2051 (B)

PRIVY COUNCIL

JUDGMENTS

ON

APPEALS FROM INDIA,

BY

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ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL

1863—71.

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PRIVY COUNCIL

JUDGMENTS

ON

APPEALS FROM INDIA.

BENGAL SECRETARIAT LIBRARY

2nd, 3rd and 4th February, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

RAMASAWMY AIYAN and others,* ... ... } *Appellants*,

versus

VENKATA ACHARI and others, ... } *Respondents*.

Right to administer the Purohitam—Evidence—Exclusive privilege.

Suit by some *Arya Brahmins* and *Gurukals* against some *Parishai Bhatters* (as representatives of the bodies to which they respectively belonged) to establish the Plaintiffs' exclusive right to administer the *Purohitam* to all pilgrims resorting to *Rameswaram*, and for damages.

Held, that ancient books like the *Puranas* may legitimately be used as evidence that a certain state of facts, or of opinion, existed at the date of their compilation.

Passages recommending the ministrations of *Arya Brahmins* and implying that the full spiritual benefits of a pilgrimage were not to be obtained without them, did not necessarily lead to the conclusion that even at that distant period all pilgrims in fact resorted to the *Aryas* or were under a positive obligation to do so. Rather, the very mode in which the peculiar efficacy of their ministrations was pressed, suggested that even then there was a variety of opinion and practice in the matter.

The admission of the alienability of the exclusive privilege claimed necessarily loosened the force of texts to the effect that the efficacy of the rite depends on the character of the ministering priest, and such admission greatly increased the difficulty of proving the privilege.

Functions inseparably annexed by the authority of sacred books to a particular order of men will be recognised and perpetuated by the religious sentiment of succeeding generations. But the privilege when alienable for money ceases to be the subject of religious sentiment and becomes a mere proprietary right.

A *Sreemokum* (certificate) from *Sankara Acharyar*, the High Priest of all Hindus in Southern India, received in evidence and acted upon.

On the merits, the Appellants held to have failed to discharge the burthen of proof which the necessities of their case and the particular issues imposed upon them.

27th April, 1863.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE:

The subject of litigation in this case is the right of administering what is called "*Purohitam*" to seventeen classes or castes of the numerous pilgrims who resort to the great *Pagoda* and other temples in the Island of *Ramaswaram*.

The Appellants, the Plaintiffs in this suit, sue, and the Respondents are sued, as representatives of the bodies to which they respectively belong. Whilst, however, the Respondents are all members of

* 9, Moore's I. A., p. 344.

a homogeneous class, described indifferently as *Tadwadi* and *Telegu* Brahmins, or as *Parishai Bhatters*, resident in and about *Ramaswaram;* the Appellants are some of them *Arya* Brahmins, and other *Gurukals:* the differences between these two latter classes, their rights and privileges, being some of the matters involved in the question at issue in this suit.

The case put forward by the Appellants is shortly this: they assert that ever since the first foundation of the *Pagoda*, an event which they ascribe to a very remote age, the *Arya* Brahmins possessed the privilege, and that an exclusive privilege, of administering *Purohitam* to all classes of pilgrims resorting to *Ramaswaram*. They treat, however, this privilege as alienable, or at least capable of delegation; and state that by an instrument bearing a date, which it is now agreed corresponds with A. D. 1765, the *Arya* Brahmins have, in consideration of an annual payment of 50 *pons*, transferred to a community called the *Adhyena Bhatters*, the privilege of administering *Purohitam* to seven specified classes of pilgrims; and in some way or another, and at some uncertain but distant date, have conferred the same privilege over ten other classes of pilgrims upon the community of the *Gurukals*. They further state, that the *Gurukals* again transferred the privilege as to six of those ten classes to the body represented by the Respondents, which it will be convenient to distinguish as *Parishai Bhatters*, on the condition that the latter would account to them for twenty per cent. of the emoluments derived from the exercise of the right; that a dispute having arisen between these two last-named bodies, an arbitration took place A. D. 1726, which resulted in the execution of an instrument, and that difficulties having subsequently occurred in carrying that arrangement into effect, the payment of twenty per cent. on the collections was commuted for a fixed annuity of 100 *pons*, which, by an agreement, dated the 11th April, 1822, called a deed of rent of pilgrims, dated the 9th *Vyasi Parabhava* (19th May, 1786), executed by the ancestors of the Defendants to the community of *Gurukals*, in which they agreed to pay two *pons* out of every ten *pons* realized by them out of six classes of pilgrims, the *Parishai Bhatters*, some time about A. D. 1762, agreed to pay, and did in fact pay up to the year 1825, to the *Gurukals*. The Appellants' plaint, after stating these facts, notices the proceedings in a suit, No. 232 of 1826, in the *Moonsiff's* Court, the effect of which their Lordships will consider when they come to deal with the evidence. It also states the effect of a copper-plate grant passed by the late *Zemindar* of *Ramnad* in 1794, by which, in A. D. 1714, the then *Zemindar* of *Ramnad* granted certain dues payable to him by the *Parishai Bhatters*, and amounting to 90 *pons*, to a particular goddess in the *Pagoda* on account of the Friday services. It also states some proceedings before the Collector in 1835, when that officer endeavoured to compose the strife which had long existed between these rival sects of Brahmins, by an order which, as appears from the decision of the Collector itself, affirmed the rights of the *Parishai Bhatters*, to administer *Purohitam* to twenty-one classes of pilgrims, subject to the payment into the *Pagoda* of 190 *pons* annually; being the 90 *pons* for the Friday services, and the 100 *pons* payable to the *Gurukals*. This order assumed that the right of the *Parishai Bhatters* as to seventeen of their classes was not in dispute, and it left either party, if dissatisfied with it, to bring a civil suit. The plaint then shortly notices the proceedings in a suit of 1835, which was brought by some of the *Arya* Brahmins against some of the *Parishai Bhatters* in respect of two of the classes comprised in the Collector's order, and was dismissed by a decree of the *Zillah* Judge, dated the 27th of June, 1840; a decree confirmed on appeal by the Provincial Court on the 28th of December, 1841. It then explains that the claim in the present suit is limited to seventeen of the twenty-one classes comprised in the Collector's order, because the remaining four belong to the *Adhyena Bhatters* under the deed of 1695; and further, that whilst the claim as to eleven of the seventeen classes is general, as to the remaining six, which were the subject of the instruments of 1726 and 1762, it is limited to the enforce-

ment of the rights of the *Gurukals* under the latest of these documents. The particular relief prayed, is a decree for the payment of Rs. 2,916, 10 as. 8 p., being the arrears for twenty-three years of the annuity of 100 *pons* payable to the *Gurukals* in respect of the six classes; of Rs. 4,400, by way of damages incurred in respect of the other eleven classes; for a declaration that the *Purohitam Mirassi* of the eleven classes is henceforth to be enjoyed by the *Arya* Brahmins, without the interference of the *Parishai Bhatters;* and for an order that the *Parishai Bhatters* do regularly pay the 100 *pons* to the Appellants and the other *Aryas*, and the *Gurukals*, or otherwise that the *Mirassi* as to these classes also is to be enjoyed by the Appellants and other members of the *Arya Mahajanum*, and the community of the *Gurukals*, without the interference of the *Parishai Bhatters*.

The case set up by the Respondents in opposition to that of the Appellants is, that their ancestors were established in the place or neighbourhood, and invested with the privilege of administering *Purohitam* to pilgrims resorting to *Ramaswaram*, by a certain *Rajah*, about 1,000 years ago; that they afterwards from generation to generation enjoyed this privilege, and the emoluments resulting from its exercise, and so acquired the title of *Parishai Bhatters;* that the *Zemindars* of *Ramnad* imposed an annual tax upon them of 160 *pons* payable out of their receipts, which they continued to pay until the time of one *Vijaya Raghunadha*, who granted 100 out of the 160 *pons* to the community of the *Gurukals* on their complaint of having no income in the *Pagoda*, and afterwards granted the remaining 60, with some other dues payable by the *Parishai Bhatters* (making 90 *pons* in all), for the Friday services of the *Pagoda*.

They treat the latter grant as made by the copper-plate deed of 1714; but do not show in what precise form or by what instrument the first was made; and assert that after 1714, the whole of the 190 *pons* was paid into the *Pagoda*. They state that in 1827, there was an attempt to settle the disputes between their community and that of the *Arya* Brahmins by a native *Punchayat* (the failure of which is much to be regretted); that afterwards, in the course of an inquiry before the Sub-Collector, the *Aryas* admitted that, in respect of seventeen classes, there was no dispute as to the right of the *Parishai Bhatters*, and that the Collector's order of 1835 was made on that admission. They further insist strongly upon the decrees in the suit of 1835 as a bar to the present suit, which they also contend is barred by the Regulation of Limitation.

The issues settled in this suit (*a*) threw upon the Appellants the burden of proving, first, the hereditary and exclusive right of the *Arya* Brahmins to administer *Purohitam* to all classes of people frequenting *Ramaswaram* as pilgrims, and their ancestor's enjoyment accordingly; secondly, the grant, as alleged, of the ten classes to the *Gurukals*, and that the *Parishai Bhatters* had since rented from the *Gurukals* six of the ten classes, undertaking to pay them annually two-tenths of the emoluments under a written document which had been acted upon; thirdly, that, under another document, this liability had been commuted for an annual payment of 100 *pons*, and that the latter had been paid up to 1825; and, fourthly, that the Defendants had taken illegal possession of the eleven other classes, and that, with the exception of these and the classes held by the *Adhyena Bhatters* all other classes were enjoyed by the *Arya* Brahmins. The issues which the Respondents were called upon to prove were, first, the alleged right of the *Parishai Bhatters* to perform *Purohitam* to all classes, that the *Arya* Brahmins had no title thereto, and had come to *Ramaswaram* since a particular date; second, that they had originally paid an annual tax of 100 *pons* to the *Zemindar*, and subsequently, with his consent, paid the 100 *pons* annually to the *Gurukals* for their maintenance.

The suit was first heard by the Judge of the Subordinate Court of *Madura*, who, on the 4th of November, 1854, made a decree in favour of the Appellants. From this there was an appeal to the Civil Court of *Madura*, and the Judge of that Court on

(*a*) See 9, Moore's I. A., p. 355.

the 29th of June, 1857, reversed the decree below, and dismissed the suit on the ground that the Appellants had failed to prove the conclusive right which they claimed; but directed each party to pay their own costs. A special appeal was then preferred to the *Sudder Dewanny Adawlut* at *Madras*. That Court on the 30th of October, 1858, dismissed the Appellants' suit with costs, on the ground that their claim was barred by the Regulation of Limitation, the only question which it allowed to be argued before it.

The present appeal is general. It has been argued before this Committee, both upon the merits of the case, and also upon the question whether the suit is effectually barred, either by the decrees in the former suit of 1835, or by lapse of time under the Regulation of Limitation.

Their Lordships propose, in the first instance, to deal with the merits of the case.

The first observation that arises is, that the existence or non-existence of the original and exclusive right to administer *Purohitam* to all classes of pilgrims, which is claimed by the *Arya* Brahmins, is an issue which goes to the whole case. It is true that that part of the claim which consists of the arrears of the annual payment of 100 *pons*, under the instrument of 1762, is founded upon contract. But the contract is one between the *Parishai* Brahmins and the *Gurukals*, and it is difficult to see how the Appellants, suing on behalf of the community of *Arya* Brahmins, can establish any title to relief in respect of this part of the case, unless they prove that the title of the *Gurukals* to these six classes was derived, as alleged in the plaint, from the earlier and original title of the *Aryas*, and was so held by the *Gurukals* that the subsequent disposition of these classes must be taken to have been made for the benefit of the *Arya* community, as well as for that of the *Gurukals*.

What, then, are the proofs adduced in support of this first and principal issue?

The earliest in date consists of extracts from one of the *Puranas*. These, like the statements in the pleadings of the Appellants' case, carry us far beyond the bounds of legal or historical evidence. But it is argued, and fairly and properly argued, that these ancient books may legitimately be used as evidence that a certain state of facts, or a certain state of opinion, existed at the date of their compilation. That date is sufficiently uncertain; for we are not told when this particular *Purana* is supposed to have been written; and it appears from the writings of eminent Orientalists, that the period during which the eighteen recognized *Puranas* were composed is a very wide one, extending probably from the eighth to the sixteenth century.

Evidence of the Appellants' right, dating even from the latest of these epochs, would of course be most valuable. Their Lordships, however, fail to find in the extracts before them satisfactory proof that at the time when this *Purana* was compiled (whenever that may have been), the *Arya* Brahmins were in the enjoyment of the peculiar and exclusive privilege which is now claimed by their descendants.

There are passages which show that a community known as *Arya* Brahmins then existed at *Ramaswaram*, and embody the legends concerning the miraculous origin of their ancestors, and their migration, at the summons of *Rama*, to the southern coast, from their native seat in *Oudh*. Other passages undoubtedly recommend in strong terms the ministrations of the *Arya* Brahmins, and imply that the full spiritual benefits of a pilgrimage are not to be obtained without them. But these do not lead with any certainty to the conclusion that even at that distant period all the pilgrims to *Ramaswaram* in fact resorted to the *Aryas* for *Purohitam*, or were under a positive and well recognized obligation to do so. The very mode in which the peculiar efficacy of the ministrations of the *Aryas* is pressed leads to the inference that even then there was some variety of practice and opinion in this matter. Part of the *Purana* cited in these proceedings is in the shape of a dialogue, wherein one of the interlocutors begins by expressing his doubts whether *Puja* should be offered through the instrumentality of the *Aryas*, doubts which are of course ultimately removed. Taking the authority of these texts at the highest—and it must be

remembered that there is little or no evidence as to their authority—their Lordships cannot find that they do more than enjoin upon pilgrims who wish to have the fullest spiritual benefit of their pilgrimage, the duty and necessity of resorting to the *Aryas* for their offices. They do not show that the duty was universally recognized as imperative, or that the enjoyment of the privilege, as it then existed, was exclusive.

Again, the value of the texts, such as it is, as evidence in support of the Appellants' title, is, in their Lordships' opinion, much diminished by the consideration that the privilege now claimed is admitted to be capable of alienation or delegation. They would be of far more weight if the case made were that by positive ordinance or by traditionary usage the privilege of administering certain religious rites had become vested in a particular class of priests, so that in the contemplation of all faithful Hindoos the efficacy of the rite must for all time depend on the *status* or character of the ministrant. When the principle of alienation or delegation is admitted, texts to the effect that the efficacy of the rite depends on the character of the ministering priest necessarily lose their force.

Moreover, this quality of the privilege must greatly increase the difficulty of proving its continued enjoyment, supposing that it ever existed. Functions inseparably annexed by the authority of sacred books to a particular order of men will be recognized, preserved, and perpetuated by the religious sentiment of succeeding generations. But the privilege of exercising these functions, when alienable for money, ceases to be the subject of religious sentiment, and becomes a mere proprietary right; and every long-continued enjoyment of the privilege by others is of course capable of being ascribed to a presumed grant or alienation of which the direct evidence is lost.

That the present claim of the Appellants is not supported by any general religious feeling or conviction on the part of the Hindoos, whether founded on the texts of the *Puranas* or independent of them, may be inferred from the very nature of the disputes which have continued for so many years. It is clear that during that long period there has been great diversity of practice and opinion amongst those who resort to the *Pagoda;* that out of the vast concourse of pilgrims from all parts of the *Deccan*, if not of *India*, some have sought for *Purohitam* at the hands of the *Aryas*, others at the hands of the *Parishai Bhatters*, others, again, at the hands of the *Adhyena Bhatters;* probably as they have been moved by considerations of race, language, district, or caste. But we have more particular evidence upon this point in the *Sreemokum* of *Sunkar Acharyar* which was produced in evidence in the suit of 1835, and is referred to in the pleadings of this suit. That document was in the nature of a certificate from a person described as the High Priest of all the Hindoos of the south of *India*, and was strongly adverse to the claim of the *Aryas*. Mr. *Elliot*, who as Judge of First Instance, decided the suit of 1835, felt it to be of sufficient weight to relieve him from the necessity of pursuing the inquiries which he had directed through Pundits touching the authority of the texts from the *Puranas*. The Appellants themselves, in their pleadings, seem to admit the general authority of *Sunkar Acharyar*, but endeavour to take off the effect of his certificate by telling a not very credible story of his having given it when in a fit of irritation against the *Aryas*. They have also produced, by way of answer to it, Exhibits, consisting of Letters Patent from *Sringeri Sankara Acharyar* to his disciples. It is sufficient, on this part of the case, to observe that the effect of these conflicting documents is at most to leave the question in doubt, and that the Appellants cannot adduce, in support of this claim, anything like a clear concurrence of opinion upon the part of those who may be supposed to be at the present time authoritative expounders of the ceremoinal law and usages of the Hindoo religion.

We now proceed to consider the effect of the other documentary evidence.

The documents which purport to be the earliest in date, except the *Puranas*, are the deed said to have been executed to the *Aryas* in A. D. 1675 by the *Adhyena Bhatters;* the copper-plate deed produced by the Respondents, dated 1714; the deed

said to have been executed by some on behalf of all the *Parishai Bhatters* to the *Gurukals* in 1726; and the subsequent agreement between the various parties, which purports to have been executed in 1762.

The first of these can at most prove that the *Adhyena Bhatters*, who are not parties to this suit, claim under a deed, purporting to be of considerable antiquity, the right of administering *Purohitam* to seven classes of pilgrims, other than the classes which are the subjct of this litigation, under a title derived from the *Aryas*. The *Adhyena Bhatters* are said to have been since dispossessed of four of these seven classes by the *Parishai Bhatters*. But whatever may be the merits of that dispute, they are not in question in this suit. This deed can prove nothing here except that in 1675, the *Aryas* claimed the right of disposing of the privilege as to these particular classes of pilgrims, and that the *Adhyena Bhatters* then admitted their title.

The effect of the deeds of 1726 and 1762 (if any) upon the issue which we are now considering, viz., the original and exclusive right of the *Arya* Brahmins to administer *Purohitam*, is limited to the six classes of pilgrims which are the subject of these instruments. They do not touch the eleven other classes that are in question in this suit.

Their genuineness is questioned by the Respondents, who give an account of the origin of the payment of 100 *pons* that is inconsistent with them. It has been argued that suspicion is cast upon them by the circumstance that no mention is made of them in the proceedings in the suit between the *Gurukals* and the *Aryas* in 1807, although the *Parishai Bhatters* are there stated to possess the privilege of administering *Purohitam* to these six classes, and to be subject to the duty of paying 100 *pons* annually to the *Gurukals*, and that nothing was heard of them until the suit of 1826. It has been further argued that there is no proof of the custody whence they came, or other evidence to support them. Notwithstanding these arguments, their Lordships are disposed to deal with the case as if both these deeds, as well as the copper-plate deed of 1714, were genuine. They think the two former may well stand with the latter.

The copper-plate deed is, upon the face of it, nothing but the grant of certain subjects in favour of the goddess named in the heading of it, "on account of the Friday services." The annual payment of the *Parishai Bhatters* on this account appears on the whole evidence to be limited to 90 *pons*. This instrument, therefore, proves nothing as to the annual payment of 100 *pons* to the *Gurukals*, or its origin. It undoubtedly proves that in A. D. 1714, the body which the Respondents represent was known as "*Parishai Bhatters*," a title which implies some connection with pilgrims, and that, as such, they carried on a business which may reasonably be inferred to have been the administration of *Purohitam* to some classes of pilgrims. And even if it be assumed that those classes of pilgrims included the six which are specified in the deeds of 1726 and 1762, that hypothesis is not necessarily inconsistent with these deeds, for the earlier deed does not purport to be the original grant of these classes, or to show how the administration of *Purohitam* to them by the *Parishai Bhatters* began. It recites the existence of a dispute between the *Parishai Bhatters* and the *Gurukals* touching the administration of *Purohitam* (a dispute which may have been of long standing), an appeal to the *Zemindar*, a reference to arbitration, and an award which, whilst it left the administration of the rite to the six classes with the *Parishai Bhatters*, imposed upon them the duty of paying 20 per cent. on their receipts to the *Gurukals*. The two deeds, 1726 and 1762, therefore, are not inconsistent with the copper-plate deed, which the Respondents may be taken to have proved, though they are inconsistent with their allegations touching the origin of the payment of 100 *pons*, which they have failed to prove. From the three documents taken together it follows, that before the year 1726, and possibly before 1714, the *Parishai Bhatters* were in the exercise of the functions involved in the administration of *Purohitam* to some classes of pilgrims, including, or at least extending to, the six classes which

were the subject of the agreement of 1726; but the material question with reference to the issue now under consideration is to what extent that arrangement with the *Gurukals*, and the description of the *Gurukals* in the two deeds as "forming the *Arya Mahajanum*," or "a part of the *Arya Mahajanum*," or "composed of the *Arya Mahajanum*," involve any admission or proof of the general title set up by the Appellants.

The answer to this question will be best supplied by a correct definition of the relation in which the *Gurukals* stood to the *Arya* Brahmins. Their Lordships must reject the statement upon this point which is contained in the fourth paragraph of the appeal petition, as inconsistent with others made by the Appellants in certain stages of the proceedings, and with the evidence in the cause. It was, in fact, almost given up by Mr. *Rolt* in his reply, and treated as a mere argument of the Appellants' Pleaders in answer to an objection taken by the Judge in the Court below.

The most credible account of this *Gurukal* community is probably to be found in the proceedings in the suit of 1807 (the piece of evidence that is next in order of date), since it was given by the *Gurukals* themselves when engaged in litigation with the *Arya* Brahmins, and was then admitted by their opponents to be substantially correct. From that it would appear that the *Gurukals* were *Marattah* Brahmins invested with the office of performing the *Puja*, or worship, in the interior of the Temples; that they were appointed by the *Aryas*, and were in the habit of marrying the daughters of *Aryas;* that the office of *Gurukal* was not hereditary, but that on the death of any one of them another *Marattah* Brahmin was appointed in his place; that in 1807, the community of *Gurukals* were in the receipt of the 100 *pons* per annum from the *Parishai Bhatters*, and of fees payable in respect of other classes of pilgrims, by whomsoever the rite of *Purohitam* was administered; that the net emoluments of this community were divided amongst the members of it, and each man's share again apportioned between him and the particular *Arya* whose daughter he might have married. The two communities were, therefore, distinct bodies, different in race; and this very suit of 1807, shows that they might have different and conflicting interests. If this be so, the description of the *Gurukals* as "composing," or "composed of," or "forming part of the *Arya Mahajanum*," must be inaccurate, unless these words imply a body in which the two communities, though distinct for some, may coalesce for other purpose. Such an hypothesis is not inconsistent with the literal meaning of the words as it may be gathered from "*Wilson's* Dictionary."

Again, in this suit of 1807, the *Gurukals* seem to have claimed the right of administering *Purohitam* to the six and certain other classes of pilgrims as a prescriptive right, without admitting any earlier title in the *Aryas*. The *Aryas*, in their answer, seem to set up a joint interest in the emoluments, and speak of a compromise and arrangement effected by a deed, bearing a date which would correspond with 1745, of which there is no proof. Therefore the case made on either side in the suit of 1807 seems to be hardly consistent with that made in the present suit as to the derivation of the *Gurukals'* title from that of the *Aryas*. And upon this part of the case it appears to their Lordships that it would be unsafe to infer from the deeds of 1726 and 1762, or from any evidence that has yet been considered, either that the *Aryas* have a common interest with the *Gurukals* in the annual payment of 100 *pons*, or that such title as the *Gurukals* may have had in the six classes of pilgrims before the arrangement of 1726 was necessarily derived from the original and exclusive title to all classes of pilgrims which is set up by the *Aryas*. This view of the case is in some degree confirmed by what is called the "*Attachi*." That paper purports to be a representation made in March, 1822, when the *Pagoda* was under the management of the Government officers, by some of the Appellants, to the effect, that the *Parishai Bhatters* have allowed the payment of 90 *pons* and 100 *pons* to fall into arrear. It treats the whole money as payable to the *Pagoda*, and therefore, in the existing circumstances,

to the *Circar* or Government, but describes the 100 *pons* as the *masadanum* for the *Sabhayar* or community of *Gurukals*.

The rest of the documentary evidence may be reduced to three heads: the proceedings in the *Moonsiff's* Court in 1826; the proceedings which resulted in the Collector's Order of 1835; and the proceedings in the suit of 1835.

The first suit was brought by some *Parishai Bhatters* against some *Aryas*, and it is said to have been collusive. The Plaintiffs in it asserted the title of their body to administer *Purohitam* to twenty-four classes of pilgrims, admitting the duty of paying annually 190 *pons* to the *Pagoda* and the community of *Gurukals*. But the immediate subject of the suit was the alleged invasion of this right as to a class called "*Sangita*," which is one of those that were afterwards awarded by the Collector to the *Aryas*. There is no question about that class in this suit. Other *Arya* Brahmins intervened by petition, and set up their general title in the *Moonsiff's* Court. The *Moonsiff* made a decree against a Defendant who had admitted (it is said collusively) the Plaintiff's claim, and dismissed the suit as against the other Defendants. He also intimated an opinion that the suit, if properly framed, should have been brought against the *Arya Mahajanum*, which appeared to have been in the enjoyment of the *Purohitam* of the *Sangita* class. This judgment has been treated as a decision in favour of the *Arya* Brahmins, but it cannot be taken for more than an expression of opinion that they might have a good title as to the class of which they appeared to be in possession.

The chief importance of the proceedings which ended in the Collector's order consists in the admission supposed to have been made before Mr. *Paris*, a subordinate Collector, in the course of a local inquiry made by him in 1829. It is contained in an attested copy of a *Mahratta* document drawn out in 1827. It is referred to, though it is not very accurately described, by the Collector, (in his decision of the 21st of February, 1835,) and is the basis of his order. It was produced in the suit of 1835, and was proved to the satisfaction of Mr. *Elliot*, the Judge. He says of it in his judgment, "The *Seristadar*, it appears, wrote down in the presence of the Sub-Collector of *Madura*, from the mouths of the Plaintiffs, that they had no dispute respecting seventeen of the twenty-five castes, but only for the remaining eight." Mr. *Rolt* argued strongly upon the improbability of the *Aryas* making such an admission so soon after the decision in the *Moonsiff's* Court. It does not, however, cover this *Sangita* class, which alone was the subject of the suit before the *Moonsiff*. And the improbability, such as it is, seems to their Lordships to be outweighed by the consideration that two officers with local experience have, whilst the facts were still recent, treated the document as genuine, and acted upon it. It is, therefore, difficult to suppose that the admission was not made by some at least of the *Arya* community, and it covers fifteen out of the seventeen classes that are the subject of this suit.

The decision of the Collector was almost immediately followed by the suit of 1835. The original Plaintiffs in this were four only of the *Arya* Brahmins. Two of them having died, twenty more members of the community intervened by petition, and seem to have adopted and prosecuted the suit. Its object was limited to the enforcement of the alleged rights of the *Arya* Brahmins as to two only of the classes which are the subject of this suit; but the original title of the community was stated in terms as wide as those in which it is now stated, and was distinctly put in issue. It was, moreover, supported by much the same evidence as that which has been adduced in this suit. The decision, however, of the *Zillah* Judge, confirmed on appeal by the Provincial Court, was that the title was not made out, and the suit was accordingly dismissed.

Their Lordships may dismiss the oral testimony with the observation that it is almost necessarily inconclusive. The question is one on which the Hindoo community has for many years been divided. Each witness, as a matter of course, deposes according to the practice, opinions, or traditions of his own family. Nor will proof of acts done even by so considerable a personage as *Holkar* do more than prove the practice or

opinion of a particular family or individual.

Upon the whole it is their Lordships' opinion that the evidence, though it may establish that the *Arya* community has existed as part, and a principal part, of the Hierarchy of this *Pagoda* and its dependencies from a period of remote antiquity, and that the Appellants may be taken to be the actual representatives of that community, fails to show, either by documentary proof of its origin, or by such proof of long and uninterrupted usage as in the absence of a documentary title will suffice to establish a prescriptive right, the existence at any time of the original and exclusive privilege which the Appellants have made the foundation of their title. It also fails to show when and how, if the right ever existed, its enjoyment was first interrupted, and, consequently, leaves it uncertain, whether the interruption was caused by an invasion for which there is now a remedy, or by an actual or presumable act of alienation. It is not proved that the Appellant's community was at any particular time in the actual enjoyment of the privilege of administering *Purohitam* to eleven out of the seventeen classes which are the subject of this suit; whilst there is evidence that the *Parishai Bhatters* for some time anterior to 1835 were in the undisputed enjoyment of this privilege as to nine of these classes, and exercised it, though subject to dispute, as to the remaining two. Nor is it inconsistent with the evidence in the cause to suppose that this state of things may have existed in or before the year 1714. And if the evidence as to the remaining six classes shows that the *Parishai Bhatters'* undisputed enjoyment of the privilege as to these six classes for nearly one hundred and fifty years has been subject to the payment of the 100 *pons*, under an arrangement which implies an acknowledgment of an earlier title in the *Gurukals*, it fails, as their Lordships have already observed, to establish either that the *Aryas* have a common interest with the *Gurukals* in this annual payment, or that the title of the *Gurukals* to these classes was necessarily derived from the still earlier and more general title of the *Aryas*, which the Appellants assert.

The Appellants, therefore, on all points have failed to relieve themselves of that burthen which the necessities of their case, and the particular issues directed in the cause, imposed upon them. Nor is this failure the less fatal to this suit because the Respondents may also have failed to show that they had any exclusive right in the privilege which they enjoy; or because they may be under a liability to the *Gurukals* in respect of the annual payment of 100 *Pons*, which may be capable of being enforced in a suit properly framed for that purpose.

Their Lordships, taking this view of the merits of the case, are relieved from the necessity of considering whether either the decrees in the former suit of 1835, or the Regulation of Limitation, present an effectual bar to the suit. They rest their decision on the ground that the Appellants have failed to support their claim by any sufficient evidence.

Their Lordships, however, are of opinion, that the *Sudder* Court ought not to have limited the argument to the single question of limitation; and that it ought not to have thrown on the Appellants the whole costs of the suit. They think that the decree of the 29th June, 1857, sealed and signed on the 1st August in that year, was correct in the direction given by it as to the costs up to the latter date, and they will, therefore, humbly advise Her Majesty that the decree of the *Sudder* Court ought to be varied, and to stand and be simply for the dismissal, with costs of the appeal to that Court, the Appellants, however, paying the costs of this appeal.

17th, 18th, 19th and 20th February, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

CHARLOTTE ABRAHAM and DANIEL VINCENT ABRAHAM,* ... *Appellants,*

versus

FRANCIS ABRAHAM, ... *Respondent.*

The status of Native Christians, considered—Effect of conversion to Christianity as to succession—Hindu law—Rights of members of undivided Hindu family—Severance of parcenership—Opinions of Pundits—Lex Loci Act (XXI. of 1850.)—Madras Regulations.

The law which governs the status and rights of native converts to Christianity, considered.

Heirship may be governed by the Hindu or other law to which the ancestor was subject, but parcenership as understood in a joint undivided Hindu family, is the creature of and must be governed by Hindu law alone.

A Hindu by conversion to Christianity becomes completely severed from his family.

Opinions of Pundits in Macnaghten's Hindu Law, Vol. II., pp. 131-32, to the effect that on the death of an apostate from Hinduism, his heirs according to Hindu Law will take the property which he had at the time of his conversion, and that his subsequently acquired property would devolve by the law of his new religion—approved.

The *Lex loci* Act (XXI. of 1850) held inapplicable where the parties have ceased to be Hindus in religion.

Madras Reg. III. of 1802, sec. XVI. cl. 1, which prescribes that the Hindu law shall be applied to the Hindus and the Mahomedan law to Mahomedans, must be understood to refer to Hindus and Mahomedans not by birth merely, but by religion also.

Held that a case of succession to the property of a deceased of pure Hindu blood (whose ancestors for generations had adopted Christianity) and who had himself married an East-Indian wife, ought to be decided (as provided in Mad. Reg. II. of 1802, sec. XVII. for cases for which no specific rule exists) according to equity and good conscience, *i.e.*, by referring the decision to the usages of the class to which the convert attached himself, and of the family to which he belonged.

As upon conversion the Hindu law ceases to have any continuing obligatory force upon the convert, he may renounce the Hindu law or abide by it notwithstanding change of religion, and a descendant from a convert family which hitherto preserved the Hindu law and custom, may also renounce the same. His course of conduct, his attaching himself to a class which as to these matters has adopted and acted upon some particular law, or his having himself observed some family usage or custom may show his intention as to the governing law.

Held on the evidence; that the class of "native Christians" in India, embracing in its extended sense all natives converted to Christianity, had subordinate divisions forming again distinct classes, of which some adhered to Hindu customs and usages as to property; others retained them in a modified form; and others again had wholly abandoned them and adopted different rules and laws as to their property. This latter class comprised the "East-Indians" a class well defined in India, which followed in all things the usages and customs of the English resident there.

Held further on the evidence, that although the family from which the deceased proprietor M. A. and the Respondent F. A. were descended belonged to that class of native Christians which commonly retains Hindu usages and customs, yet the deceased M. A. from the time of his marriage, with an East-Indian wife, adhered in all respects to the religion, manners and habits of the East-Indians.

Although it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, yet when there are different laws as to property applying to different classes, parties ought to be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in other respects, of the class to which they are shewn to belong. Nothing can be more just than that the rights and interests in a person's property and his power over it, should be governed by the law which he has adopted, or the rules which he has observed.

Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and in forming their presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

A case submitted by an Indian Court for the opinion of Pundits ought to set forth all special circumstances which bear upon the question.

Decree of the Sudder Court of Madras, which awarded a half share of the property to the Respondent F. A. under Hindu law, reversed.

13th June, 1863.

THEIR Lordships' judgment was postponed, and was now delivered by

THE RIGHT HON. LORD KINGSDOWN:

The Appellants in this case are *Char-*

* 9, Moore's I. A., p. 195.

lotte Abraham, the widow, and *Daniel Vincent Abraham*, the only surviving child of *Matthew Abraham*. The Respondent, *Francis Abraham*, was the only brother of the late *Matthew Abraham*. *Matthew Abraham* and the Respondent were by birth Hindoos of pure native blood, being descended from a family of Hindoos. Their ancestors for several generations had embraced Christianity, and they were themselves Christians, originally it appears Roman Catholics, afterwards Protestant Dissenters, and subsequently members of the Church of England. They were of the class known in *India* as "native Christians." *Matthew Abraham* was by far the elder of the two brothers; for in early life, when the Respondent was only about two or three years old, he was employed as a clerk in the arsenal at *Bellary*. In the year 1820, he married the Appellant, *Charlotte Abraham*. This lady and her father and mother were also Christians; the father an Englishman and the mother a Portuguese. They were of the class known in *India* as East Indians. There was issue of this marriage the Appellant, *Daniel Vincent Abraham*, and another son, *Charles Henry Abraham*, who survived his father, *Matthew Abraham*, but died pending the proceedings brought before us by this appeal. In the year 1823, *Matthew Abraham* established a shop at *Bellary*, the business of which was continued to be carried on up to the time of his decease. Throughout these proceedings it is called the shop-business. In the year 1827, *Matthew Abraham* entered into a contract with Government for the supply of liquors to the troops at *Bellary*, and erected a distillery for the purposes of this contract. The contract was renewable annually, and was annually renewed to *Matthew Abraham* up to the time of his decease, except in one year when it fell into other hands. Throughout these proceedings it is called the *Abkarry* contract. In the year 1832, *Matthew Abraham* took Mr. *Richardson* and the Respondent, his brother, into partnership with him in the shop-business, each party taking a third of the profits. This partnership was dissolved in the year 1837, and the business was thenceforth, until the death of *Matthew Abraham*, continued by him and the Respondent, his brother, without any new arrangement having been come to between them. The Respondent, some time before the death of *Matthew Abraham*, also married a Christian lady of the class known as "East Indians." In the year 1842, *Matthew Abraham* died, leaving the Appellants and *Charles Henry Abraham*, his widow and children. After his death the Respondent continued to carry on the shop-business, and he also procured the *Abkarry* contract to be annually renewed in his name, and carried on the business of that contract, and the distillery connected with it. In the year 1854, the Appellants and *Charles Henry Abraham* instituted against the Respondent the suit out of which this appeal has arisen, estimating the property to be recovered in the suit at Rs. 3,00,000.

By their plaint in the suit they alleged, that the whole of the capital in the shop-business was supplied by the late *Matthew Abraham*; that the distillery business was carried on by him alone and with his own capital, and that the Respondent was his clerk, agent, or manager, in this business at a salary; that on the death of *Matthew Abraham*, the duty of collecting his estate devolved on the Appellant, *Charlotte Abraham*, and she intrusted the collection, realization, and management of it to the Respondent, and gave him a power of attorney for that purpose, and that the Respondent had carried on both the shop-business and the distillery business by means of the late *Matthew Abraham's* capital; that he had made payments to and on account of the Plaintiffs, and for the debts of *Matthew Abraham*, but not nearly to the amount which he had received; and the Plaintiffs accordingly by their plaint, prayed for an account of the late *Matthew Abraham's* estate received by the Respondent, including the profits of the shop-business and of the distillery, subsequently to his decease, offering to make the Respondent a just and sufficient allowance for his services in managing the distillery business since the death of *Matthew Abraham*.

The Respondent, by his answer to the plaint, insisted, that the Appellant, *Charlotte Abraham*, being the widow of the late *Matthew Abraham*, could not claim joint-

ly with her sons, the other Plaintiffs; that she was entitled only to maintenance, and must seek it from her sons. He said that *Matthew Abraham's* situation in the arsenal was procured for him by his father; that the father demised when he, the Defendant, was about two or three years of age, and that the late *Matthew Abraham* took charge of him, the Defendant, as his guardian, and took charge also of all the property left by their father; that the shop-business had been conducted by him both in the life-time and since the decease of *Matthew Abraham*, but that as the deceased *Matthew Abraham* and he (the Defendant) were possessed of very little property, they had jointly borrowed money at interest on their joint bonds to carry on their business, and that it was by these means the capital of the business had been raised; and he urged that the late *Matthew Abraham* and he (the Defendant) were brothers of an undivided native Hindoo family, jointly labouring together for their common welfare, borrowing money on interest for their business upon their joint bonds and security, and mortgaging all their joint property of every description as security for the same; and consequently that the late *Matthew Abraham* and he (the Defendant) had an equal right to all the capital, and not the elder brother, *Matthew Abraham*, alone. He said that the Plaintiffs, *Charles Henry Abraham* and *Daniel Vincent Abraham*, were merely junior members of an undivided Hindoo family, and that he (the Defendant) by the death of *Matthew Abraham* had become the head of the family, and he insisted that the fact of himself and his father and family being Christians could not and did not make them subject to the English law. That their religion was an accident, and that in fact they were Hindoos and undivided, and must of necessity, and according to all practice and precedent, be subject to the Hindoo law and no other. He denied that the *Abkarry* contract was the property of *Matthew Abraham* alone, and alleged that he (the Defendant) had purchased the contract after the death of the late *Matthew Abraham* on his own responsibility.

The Plaintiffs by their replication submitted, that by whatever law the case was to be decided, they had all a common interest against the Defendant, and that no final decision could be come to in the absence of any of them. They relied upon the family having been Christians for several generations as putting an end to the Defendant's assertion that the case ought to be decided according to the Hindoo law; and after referring to the class of East Indians having always been considered to be governed by the same laws as Englishmen as to their rights of descent and inheritance, and to authorities by which, as they contended, it was shown that in suits between parties who were neither Hindoos nor Mahomedans in religion, the usages of the particular class to which they belonged formed the guide of the Court, and that even in cases to which Hindoo law was applicable, the usages of the family were to be the rule of guidance when they were opposed to the law, they submitted that the Court, before coming to a decision in the case, ought to consult the usages of the class to which the parties in the suit belonged, and ascertain what had been the usages of the family in which they had been reared. They further insisted, that even if the case was to be governed by the Hindoo law, the Defendant had no right to any portion of the late *Matthew Abraham's* estate. They denied that *Matthew Abraham* inherited any property whatever from his father, and said that the father died an insolvent and ruined man, and that *Matthew Abraham* had taken charge of the Defendant and reared him from generosity, and had begun the affairs under litigation when the Defendant was a boy at school, and unable to assist him in them. They insisted that *Matthew Abraham* and the Defendant were not members of an undivided family in the light alleged by the Defendant, and that even if *Matthew Abraham* obtained his original appointment under Government through the instrumentality of his father, it would confer no right on a younger brother, but the salary attached to the appointment would, even under the Hindoo law, be considered a separate acquisition.

The Defendant, by his rejoinder, adopted the view insisted upon by the replica-

tion as to the principles which ought to determine the law by which the case should be decided, submitting that the Plaintiffs had laid down the correct principle, namely, that the customs and usages of the class to which both parties belonged must be sought for and searched, and, further, that the usages of the particular family to which the parties belonged must be looked to, in order to ascertain what law was to govern their relations to each other.

It appears from the record of proceedings before us that in this stage of the suit the Plaintiffs were non-suited by a decree of the Civil Court of *Bellary* upon the grounds, first, that the Plaintiff, *Charlotte Abraham*, the widow, could not take part in the suit, she having no right of inheritance as the family stood; and secondly, that no sufficient description or specification of the value of the property sued for had been given in the plaint: but upon an appeal to the *Sudder Adawlut*, this non-suit was set aside, and the Civil Judge was directed to dispose of the case on the merits, the Court observing, that the Civil Judge had pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties were to be bound, without receiving any evidence whereby to govern his judgment on the subject, and that such a judgment could only be rightly pronounced upon a consideration of the usages of persons situated as the parties were, being Christians whose ancestors were of Hindoo stock, and of the usages in their particular family, as indicated by the acts of the parties and their predecessors in respect of their property since they had belonged to the Christian community, and that it would be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine whether it was the estate of the deceased, *Matthew Abraham*, acquired by himself, or of ancestral origin, after which the rights of the parties thereto, whether under the English or Hindoo law, should be declared.

The case was accordingly remitted to the Civil Court of *Bellary*, and the points stated in the pleadings (*a*) were recorded for proof. A vast mass of evidence upon the points recorded was adduced, both on the part of the Plaintiffs and on the part of the Defendant. Their Lordships do not find it necessary to enter into the details of this evidence. It will be sufficient for them, in disposing of the several points of the case, to state the conclusions at which they have arrived as to the result of the evidence bearing on these points.

By the decree made upon the hearing of the cause by the Civil Court of *Bellary*, the Court ordered as follows:—That an account be taken of the capital employed in the shop-business and of the profits thereof, both prior and subsequent to *Matthew Abraham's* death, and that the Defendant do pay to the Plaintiffs one-half of the capital and profits found due. That an account be taken of all the capital employed in the distillery business and of the profits, down to the time of the death of *Matthew Abraham*, and also of the profits of the distillery business arisen since his death, and that the Defendant do pay to the Plaintiffs the amount of the capital and profits found due. That an account be taken of all other the moneys, goods, debts and property of *Matthew Abraham* which have been collected or received by, or come into the possession of, the Defendant, or any person by his order or for his use, and that the Defendant do deliver up to the Plaintiffs all such portions thereof as consist in kind or specie, and do pay to the Plaintiffs all such portions thereof as consist of money, and do pay such portions thereof as have been converted into money since the death of *Matthew Abraham*. That so long as the present contract endures, and so long as the Defendant carries on the business in the Plaintiffs' distillery buildings, &c., and with their capital, stock, &c., he must and shall be considered as their agent, and as such accountable to them for all the profits arising from the said business, and that he shall deliver up to the Plaintiffs all deeds, books, securities, documents, papers, and writings in his possession or power, relating to the said contract or to the said distillery business, or otherwise relating to the property, estate, or effects of *Matthew Abraham*, deceased; the Plain-

(*a*) 9, Moore's I. A., p. 207.

tiffs being bound, in taking the aforesaid several accounts, to make to the Defendant a just and sufficient allowance for his services in managing the said distillery business, and also for his services in collecting and managing all other the property, estate, and effects of *Matthew Abraham*, and that the Defendant do pay to the Plaintiffs the costs of the suit.

From this decree the Defendant appealed to the *Sudder* Court.

The *Sudder* Court, upon the case being brought before it, submitted a question to their Pundits in these terms:—"Two brothers, governed by Hindoo law, inherit no ancestral property. They live together. The elder acquires some property. The younger brother, as he comes to years of discretion, is subsequently admitted by the elder to take part in the administration of his business. They jointly borrow money for the uses of the business, and both give their labour thereto. The elder of those brothers has demised. During the latter years of the deceased brother the labour fell chiefly on the younger one. Since the demise it has fallen exclusively on him. The elder brother has left two sons. Are the said uncle and nephews to be considered co-sharers; and, if so, in what proportions?"

And the Court afterwards submitted this further question to the same Pundits:—"Supposing the said two brothers and the sons of the deceased brother to be ignorant of their respective rights in law over the said property, would this interfere with the title of one party or the other to recover such right when disputes and consequent litigation occurred between them?"

The opinion given by the Pundits upon these questions having been, that the property ought to be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one, and that the rights acquired by the sons could not be affected by their ignorance of those rights, the Court as to the legal rights of the parties held that they stood as representing two branches of a family governed, as to rights in property, by Hindoo law, and with equal shares; and having arrived at this conclusion, the Court adopted the estimate of the value of the property made by the Plaintiffs for the purposes of their suit—that it was of the value of Rs. 3,00,000, added to that amount the sums which had been paid to the Plaintiffs and to creditors, and the value of some part of the property in the Plaintiffs' possession, thus bringing up the entire value of the property to Rs. 4,71,114 10 as. 5 p., and taking one-half of that amount as the Plaintiffs' share, and deducting from it the sums which had been paid to them, and one-half of the debts, found the balance due to the Plaintiffs to be the sum of Rs. 71,492 10 as. 9½ p., which the Court ordered the Defendant to pay to the Plaintiffs in discharge of all obligations due by him up to the date of the suit. The Court was also of opinion that the Plaintiffs were not justified in having recourse to the suit, and accordingly imposed upon them all the costs which had been incurred by it.

It is from this decree of the *Sudder* Court that the present appeal has been brought.

The first and most important question raised by this appeal is, by what law the rights of these parties ought to be determined. In considering this question it is material in the first place to observe what was the real point in issue in the cause. Laying out of consideration the objection raised by the answer, that the Plaintiff, *Charlotte Abraham*, as widow, could not sue jointly with the other Plaintiffs, her sons, an objection of misjoinder of parties which, in their Lordships' opinion, was properly answered by the replication, and properly disposed of by the *Sudder* Court when the case was first brought before it by appeal, the true question at issue in this case is, not who was the heir of the late *Matthew Abraham*, but whether he and the Respondent formed an undivided family in the sense which those words bear in the Hindoo law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership, and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in

which their Lordships here use the term, as expressing the rights and obligations growing out of the *status* of an undivided family, is the creature of, and must be governed by, the Hindoo law. Considering the case, then, with reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severence which the Hindoo law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindoo to Christianity the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.

It appears, indeed, both from the pleadings and from the points before referred to, that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The custom and usages of families are alone appealed to, with a reference also to the usages of this particular family; a reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity. The conclusion at which their Lordships have arrived on this point, appears also to be supported by authority; for the opinion expressed as to the Hindoo law by the Judge of the Civil Court at *Bellary* seems to coincide entirely with the opinions of pundits reported in *W. H. Macnaghten's* "Hindu Law," Vol. II. pp. 131-2. It is there stated, that on the death of an apostate from the Hindoo faith, his heirs, according to Hindoo law, will take all the property which he had at the time of his conversion; and the marginal note states, that his subsequently acquired property would be governed as to its devolution by the law of his new religion. The religion embraced in that case was the Mahomedan, which regulated the devolution of property. The Pundits, therefore, in their reply, naturally connected religion with the rules of descent of property as an adjunct, but the important point which they declare is the separation of the convert from the binding force of Hindoo law, as to his subsequent acquisitions.

Such, then, being the state of the case, so far as the Hindoo law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindoo becoming a convert to Christianity. The *lex loci* Act clearly does not apply, the parties having ceased to be Hindoo in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindoo law shall be applied to Hindoos and the Mahomedan law to Mahomedans, they must be understood to refer to Hindoos and Mahomedans not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in *India* in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as

to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed.

Their Lordships have thought it right thus to state their opinion on this point, as this is the first case in which the question has been brought under their consideration. They consider the decision referred to in the judgment of the *Sudder Dewanny Adawlut* in the case of a succession to one of the class of East Indians to be an instance of a just and proper exercise of the discretion entrusted to these Courts. The English law, as such, is not the law of those Courts. They have, properly speaking, no obligatory law of the *forum*, as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners, and customs, and the English law as to the succession of moveables was applied by the Courts in the *Mofussil* to the succession of the property of this class.

Such, then, being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence.

Their Lordships collect from the evidence that the class known in *India* as "native Christians," using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate divisions forming again distinct classes, of which some adhere to the Hindoo customs and usages as to property; others retain those customs and usages in a modified form; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property.

Of this latter class are the "East Indians," a class well defined in *India*, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects, in the limited sense of the terms of the jurisdiction of the Charters of the Supreme Courts, enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects.

Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late *Matthew Abraham* and the Respondent descended was of that class of native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom; but their Lordships are perfectly satisfied upon the evidence that the late *Matthew Abraham* and the Respondent had no ancestral property, and that the property which the late *Matthew Abraham* had was acquired by him by his own sole unaided exertions, and without any use whatever of any common stock. They fully concur in the finding of both the Courts in *India* upon this point. They are also quite satisfied upon the evidence that from the time of the late *Matthew Abraham's* marriage he and the Appellant, *Charlotte*, his wife, and their children adhered in all respects to the religion, manners, and habits of the East Indians, the class to which the Appellant, *Charlotte Abraham*, belonged.

Previously to the marriage some doubt appears to have been entertained whether the East Indians, the class to which the lady belonged, would receive *Matthew Abraham* into their society and treat him as one of themselves. The evidence on this point of the Appellant, *Charlotte Abraham*, the first Plaintiff, is corroborated by that of a very respectable witness, on whose veracity no doubt can rest. Before this time Mr. *Matthew Abraham* had assumed the English dress, and had outwardly conformed to all the habits of the English. Assurances were given that the East Indians of *Bellary* would recog-

nize her husband as one of their body, and the marriage took place. On one important public occasion when a jury was summoned of East Indians, *Matthew* sat as one of them, and acted as their foreman.

The evidence on this part of the case appears to their Lordships to be clear beyond all doubt. They proceed, then, to consider its effect. That it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, their Lordships entertain no doubt; but that is not the question on which this case depends. The question is, whether, when there are different laws as to property applying to different classes, parties ought not be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in other respects, of the class to which they belong. In this particular case the question is, whether the property was bound by the Hindoo law of parcenership.

Now, *Matthew Abraham* acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown, as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves, could be of compulsory obligation on a descendant of theirs acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, *à fortiori* a Christian may do the same. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. It was well observed by Mr. *Melvill*, that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings, and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or interest? Surely, in things indifferent in themselves, the Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicile. The *argumentum ab inconvenienti* cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing in law? Their Lordships are of opinion, that it was competent to *Matthew Abraham*, though himself both by origin and actually in his youth a "Native Christian," following the Hindoo laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderate step, taken up on a whim, and to be as lightly laid aside. We find in the evidence that there was on one side an exhibition of preliminary caution. The change was deliberate, it was publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union in the sense before-mentioned is unknown. How, then, can it be imposed on that family of which *Matthew Abraham* formed the head as father? Not by consent, for there was none; not by force of obligatory law, for there was none; not by adoption, for they had not adopted any Hindoo customs, but,

on the contrary, had rejected them all. It could only be imposed, as it seems to their Lordships, by passing over the actual family springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members; by passing over all actual usages, customs, and ways of living; and by supposing, contrary to fact, the prevalence of Hindoo customs which had been deliberately abandoned. Their Lordships, therefore, are of opinion, that the undivided family on which the Defendant relies in his answer did not exist in any sense which is material to or assists the decision of the case.

There being then, in their Lordships' opinion, no such undivided family, and the case not being, in their judgment, governed by the Hindoo law, it is unnecessary to discuss the opinion given by the Pundits upon the operation of that law, or to enter into the question, so much discussed at the Bar, whether the late *Matthew Abraham's* acquisitions ought, or ought not, according to that law, to have been deemed to be his separate estate. It is sufficient, with reference to the opinion of the Pundits, to say, that the case stated for their opinion proceeds upon an assumption which, in their Lordships' judgment, was not warranted by the facts. Their Lordships, however, think it right to add, for the guidance of the Courts in *India* in future cases, that whenever the opinion of Pundits is required, and there are any special circumstances which may bear upon the question to be submitted for their opinion, those special circumstances ought to be set forth in the case submitted to them. Their Lordships make this observation with reference to the broad and general statements contained in the case which, in this instance, was laid before the Pundits; "that the brothers lived together, and that the eldest acquired some property," unaccompanied as those statements were by any specification of the mode in which, and the circumstances under which, the brothers so lived, and the property was so acquired—circumstances which, to say the least, were important to be considered in forming an opinion upon the point submitted for consideration.

Having thus considered the case so far as respects the law to be applied in determining it, their Lordships will now proceed to consider how the case stands upon the evidence with reference to the point whether the Defendant was entitled to share in the property in question by agreement, or consent amounting to agreement, between him and the late *Matthew Abraham;* a point which, though not distinctly pleaded on the part of the Respondent, must, as their Lordships think, upon a fair view of all the pleadings in the case, be considered to be open.

In considering the weight of the evidence upon this point, the first thing to be determined is, upon whom does the burthen of proof rest? Their Lordships are of opinion, that it lies on the Defendant. It must be so, even under the Hindoo law, as the nucleus of acquired property was in this case separate, unaided acquisition, unaided either by funds or labour of the claimant. Their Lordships do not propose to enter into a minute examination and consideration in detail of every part of the evidence relied upon, nor of every observation made and argument urged upon it by either side: that course would extend their observations to an unnecessary and unprofitable length. They propose to deal with the presumptions insisted on, on either side, as arising from the conduct of the parties, and to contrast and weigh those presumptions. The case was rightly stated by Mr. *Mackeson* to be, not a one-sided one; on the contrary, it presents evidence embarrassing to deal with, both in the conflict of positive testimony and of opposing presumptions. For the Appellants, the presumptions from conduct principally relied on are those which arise from what appears upon the evidence as to the following matters; first, the habits of life of the families both of *Matthew Abraham* and the Respondent, as inconsistent with the nature of the existence of an undivided Hindoo family, Hindoos by origin, but not Hindoos by religion. Secondly, the establishment by *Matthew Abraham* of a business under his sole name; his introduction into it of his brother and *Richardson* as partners with himself; his formal public notification of that fact to the world by a

notice stating that he had introduced them into his firm; the payment of rent for the shop, both during the continuance of that firm and by the succeeding firm, which then consisted of himself and his brother only; and the inconsistency of that payment with the joint property in the building and premises. Thirdly, the signatures on several occasions of *Francis Abraham* as agent; his dissatisfaction with the business at *Kurnoul;* and his language regarding it as inconsistent with a joint ownership and corresponding voice. Fourthly, after the death of *Matthew Abraham*, the inconsistency of the Defendant's whole conduct for a time, with any notion in his mind that he had a joint-legal interest in the whole property of the family. Much stress was laid on the inconsistency of the statement in the Respondent's letter to *Charles Henry Abraham*, of the 19th of August, 1842, in which, giving an account of all the property of *Matthew Abraham*, he states that, it was in the bracketed item or items alone he had a half share, the item or items so bracketed not including the distillery, which is afterwards mentioned as a part of the property of *Matthew Abraham;* on the Respondent's fears expressed in the same letter of being left to seek his fortune; on his expression that he had hoped that his brother would have provided for him; and on the request to *Charles Henry Abraham*, to intercede with his mother to carry out the presumed intentions of his father. Fifthly, the treatment by the Defendant of Mrs. *Charlotte Abraham*, as the head of the family; the inconsistency of that treatment with her condition of a widow in a family adopting or retaining Hindoo customs and law in part and by choice; the administration taken out in her name; and his taking a power of attorney from her. These were treated as inconsistent with the Respondent's position in the family on his hypothesis.

On the other side, the nature of the original family to which the Defendant and his brother belonged; the customs of the Christian class within which that family was included; and the ordinary enjoyment of their property by such families according to the customs of their Hindoo progenitors, were relied on to show that the family dealt with the property as an undivided one.

The dealings of the Defendant in the management of his brother's affairs; the absence of any satisfactory proof that he had received any salary or emolument as agent or clerk; the consistency of all that he did with the ordinary course of dealing in an undivided Hindoo family; the presumed continuance of a state proved to have existed, and not in terms proved to have been interrupted; the execution of the bonds and conveyance referred to in the Respondent's case; and the inconsistency of those instruments with the ordinary dealing of a mere clerk or agent, —were pressed with much force on the attention of their Lordships. The statement of ownership in *Francis Abraham* contained in his mortgage deed, and the admissions derived from the acts of the third Plaintiff, *Daniel Vincent Abraham*, in the suits and proceedings relating to the *Kurnoul* affairs, also referred to in the case of the Respondents, were urged as additional grounds in support of the case of the Defendant, which it was argued the language of a large portion of the correspondence strengthened.

Their Lordships will first consider the evidence on these points, and the presumptions to be drawn from it with reference to the Hindoo law. In this point of view much, if not the whole, of what is urged on the part of the Respondent as to the nature of the original family to which he and *Matthew Abraham* belonged, and as to the dealings of such families, is sufficiently answered by what has been already said as to the right of *Matthew Abraham* to change, and as to the fact of his having changed, the class of Christians to which he was attached. As to the absence of proof that the Respondent received any salary or emolument as agent or clerk, independently of the absence and destruction of books and accounts, which cannot but weigh heavily against the Respondent, it is to be observed that there is an equal absence of proof that the Respondent ever received any share of profits as parcener.

The arguments from the dealings of the brothers, so forcibly urged by Sir *Hugh*

Cairns, are certainly as forcible to prove an ordinary partnership as to prove that kind of parcenary which obtains under the Hindoo law. These brothers, when they established a partnership in the shop, established and maintained it on the ordinary commercial basis, in shares, as well when they were the only partners as when *Richardson* was associated with them. On what ground, then, should a Court conclude, if it thought that a conjoint interest existed in the *Abkarry* contracts, that it was founded on Hindoo family union, rather than on the model of the shop business? This presumption could only be made by assuming the Hindoo law to govern the case.

As to the bonds and conveyances, it is to be observed, that these instruments are wholly unexplained by the evidence, and that the fact of the Appellant, *Charlotte Abraham*, having been made a party to some or one of them, renders it very difficult to deduce from any of them the inference for which the Respondent has contended; but, what is, perhaps, of still greater importance is this, that there is no proof of the application of any of the moneys raised by these instruments to any other purposes than the purposes of the shop, and that the Respondent by his answer refers to these moneys having been raised for the purposes of the shop business. With respect to the correspondence, their Lordships feel no doubt as to the conclusion to be drawn from it. After carefully perusing it, they have been unable to find anything at variance with the statement contained in the letter of the 19th of August, 1842, to which they have above referred. They find much, both in the correspondence and in the other documents, in proof in the cause which tends to confirm what is stated in that letter.

The Respondent, by that letter insists on no right. He merely suggests a similar remuneration to that which he had hoped to receive by way of testamentary gift from his deceased brother. Their Lordships are totally unable to reconcile this letter with the existence of the right since insisted on. After giving due weight to the arguments on both sides on its construction and meaning, they are unable to adopt that reading of it on which the Counsel for the Respondent have insisted. That construction is not, in their opinion, consistent with either the spirit of the composition, viewed as a whole, or with its language.

Then as to the admission contended to have been made by the Appellant, *Daniel Vincent Abraham*. Neither the Appellant, *Charlotte Abraham*, nor the late Plaintiff, *Charles Henry Abraham*, is in any way proved to have been privy to, or cognizant of, this admission; the late Plaintiff, *Charles Henry Abraham*, was absent in *England* at the time, and he never in any way adopted it. It is, no doubt, evidence against all the Plaintiffs, but, in their Lordships' opinion, undue weight has been ascribed to it in the judgment of the *Sudder* Court. Whence had this young man of nineteen his knowledge that the family was undivided? It is a mixed and complex proposition of fact and law; and it supposes a *status* concerning which the Respondent himself seems to have been long uncertain. Had he so understood his position at the time when he wrote the letter of the 19th of August, 1842; had he then considered that he was a half sharer in the whole property, he could scarcely have expressed himself as he did in that letter. Yet to this admission of a youth, ignorant alike of law and business, a binding effect is given against all the Plaintiffs on the record.

Their Lordships are not prepared to follow the *Sudder* Court in the weight which they have given to this admission. Looking at the whole case, with reference to the Hindoo law, they are of opinion, that the claim of the Respondent to a share of the property in dispute by virtue of that law cannot be supported, and they are not less satisfied that if the case be looked at with reference to the English law—a point of view, however, which, so far as the Respondent is concerned, seems to them to be excluded by the pleadings in the cause—the evidence on the part of the Respondent is insufficient, when weighed against the evidence on the other side, to establish a partnership according to that law. Their Lordships, therefore, have come to the conclusion, that the decree of the *Sudder* Court cannot be maintained; but, on the

other hand, they are not prepared to go to the full length to which the Judge of the Civil Court of *Bellary* has gone by his decree. The Respondent no doubt stood in a fiduciary position; though he may have been unconscious of the duty arising from his acts, he had, in effect, attorned to the Appellant, *Charlotte Abraham*, by accepting a power of attorney from her. That character, and the acquisitions under it, should have been renounced before the Respondent asserted an interest adverse to that of his constituent; such an assertion in one acting as agent is not prohibited on grounds of policy alone. It is in itself an unconscientious breach of duty to a principal. The Letters of administration were, indeed, taken out for a special object only; they were not strictly necessary, a certificate would have sufficed. But they were not of a limited character. There were assets in the local jurisdiction, and all parties concerned in interest were either consenting to, or subsequently ratified, the authority delegated by the Letters of administration. The administration related back to the death of *Matthew Abraham;* the possession of the whole property, therefore, from the time of his death must be ascribed to the first Plaintiff, as the Defendant acting under his power could not claim adversely.

Their Lordships are by no means disposed to infringe upon the wise and salutary rules which have been laid down as to the conduct of persons standing in confidential positions; but, on the other hand, they entirely agree with the *Sudder Dewanny Adawlut* in their estimate of the value of the Respondent's services. The property in the *Abkarry* contract may, by reason of its special character, be said to have been in a great degree preserved to the family by him. The evidence shows that none of the Plaintiffs were competent to the management of the concern. In all probability, but for the Respondent, the contract would have been lost to the family. It is represented to have been the chief source of their income. It differs materially from an ordinary trading partnership. The selection of the contractor is influenced by considerations which might probably have caused the Respondent to be named as the successor to his brother in the contract. The relationship of the Respondent to the family, the devotion of his time and labour to the augmentation of its wealth, the creation, as it were, of the profits of the *Abkarry* business, establish a great difference between this and the case of any ordinary agency.

In ordinary cases and under ordinary circumstances these services on the part of the Respondent would, no doubt, be sufficiently compensated by the provision in that behalf contained in the decree of the Civil Court, but in this case their Lordships find it proved by the Plaintiff's first witness, that the Respondent on *Matthew Abraham's* death declared to him that he had worked like a slave in the *Abkarry* business, and was merely paid for his labour; but that for the future he would not do so unless he received an equal share with the others, meaning his brother's widow and two sons; and the witness says that he soon afterwards mentioned this conversation to the widow. If the widow dissented from this view, she ought, as their Lordships think, to have communicated such dissent to the Respondent, but she never did so. After her having so long availed herself of the Respondent's services, which she knew to be rendered on the faith of his receiving one-half the profits as a remuneration for those services, she and the other parties interested in the estate could not, in their Lordships' opinion, be justly entitled to dispute the right of the Respondent to be remunerated to that extent. Their Lordships, therefore, think, that it ought to have been declared by the decree that the Respondent was entitled to an equal share of the profits of the *Abkarry* contract accrued after the death of *Matthew Abraham* as a remuneration for his services in the execution of that contract. Their Lordships think also that, having regard to the evidence to which they have last alluded, and to the Respondent having been permitted for so many years to carry on the *Abkarry* contracts without any dissent having been expressed to the terms stipulated for by him, the decree of the Civil Court has not dealt properly with the question of costs. They are of opinion that, under the circum-

stances of the case, the costs, up to the hearing, ought not to have been given against the Respondent by the decree, but ought to have been reserved until the accounts were taken. The benefit which may result to the estate may form a material ingredient in considering what ought ultimately to be done as to the costs, and the mode in which the Respondent may account under the decree may also influence that question. The decree of the Civil Court having thus, in their Lordships' opinion, gone too far, their Lordships think that there should be no costs of the appeal to the *Sudder* Court or of this appeal.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the *Sudder* Court, and to restore the decree of the Civil Court of *Bellary*, modified as above pointed out (*a*.)

23rd February, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

PRANNATH CHOWDRY,* ... *Appellant*,

versus

RANEE SURNOMOYE DOSSEE, *Respondent*.

Putnee Lease—Renewal of the Settlement —Refund of the Government Revenue.

A *Zemindar* gave a putnee lease at a fixed *Jumma* of his *Zemindary* together with certain *Bheel Bhurruttee* lands which were added by accretion to the *Zemindary* and held originally under a ten years' settlement (with a preferential right of renewal) which had only ten months more to run.

On the expiration of the said term the lessor chose to take a renewal of the Settlement in his own name and engaged to pay separate rents therefor to Government—and continued for nine years to pay to the *Zemindar* the entire *putnee* rent.

Held, affirming the judgment of the Court below, that under the circumstances the lessor had no right to bring a suit against the *Zemindar* for a refund of the Government revenue paid by the lessor for the re-settled *Bheel Bhurruttee* lands or for abatement in the fixed *putnee jumma*.

THE RIGHT HON. LORD KINGSDOWN:

THEIR Lordships are of opinion that this case is perfectly clear,—and that there can be no doubt that the judgment of the *Sudder* Court must be affirmed.

The *Rajah* held the *Zemindary* at a *jumma* rent of nearly Rs. 10,000, he sells the *Zemindary* to a purchaser for Rs. 20,000, and a *jumma* rent of Rs. 16,000.

In addition to the *Zemindary*, which he held in perpetuity, there were certain lands which were added by accretion to the *Zemindary*, which he held for a term of ten years at a *jumma* rent, with a right of renewal, more or less defined, but at all events with some preferential rights.

In that state of things he sells his *Zemindary*, and says nothing about the other lands. What does he sell then? He sells, of course, the interest he had; he sells the perpetual interest he had in the lands he held in perpetuity, and he sells the interest he had in the lands he held for ten years for the remainder of that term. At the time the sale is made, it appears that there were only ten months of that term to run. The *jumma* was a simple one, and it was not necessary to mention the rent for that *jumma* in the contract. The expiration of the term, namely, at the expiration of the ten months, the purchaser asks a renewal of the term. He has the right of renewal, or the right of throwing up the lands, but he has no contract or engagement with the vendor that will run for his benefit; but he makes a renewal, and he makes a renewal by which he engages to pay a certain rent, he continues to pay a certain rent to the Government, and, having engaged to pay that rent, he continues to pay it for nine years, and then he and others, institute a suit for the purpose of obtaining repayment of what he has thus paid, insisting that he was entitled to it, and asking to have deducted out of Rs. 16,000, which he had engaged to pay to the *Ranee*. He had obtained by some reason or other a renewal of the grant from the *Ranee*, and in it he stipulates for payment of Rs.

(*a*) See Varden Seth Sam *v.* Luckpathy Royjee Lallah, Vol. 1, P. C J., p. 857.

* 9, Moore's I. A., p. 431.

16,000, *per annum*, from which he now says Rs. 714, 11 as. are to be deducted.

Their Lordships are satisfied that there is no ground for the claim, and will advise Her Majesty to dismiss the appeal with costs, as the appeal in their opinion was groundless.

15th & 16th June, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Supreme Court at Madras.

GHOOLAM MOORTOOZAH KHAN BAHADOOR,* ... } *Appellant*,

versus

THE GOVERNMENT, representing the estate of the late NABOB of the CARNATIC, ... } *Respondent*.

Nabob of Carnatic's Debts' Act (No. XXX. of 1858)—Burden of Proof—Evidence—State of Insolvency.

The *Nabob* of *Carnatic's* Debts' Act (No. XXX. of 1858) not only limits the extraordinary remedy which it gives, to certain defined classes of debts, but throws upon the claimant more than the ordinary burden of proof, compelling the holder of any acknowledgment or security to prove the actual consideration for it; and those claiming the price of goods delivered, to prove their fair and actual value.

Held on the merits that the appellant had failed to discharge the burden of proof.

The Judicial Committee will not disturb the finding of the Courts below upon mere issues of fact, unless clearly satisfied of some miscarriage either in the reception or in the appreciation of evidence. In cases turning upon the credibility of evidence, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination, and of inspecting the original documents.

In a scheme involving the payment out of the Public Treasury, of the debts of a Native Prince, who lived and died in a state of chronic insolvency, strict proof would be required of claimants, as under the circumstances the temptation is greater and the risks of detection smaller than in the ordinary case of claims against the representatives of a deceased person.

* 9, Moore's I. A., p. 456.

9th July, 1863.

AFTER consideration, judgment was now delivered by

THE RIGHT HON. LORD KINGSDOWN:

This case stood over after the Appellant's Counsel had been heard, in order that their Lordships might have an opportunity of examining the evidence on which the questions raised by the appeal depend. They have accordingly done so, and having considered it carefully, and fully weighed the arguments advanced on the part of the original Appellant, in the course of which everything that can be found in the record favourable to his case, was well connected and arranged, they have come to the conclusion that the appeal cannot be supported.

It is brought against an Order of the Supreme Court of *Madras*, disallowing some, while it allowed other items of a claim preferred by *Ghoolam Moortoozah Khan Bahadoor*, the deceased Appellant, under the Act passed in 1858, by the then Legislative Council of *India*, for the administration of the estate and for the payment of the debts of the last *Nabob* of the *Carnatic*.

The claim was made under the 14th section of the Act, No. XXX. of 1858. By that and the subsequent sections it is provided, that any person claiming to be a creditor of the late *Nabob*, who shall file a declaration stating that he is willing to receive in full discharge of all his claims against the *Nabob*, or his estate, such amount as the Supreme Court shall award under the provisions of that Act, shall be entitled to have his claim investigated in a summary way, and to receive the amount awarded out of the assets of the late *Nabob*, in the hands of the Receiver appointed under the Act, if these shall be sufficient for the purpose; and if they shall be insufficient, out of the Public Treasury. The Court, however, in the exercise of this summary jurisdiction, is by the 22nd section forbidden to allow to any Claimant, in respect to money lent or advanced, any larger sum than the amount which shall be proved to have been actually advanced to

or for the late *Nabob*, with simple interest thereon, not exceeding the rate of six per centum per annum; or to any Claimant in respect of goods supplied, or of any other matters, any larger sum than the amount shall be proved to have been the fair and actual value thereof at the time when the debt was incurred, with simple interest, not exceeding the rate aforesaid, if the Court shall consider the Claimant entitled to interest. It would seem, therefore, that the Act not only limits the extraordinary remedy which it gives to certain defined classes of debt, but throws upon the Claimant more than the ordinary burden of proof, compelling the holder of any written acknowledgment, or security, to prove the actual consideration for it; and those claiming the price of goods delivered, to prove the fair and actual value of them.

The late Appellant, who was a kinsman of the *Nabob*, and was always on terms of intimacy with him, appears to have been an extravagant, and, for many years, a needy person. In 1843, he took the step, most unusual, as we understand, for a person of his rank, of passing through the Insolvent Court. In 1851, on the occasion of making a final settlement with his creditors, he was assisted by the issue, by the *Nabob*, of some securities, known as the *Istafa Cutcherry* Bonds, to the extent of seven *lacs* of Rupees. These Bonds were handed over to creditors of the late Appellant; they have been since paid, and are not now in question. It is said on the part of the Appellant that they were given in part discharged of a large debt due from the *Nabob*, but that this payment left other demands still unsatisfied, which are the subject of the present proceedings.

The principal item now in controversy, is founded upon moneys said to have been placed by the mother of the late Appellant in the hands of the mother of the *Nabob*; three *lacs* by way of loan, two *lacs* by way of deposit in trust for the late Appellant.

For these sums it is not pretended that the *Nabob* was originally liable, but it is stated, that he received them from his mother, and thereby became liable for them, and acknowledged his liability. The debt of seven *lacs* of Rupees was said also to have consisted mainly of moneys advanced in the same way by the mother of the *Nabob*, and secured by his promissory note.

The story told on behalf of the late Appellant seems to their Lordships full of the grossest improbabilities. It is highly improbable that his mother, who appears to have been in the receipt of a small pension only, should have had the means of advancing, as she is said to have done, no less than ten *lacs* of Rupees to the mother of the *Nabob*, especially within the short period within which these sums are alleged to have been advanced. It is equally improbable that these advances, if in fact made by the late Appellant's mother, should have been made, as they are alleged to have been, without his knowledge. If these sums were really due, it is scarcely to be credited that the claim for them should not have been prosecuted in 1848, when the account was sent in to the *Istafa Cutcherry*,—an account, it is to be observed, in which written documents not now produced are referred to as vouchers for some of the items. Again, it is most improbable that the grandmother of the *Nabob* should have deposited two *lacs* of Rupees with the *Nobob's* mother as a provision for the late Appellant, and that no communication should for several years have been made to him upon the subject. Yet there is no trustworthy evidence to explain any of these improbabilities, or to support the ingenious theories suggested at the Bar. The promissory note for seven *lacs* of Rupees, part of these alleged advances, is not given to the lady who is said to have made the advances, but to *Arathoon*, who appears to have been engaged in other pecuniary transactions with the *Nabob*. No reliance can, in their Lordships' judgment, be placed on the letters alleged to have been written by or by the direction of the *Nabob* admitting the late Appellant's claims, or upon the extracts alleged to have been made from the *Nabob's* accounts. The letter of the 26th of April, 1848, in their Lordships' opinion, bears upon the face of it palpable marks of having been concocted for the mere purpose of sustaining the late Appellant's claims, and cannot be relied upon to support them; and if this document be fabricated, the fabrication is

all but fatal to the Appellant's case. Beyond this, it is plain upon the evidence, that the *Istafa Cutcherry* disputed the late Appellant's claims. He was called upon for accounts and particulars. He rendered none, and did not prosecute his claim in the life-time of the *Nabob*. Moreover, the evidence shows that the late Appellant for some time at least acted as agent for the *Nabob*, and was in receipt of moneys on his account, and there is no proof of these moneys having been fully accounted for by him. Their Lordships are satisfied that the Court below was quite right in holding that no sufficient evidence had been offered in support of this charge.

Nor have they been able to satisfy themselves that any of the smaller items which have been disallowed on the second part of the claim ought to have been allowed. It is unnecessary to consider whether some of the items disallowed, if satisfactorily proved, would have constituted debts recoverable under the 14th section of the Act, because their Lordships think that they are not proved. It is not the course of this Committee to disturb the finding of the Courts below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage, either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination, and of inspecting the original documents. Their Lordships also feel that in the exercise of this Statutory and peculiar jurisdiction, the Court below was almost bound to insist on the utmost strictness of proof. For it needs but little knowledge of human nature, as it exists in *India*, to see that a scheme involving the payment out of the public Treasury of the debts of a native Prince, who seems to have lived and died in a state of chronic insolvency, was calculated to bring forth a host of Claimants not likely to be very scrupulous, either in the statement of their demands, or in the manufacture of evidence to support them. And, it is obvious that the Government which has thus undertaken to pay the debts of the *Nabob*, must be without many of the means which an ordinary representative of a deceased person would have of resisting claims, either wholly false or dishonestly swollen.

Upon the whole case their Lordships are unable to see any sufficient ground for disturbing the judgment of the Court below, and they must, therefore, humbly recommend to Her Majesty that this appeal be dismissed, with costs.

27th, 28th, 29th, and 30th April, 30th May, and 1st of June, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

KATAMA NATCHIAR,* ... *Appellant,*

versus

SRIMUT RAJAH MOOTTOO VIJAYA RAGANADHA BODHA GOOROO SAWMY PERIYA ODAYA TAVER, *Respondent.*

Zemindary of Shivagunga is in the nature of a Raj, impartible—Mitacshara—Separate acquired estate descends to a widow—Interest of a Hindu widow—Decree against the widow how far a bar to a suit by the daughter—United Hindu Family—Survivorship.

The *Zemindary* of *Shivagunga* in *Madras* is in the nature of an impartible Principality—capable of enjoyment by only one member of the family at a time.

By the law of inheritance prevailing throughout southern *India*, separate acquired estate descends to a widow, in default of male issue of the deceased proprietor.

Property inherited by a Hindu widow vests in her absolutely for some purposes, though in some respects, for a qualified interest. She represents the inheritance as fully as a tenant-in-tail and a decree fairly and properly obtained against her binds succeeding reversioners.

The widow having died whilst an appeal by her to the *Madras Sudder* Court against an adverse decree of 1847 was pending, various persons appeared on issue of the usual notice and claimed conflictingly to prosecute the appeal as representing

* 9, Moore's I. A., p. 539.

the estate. The Court dismissed their applications leaving any of them at liberty to bring a new action to enforce their respective claims.

The Appellant accordingly brought a fresh suit which was dismissed on the merits by treating the decree of 1847 as a judgment *in rem*.

Held on appeal by the Judicial Committee, that a decree in a suit by *A.* against *B.*, claiming as widow to succeed to her husband's estate in preference to *B.*, his nephew, on the ground of a divided family, could not operate as a bar to a suit by *C.*, a daughter, claiming to succeed to her father's estate on *A.'s* death, on the ground that the property was self-acquired by her father. Such judgment was not a judgment *in rem* but a judgment *inter partes*.

That the procedure adopted by the *Sudder* Court in disposing of the appeal against the decree of 1847 and the subsequent finality attached to it amounted to a signal failure of justice. The High Court, after the death of the widow, ought to have ascertained who were the next heirs of the husband and allowed them to prosecute the appeal against the decree of 1847. As they were not allowed to prosecute such appeal, that decree could not be treated as final against them in the fresh suit which they were directed to institute.

It is doubtful whether the procedure of the *Indian* Courts admitted of a suit in the nature of a bill of revivor or a bill of revivor and supplement, and in no case could it be said that the *Sudder* Court contemplated such a suit.

The Judicial Committee having all the materials before them were fully competent to make the order which the *Sudder* Court ought to have made in the appeal against the decree of 1847 and were not at all bound to transmit the case to the *Sudder* Court to hear and determine the appeal.

On the merits, it was held that the Appellant had failed to prove that *Gowery Vallabha Taver* was separate from his brother, and that the *Zemindary* was proved to be the self-acquired property of *G. V. T.*

The *Mitacshara* in Chap. II, Sec. 1 does not treat of a case like the present where the estate of the deceased is in part the common property of a united family and in part his separate acquisition, and there being no positive text governing the case the decision should be guided by the general principles of the Hindu Law.

Where joint family property has been divided, the share of a deceased member is inherited by his personal heirs, but if there is a copartnership between the different members of the united family, then survivorship follows.

By survivorship alone, the right of co partners in the undivided estate over-rides the widow's right of succession, but with respect to self-acquired property of a member of the united family, the other members of the family have neither community of interest, nor unity of possession; therefore the foundation of the right to take by survivorship fails.

30th November, 1863.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. THE LORD JUSTICE TURNER:

The subject of this appeal, and of the long litigation which has preceded it, is the *Zemindary* of *Shivagunga*, in the District of *Madura* and Presidency of *Madras*.

This *Zemindary* is said to have been created in the year 1730, by the then *Nabob* of the *Carnatic*, in favour of one *Shasavarna*, on the extinction of whose lineal descendants in 1801, it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the *Nabob* of the *Carnatic*, and was granted by the *Madras* Government to a person whom we shall distinguish by one of his many names, as *Gowery Vallabha Taver*. He had an elder brother named *Oya Taver*, who predeceased him, dying in 1815. The *Zemindar* himself died on the 19th of July, 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead), who left a son named *Vadoga Taver;* the second had a daughter named *Bootaka Natchiar;* the third had two daughters, *Kota Natchiar* and *Katama Natchiar*, the present Appellant; and the fourth was childless. The three surviving widows were *Anga Moottoo Natchiar*, *Purvata Natchiar*, and *Moottoo Verey Natchiar*. Of these *Purvata Natchiar* was *enceinte* at the time of her husband's death, and afterwards gave birth to a daughter named *Sowmia Natchiar*. The two others were childless.

Oya Taver, the brother, left three sons, of whom the eldest was named *Moottoo Vadooga*.

The *Zemindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings,) the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of *India*, with such qualifications only as flow from the impartible character of the subject.

Hence if the *Zemindar*, at the time of his death, and his nephews were members of an undivided Hindoo family, and the *Zemindary*, though impartible, was part

of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar*, at the time of his death, was separate in estate from his brother's family, the *Zemindary* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestable; but *Gowery Vallabha Taver's* widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late *Zemindar* continued to be generally undivided in estate with his brother's family, this *Zemindary* was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the *Zemindary* was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of *Gowery Vallabha Taver*, at least on the failure of his male issue, being demonstrated by the birth of his posthumous daughter, his nephew, *Moottoo Vadooga*, obtained possession of the *Zemindary*. He seems to have set up an instrument which in the proceedings is called a Will. On the Appellant's side this is treated as a forgery. The Respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may, therefore, be dismissed from consideration. *Moottoo Vadooga* obtained possession with the concurrence of various members of the family, and of Government and its officers. He afterwards obtained from the then three surviving widows the *Razinamah*, or agreement. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July, 1831; and was then succeeded by his eldest son, *Bodha Gooroo Sawmy Taver*.

Soon after this event began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the first beginning with the institution of suit, No. 4, of 1832, and ending with the Order of the Queen in Council in 1844; the second beginning from the date of that Order, and ending with the death of the widow, *Anga Moottoo Natchiar*, on the 23rd of June, 1850; and the third being that which covers the proceedings which have been had since *Anga Moottoo Natchiar* died.

The suit, No. 4 of 1832, was brought by *Velli Natchiar*, the daughter of *Gowery Vallabha Taver* by his first wife, on behalf of her infant son, *Moottoo Vadooga*. It claimed the *Zemindary* for the infant by virtue of an *Arze* said to have been sent by the Collector to *Gowery Vallabha Taver* in 1822, according to which the succession would be to the son of a daughter in preference to his widows, and *à fortiori* in preference to his brother's descendants. The defence to this suit insisted that the *Zemindary* had been granted to *Gowery Vallabha Taver* solely in consequence of his relationship to the former *Zemindars*, and was, therefore, to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male co-parceners in preference to any descendant in the female line from *Gowery Vallabha Taver*. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the *Zemindary* was to be regarded as the self-acquired and separate property of *Gowery Vallabha Taver*, and ought to pass by virtue of the *Arze* to the Plaintiff.

In 1833, two other suits were instituted against the *Zemindar* in possession. Of these, that distinguished as No. 4 may be left out of consideration, inasmuch as the Plaintiff in it rested his title on an alleged adoption by *Gowery Vallabha Taver*, of which he failed to give satisfactory proof. Such a title, if established, would of course have been paramount to the claims of either the nephews or the widows.

Suit 3, of 1833 is, however, the most important, with reference to this appeal, of the three suits now under consideration. It was brought by *Anga Moottoo Natchiar*, the fifth wife, and the elder of the three widows of *Gowery Vallabha Taver*. She set up an adoption, or *quasi* adoption, of *Gowery Vallabha Taver*, by the widow of the last *Zemindar* of the elder line, and treated this as the consideration, or a principal consideration, for the grant of the *Zemindary* made to him by the East India Company, and she insisted that *Moottoo Vadooga Taver*, on her husband's death, got possession of the *Zemindary*, of which she was the legal heiress, by means of the forged Will. The defence to this suit, so far as it related to the title of the *Zemindar* in possession, was substantially the same as that made to the suit, No. 4 of 1832; but it also denied the alleged forgery of the Will, and insisted on the *Razinamah* executed by *Anga Moottoo Natchiar* and the other widows to *Moottoo Vadooga Taver*. In her reply, *Anga Moottoo Natchiar* did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the *Zemindary* had been acquired by the sole exertions and merits of her husband; and as an issue of law, that what is acquired by a man, without employment of his patrimony, shall not be inherited by his brothers and co-heirs, but if he dies without male issue shall descend to his widows, his daughters, and parents, before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the decree or decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether *Gowery Vallabha Taver* and his nephews were or were not an undivided Hindoo family, some evidence was given in the suit, No. 4 of 1832, to show that he and his brother were separate in estate. There was an appeal in each of the three suits, and these were heard together, and disposed of by the decree of the *Sudder* Court. That decree dismissed No. 4 of 1833, on the ground that the Plaintiff had failed to prove his alleged adoption by *Gowery Vallabha Taver*, and it dismissed No. 4 of 1832 on the ground that the succession to the *Zemindary* was governed by the general Hindoo law, and not by any particular or customary canon of descent; so that, if descendible as separate estate, it would go to the widows of *Gowery Vallabha Taver* in preference of a grandson by a daughter. In the suit, No. 3, of 1832, it was decided, first, that as a matter of fact the *Zemindary* was the self-acquired and separate property of *Gowery Vallabha Taver*: secondly, that according to the opinion of the Pundits whom it had consulted, the rule of succession to the *Zemindary*, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that in the former case it would belong to the widow, and in the latter to the nephew; thirdly, that upon the whole evidence the brothers must be taken to have divided their ancestral property; and lastly, that the Plaintiff, *Anga Moottoo Natchiar*, was entitled to recover the *Zemindary*, not having forfeited her rights by the execution of the *Razinamah*.

Against this decree the *Zemindar* then in possession appealed to Her Majesty in Council. The Order made on that appeal on the 19th of June, 1844, was that the decree of the *Sudder* Court should be reversed, with liberty to the Respondent, *Anga Moottoo Taver*, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that Order in the *Sudder Dewanny Adawlut*. The grounds on which their Lordships who recommended this Order proceeded were, as appears from the judgment delivered by Dr. *Lushington*, that the *Sudder* Court had miscarried in deciding the question of division, which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the Respondent ought to be allowed to remedy the omission in a new suit. And their Lordships added, that though they could make no Order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division

or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

On the 20th of August, 1845, *Anga Moottoo Natchiar* commenced her second suit *in formâ pauperis*. In the interim *Bodha Gooroo Swamy Taver* had died, and the *Zemindary* had passed to his brother, *Gowery Vallabha Taver*, the father of the Respondent, and he with a younger brother were the Defendants to the new suit. In her plaint the widow, after stating the pedigree of the family, some of the former proceedings, and the desire of *Velu Natchiar*, the widow of the last *Zemindar* of the elder line, to make *Gowery Vallabha Taver*, the first of that name whom we have mentioned, her successor, proceeds to allege, that with that object she had caused him and his elder brother, *Oya Taver*, to make a partition of their ancestral property as early as the year 1792. The Plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised it was only necessary for her to show that her husband had been adopted by *Velu Natchiar*, and that the *Zemindary* was his self-acquisition. She then proceeds to allege, that on the death of *Velu Natchiar*, he actually became *Zemindar* until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company, he was again put into possession under their grant. She also in this suit makes the alternative case, that even if no partition of their ancestral property took place between *Gowery Vallabha Taver* and his brother *Oya Taver*, she, as the eldest widow, was entitled to the *Zemindary*, as a separate acquisition, in preference to that brother's descendants, and pleads the decision, in what is called the *Sandayar* case, to prove that such is the Hindoo law, and that the opinion given in the former case by the Pundits to the contrary was erroneous.

In his answer, the first and principal Defendant recapitulated the several facts relied upon by *Bodha Gooroo* in the former suit as constituting his title. He insisted that by the decision of the Judicial Committee of the Privy Council the contest was narrowed to the issue whether the brothers were undivided in estate or not, and that the Plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit are thus somewhat vaguely stated:—"The Plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the Defendant cannot be called upon to establish the negative side by direct proof. But the Defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the Plaintiff."

A large body of evidence is, in fact, given by each side on the question of division or non-division. The case was heard by the Civil Judge, Mr. *Baynes*, whose decree is dated the 27th of December, 1847. The effect of it was, that the only question really open between the parties was that of division or non-division; that the Plaintiff had failed to prove the partition between *Gowery Vallabha Taver* and his brother, *Oya Taver;* and that her suit must be dismissed with costs.

Against this decree, on the 6th of April, 1848, *Anga Moottoo Natchiar* appealed to the *Sudder* Court. The Defendant, *Gowery Vallabha*, then died, and his infant son, the present Respondent, came in, and on the 5th of November, 1849, filed an answer to the appeal. Before the appeal was heard, and on the 24th of June, 1850, *Anga Moottoo Natchiar* also died, and with her death ended the second stage of this long litigation.

On the death of *Anga Moottoo Natchiar* the Court seems to have issued a notice in the form ordinarily used on the abatement of an appeal by the death of an Appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindoo widow, the right of action formerly vested in her devolves not upon her heirs, but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three

sets of claimants. The first consisted of *Bootaka Natchiar*, the daughter of *Gowery Vallabha Taver* by his second wife, and *Kota Natchiar* and the present Appellant, his daughters by his third wife. They claimed as the rightful heirs of the *Zemindary*, if it passed as separate property, next in succession to the widow, *Anga Moottoo Natchiar;* but considering its impartible nature, they expressed their willingness that it should be enjoyed first by *Boothaka Natchiar* for her life, next by *Kota Natchiar* for her life, and lastly by the Appellant. They treated *Sowmia Natchiar*, the daughter by the sixth wife, as excluded from the succession by reason of her marriage with *Bodha Gooroo*, and of her being then a childless widow.

Sowmia Natchiar, however, came forward by a separate petition, claiming to be heiress both to *Anga Moottoo Natchiar* and the *Zemindary*, by virtue of an instrument alleged to have been executed by *Anga Moottoo Natchiar* in her life-time.

A third claimant was *Moottoo Vadooga*, the Plaintiff in the dismissed suit of 1832. His contention was, that though the decree in that suit may have been right in preferring to his claim that of *Anga Moottoo Natchiar*, his title as grandson was nevertheless preferable to that of daughters, and that on the death of the widow he became entitled to the *Zemindary*.

Counter-petitions were filed on behalf of the Respondent, objecting to the revival of the appeal by any of these claimants; and it is observable that he then insisted that they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of *Anga Moottoo Natchiar*.

The *Sudder* Court, in dealing with these claims to prosecute the appeal, has made three different and inconsistent orders.

By the first, dated 21st of October, 1850, it held that none of the claimants could prosecute the appeal, which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th of April, 1851.

They all petitioned for a review of this Order; counter-petitions were filed on behalf of the Respondent; and the Court, by its Order of the 1st of May, 1851, notwithstanding an adverse opinion given by its Pundits on the 7th of March preceding, reversed its former Order, and directed the appeal to be replaced on the file, and the several claimants to be made supplemental Appellants; resolving to hear the appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the Defendant should be tried.

On the 19th of April, 1852, the Court, apparently of its own mere motion on taking up the record of the appeal, reversed this Order of the 1st of May, 1851, and ruled that the several claimants could not be heard on the appeal, but might prosecute their respective rights in the Court of first instance, which Court was to be guided in the admission and hearing of their claims by the Regulations in force, and the appeal was again removed from the file.

Thereupon the Respondent shifted his ground, and by a petition dated the 30th of June, 1852, objected to the last Order and prayed for a review of it. His contention then was, that the heirs next in succession to *Anga Moottoo Natchiar*, according to that course of succession, might have been admitted to carry on the appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceeding of the 16th of September, 1852, adhered to its Order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of *Gowery Vallabha Taver* who joined in the first of the above-mentioned applications to the *Sudder* Court, the Appellant alone brought a fresh suit. The plaint was not filed until the 5th of December, 1856, but there seem to have been various intermediate proceedings before both the *Zillah* and *Sudder* Courts. These are referred to in the Appellant's petition of appeal, but are nowhere stated in detail. Her plaint stated, that her father and his brother, *Qya*

Taver, were divided in estate prior to 1801, and were then living separately; that the *Zemindary* was granted exclusively to the former, and was, therefore, his self-acquisition, and enjoyed by him in exclusion of his brother.

The Appellant's title in succession to *Anga Moottoo Natchiar* is thus stated:—"The *Zemindary*, which is the self-acquisition of the Plaintiff's father after his division with *Oya Taver*, belongs on the death of his widow, *Anga Moottoo Natchiar*, to his second daughter, the Plaintiff, who has male and female issue: whilst his first daughter *Bootaka*, has no issue, and the third daughter, *Sowmia*, is a widow". In the seventh paragraph (though the point is not taken so distinctly as in the suit of *Anga Moottoo Natchiar*) she claims the *Zemindary* as her father's self-acquisition, irrespectively of the alleged partition with his brother, and the question of division.

The answer took a formal objection to the suit, namely, that it was brought against the guardian of the infant *Zemindar*, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the decree of the 27th of December, 1847, as bars to the Appellant's claim. It further impeached her title as the heir next in succession to *Anga Moottoo Natchiar* in that line of succession, alleging that there were descendants of *Gowery Vallabha Taver* through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845, as constituting the title of the infant *Zemindar*.

The estate being then in the custody of the Court of Wards, the Collector was made a Defendant, and put in a similar answer. Replies and rejoinders were filed; but without settling any issues or taking any evidence in the cause. The *Zillah* Judge, Mr. *Cotton*, on the 25th of August, 1859, dismissed the suit, together with the suit, No. 4 of 1857, which had been instituted by *Sowmia Natchiar*, but with which we have no concern. His reasons for dismissing the Appellant's suit were:—first, that upon the question of division she was concluded by the decree of 1847, which he treated as a judgment *in rem*, made final by the removal of the appeal from the file; and, secondly, that it was clear upon the opinions of the Pundits, that the *Zemindary*, whether self-acquired or not, could not descend to the widow, nor, *à fortiori*, to a daughter, except in the event of the *Zemindar* having been of a divided family.

The Appellant appealed from this decision to the *Sudder* Court, praying that the suit might be remanded for adjudication on the merits. Her appeal was dismissed by a decree, dated the 5th of November, 1859. The *Sudder* Court seems also to have considered that by the dropping of the appeal on *Anga Moottoo Natchiar's* death the decree of 1847 had become final, and, as such, was an effectual bar to the Appellant's claim. On the 3rd of March, 1860, the *Sudder* Court refused to give the Appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of this Committee.

The present appeal is against the decree of the *Sudder* Court of the 5th of November, 1859, and its Order of the 3rd of March, 1860, and the decree of the 25th of August, 1859. It is also against the Order of the *Sudder* Court of 1852, and the decree of the Civil Court of *Madura* of the 27th of December, 1847. If, therefore, the latter decree is in truth a bar to the Appellant's obtaining effectual relief in her original suit, the appeal seeks by reopening that decree to remove the bar.

And here, before going further, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this decree which was propounded by the *Zillah* Judge when dismissing the suit of 1856; because if unnoticed here, as it seems to have been unnoticed by the *Sudder* Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in *India*. Their Lordships would otherwise think it unnecessary to observe that a judgment is not a judgment *in rem*, because in a suit by *A.* for the recovery of an estate from *B.* it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes*; and the only question which could properly

arise concerning it in the suit of 1856 was to what extent, as such, it was binding on the Appellant.

Their Lordships also feel constrained to observe that the various proceedings which have taken place since *Anga Moottoo Natchiar's* death have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When *Anga Moottoo Natchiar* died, the decree of 1847 was not a final decree. An appeal was pending against it. Either it was binding upon those who in the event of her title being a good one would succeed to the *Zemindary*, or it was not. Those persons were obviously not her heirs, but the next heirs of her husband according to the canon of Hindoo law, which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the appeal. If the decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The *Sudder* Court, however, after making two other and inconsistent Orders, referred the parties to an original suit; and yet a suit of that nature when brought by the Appellant has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the decree of 1847. Therefore, she has fallen, so to speak, between two stools. She has had neither the benefit of the appeal against the decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result the Appellant is herself solely responsible; that the suit which she ought to have brought, and which the *Sudder* Court intended her to bring, was one in the nature of a Bill of revivor, or a Bill of revivor and supplement, limited to the object of obtaining from the *Zillah* Court a declaration that she had established her title to stand in the place of *Anga Moottoo Natchiar*, and carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced), their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the *Sudder* Court had in its contemplation when it made its Order of 1852. The omission to reserve the hearing of this appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the Respondent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the appeal—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure Order of the 16th of September, 1852, is hardly inconsistent with this, though it seem to contemplate that the decree of 1847 might prove an effectual bar to the suit which the Court itself had directed. Yet if there was ground for this apprehension, in what a position had the *Sudder* Court placed the claimants? It had denied to them the power of prosecuting the appeal; it had thereby made final that which was not in its nature final; and having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the decree of 1847, when final, was binding on the claimants, the *Sudder* Court ought either to have dealt with the appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest Order of the *Sudder* Court which is appealed against, viz. that of the 19th of April, 1852.

It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Moottoo*

Natchiar's life-time, would have bound those claiming the *Zemindary* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to *Anga Moottoo Natchiar*. For assuming her to be entitled to the *Zemindary* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the Respondent that this Committee can do no more than remit the cause, with directions to the *Sudder* Court to hear and determine the appeal against the decree of 1847; that it cannot itself deal with the merits of a decree of the Civil Court, until they have been determined by the appellate Court. Their Lordships, however, are not of that opinion. The appeal was ripe for hearing by the *Sudder* Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the Order which the *Sudder* Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the Appellant and the Respondent is, as it was between *Anga Moottoo Natchiar* and the Respondent's predecessors, whether the *Zemindary* ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:—

First. Were *Gowery Vallabha Taver* and his brother, *Oya Taver*, undivided in estate, or had a partition taken place between them?

Second. If they were undivided, was the *Zemindary* the self-acquired and separate property of *Gowery Vallabha Taver?* And if so—

Third: What is the course of succession according to the Hindoo law of the south of *India* of such an acquisition, where the family is in other respects an undivided family?

Upon the first question their Lordships are not prepared to disturb the finding of Mr. *Baynes* in the decree of 1847. There are undoubtedly strong reasons for concluding that *Gowery Vallabha Taver* and his brother, after the acquisition by the former of the *Zemindary*, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately enjoyed *Zemindary*. And *Anga Moottoo Natchiar*, having admitted that the brothers had been joined in estate, and alleged a partition at a particular place and time, took upon herself the burden of proving that partition; a burden from which it must be admitted she has not satisfactorily relieved herself. Nor can their Lordships in considering this question be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made; and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the *Zemindary* as the self-acquired property of *Gowery*

Vallabha Taver. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the *Zemindars* of the former line does not, their Lordships apprehend, bring this case within the rule cited from *Strange's* "Hindu Law" by Sir *Hugh Cairns*.

The Third question is one of nicety and of some difficulty. The conclusion which the Courts in *India* have arrived at upon it, is founded upon the opinion of the Pundits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but before doing so, it will be well to consider more fully the law of inheritance as it prevails at *Madras* and throughout the southern parts of *India*, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of *India* is to be found in the *Mitacshara*, and in ch. II., sec. 1, of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The *Mitacshara* purports to be a commentary upon the earlier institutes of *Yajnyawalcya*; and the section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the *Mitacshara* refers to various authorities which are apparently in conflict with the doctrines of *Yajnyawalcya*, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with, their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindoo law is not disputed. It is admitted that, according to that law, such property descends to widows in default of male issue. It is upon the Respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindoo family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported

by authority, and at variance with principle. That two courses of descent may obtain on a part division of joint property, is apparent from a passage in *W. H. Macnaghten's* "Hindu Law," title "Partition," vol. I. p. 53, where it is said as follows: "According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property; in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the coparceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that, according to the Hindoo law, there need not be unity of heirship.

But to look more closely into the Hindoo law. When property belonging in common to a united Hindoo family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which from its first acquisition has always been separate? We have seen from the passage already quoted from *Macnaghten's* "Hindu Law," that where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line: that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindoo law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 *Strange's* "Hindu Law," p. 135). But some ancient authorities also invoke the other principle. *Vrihaspati* (3 *Coleb.* Dig. 458, tit. cccxcix; see also Sir *William Jones'* paper cited in 2 *Strange's* "Hindu Law," p. 250) says: "Of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives?" Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is perfectly intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should override the widow's right of succession, whether based upon the spiritual doctrine, or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right established by the *Mitacshara*, whatever be its extent, must be taken to depend. If this be so, we can hardly, in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindoo law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that

in which they had during the deceased's life-time a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to any superior right of the co-parceners in the undivided property.

Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir *Thomas Strange*, are so intimately connected that they may almost be said to be blended together; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe, that the view which we have thus indicated of the Hindoo law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindoo being a member of a united family having common property, and being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first object without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to consider the opinions of the Pundits and the authorities referred to by them.

The case appears to have been referred to the Pundits on several occasions. The first of these references was made by the *Zillah* Court in 1833, in the suit No. 4 of 1832. The answer of the Pundits bears date the 28th of October in that year. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same Pundits in answer to references directed by the *Sudder* Court before making the decree of the 17th of April, 1837 (*a*). The answers are dated the 28th of December, 1836, and the 16th of January, 1837.

On examining the reasons on which the Pundits rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from *Vrihaspati* and as to the text in the *Mitacshara* to which they refer; but they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from the *Mitacshara*, and what we shall presently say as to the passages from *Vrihaspati* is, we think, a sufficient answer to this part of the reasons on which the Pundits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage; and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last argument seems to be founded on the passages in the *Mitacshara* contained in clauses 2 and 3 of section 1, chapter 1; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed, the argument which the Pundits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the Pundits rely in support of their opinions. They consist of the text from the *Mitacshara*, to which we have already so frequently referred, and of passages from *Vrihaspati* and several other

(*a*) See questions and answers, 3 Moore's Ind. App. Cases, 282.

commentators on the Hindoo law. We have already intimated our opinion that the text from the *Mitacshara* does not apply to this case, and as to the passages from the Commentators they are all of equivocal import. They may, or may not, have been intended to apply to a case like the present, and if there was nothing more to be found upon the subject they might or might not be thought sufficient to warrant the opinion which the Pundits have founded upon them; but these passages seem to be the same passages, or passages similar to those, which were brought forward before the time of the *Mitacshara*, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from *Nareda*. These authorities failed when contrasted with conflicting passages in the works of other Commentators, of which the Pundits in this case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the Pundits in this case have gone much too far in bringing them forward as uncontradicted authorities in favour of the opinion which they have formed that the widows are not, in this case, entitled to the separately acquired property. It seems to us, too, that the decision in the *Sandayar* case (*a*)—a decision also founded on the opinion of the Pundits of the *Sudder* Court—is wholly at variance with the opinion of the Pundits in the present case. Whether the Pundits in that case were or were not right in the opinion, that the *Zemindary* became the separate property of the uncle by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is, that holding the *Zemindary* to have become the separate property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The Pundits, in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pundits in the *Sandayar* case, by assuming that the Pundits in that case proceeded upon an idea that the descendants of the common ancestor had been separated, but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case, therefore, stands thus upon the authorities. On the one hand, we have the opinion of the Pundits in this case, which seem never to have been acted upon by any final decree. On the other hand we have the decision in the *Sandayar* case, and the other authorities cited for the Appellant at the Bar, particularly the passage from *Menu*, in Sir *William Jones's* paper, given at *Strange's* "Hindu Law," Vol. II., p. 250 [2nd Edit.], and the opinion of the Pundit, *Kistnamachary*, (2 *Strange's* "Hindu Law," p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. *Colebrooke* and *Dorin*.

In this state of things their Lordships cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favour of the Appellant's contention.

We proceed, then, to consider how the *Sudder* Court ought to have dealt with this case after *Anga Moottoo Natchiar's* death, and we are of opinion that that Court ought upon the applications made by the different parties claiming to prosecute the appeal, to have determined which of the parties was so entitled. We are of opinion, that *Sowmia Natchiar* and the grandson were not so entitled, and that their claims, therefore, ought at once to have been dismissed. The claims of the Appellant and her two sisters were founded on a right common to them as against the Respondent; and we think that the Court ought to have held them entitled to prosecute the appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and upon the merits

(*a*) 9, Moore's I. A., p. 576.

we are of opinion, for the reasons above given, that the Appellant and her sisters were well entitled to the *Zemindary*, as against the Respondent. We have, of course, not failed to consider the judgment of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindoo Law of Inheritance, Mr. *Strange*, one of the Judges of the *Sudder* Court of *Madras*, has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not so fully discussed and examined in 1844, as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the Appellant bound by the opinion which was then expressed; which, though of course entitled to the greatest possible respect, was not necessary to the decision then arrived at. And, as to the opinion expressed by Mr. *Strange*, it seems to rest upon the opinions of the Pundits, and the proceedings of the Courts which we have now been called upon to review. If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

We shall, therefore, humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the *Sudder* Court, ought to have been and ought to be dismissed; and in the suit of 1845 to declare that *Sowmia Natchiar* and *Moottoo Vadooga* were not, nor was either of them, but that the Appellant and her sisters were, as against the Respondent, entitled to prosecute the appeal, and to recover the *Zemindary*—this declaration to be without prejudice to the rights of the Appellant and her sisters *inter se;* and, further, to declare that an account ought to have been and ought to be directed of the rents and profits of the *Zemindary* received by the Respondent, or by his order, or for his use, since the death of *Anga Moottoo Natchiar*, with directions for payment to the parties entitled of what should be found due upon the account; and also to declare that the *Zemindary* ought at once to be put into the hands of the Collector, or of a Receiver to be appointed by the Court, with liberty to the Appellant and her sisters, or any of them, to apply at the Court as they may be advised. We shall further recommend that the case be remitted to the *Sudder* Court, with directions to carry these declarations into effect; but we shall not recommend that any costs be given of the suit of 1856, or of this appeal, or of any of the proceedings below. But any costs to which the Appellant has been subjected must be refunded (*a*.)

(*a*) The following authorities cited by the Appellant's Counsel:—

Macnaghten's H. L., vol. I. p. 54; Coleb. Dig. vol. III. pp. 415; Strange's H. Law, vol. I. pp. 225—27 (2nd Ed.) *ib.* vol. II. p. 397. Thau Sing *v.* Musst. Jeettoo, 2 Sel. Rep. 324, new ed. 411; Strange's Manual of Hindu Law, sec. 296 (ed. 1863). E. I. Company *v.* Syed Ally, 7 M. I. A., 578; 1 P. C. Judgments, p. 878; Ellavambadoo Mootiah Moodeliar *v.* Ellavambadoo Nineapah Moodeliar, 2 Strange's Mad. Cases, 333; Koonwar Bodh Sing *v.* Seonath Sing, 2 Sel. Rep 92, new ed. 116; Mahipat Sing *v.* The Collector of Benares, 5 Sel. Rep. 32, new ed. 39; Macn. H. L, vol. II. pp. 33—152-3-5; Strange's Manual of H. L. sec. 238.

Macn. H. L., vol. I. p. 19, *ib.* vol. II. p. 33; Strange's H. L., vol. I. pp. 121—137 (2nd ed.); Mohun Lal Khan *v.* Rauee Siromanee, 2 Sel. Rep. 32, new ed. 40; Keerut Sing *v.* Koolahul Sing, 2 Moore's I. A, 331; 1 P. C. J., p. 196, 4 Sel. Rep. 9, new ed. 12; Nund Koowar *v.* Tootee Sing; Note to Musst. Gyan Koowar *v.* Dookhurun Sing, 4 Sel. Rep. 330, new ed. 420; Musst. Lalchee Koonwar *v.* Sheopersad Sing, 7 Sel. Rep. 22, new ed. 26; Cossinath Bysak *v.* Hurosoondery Dossee, Morton's Cal. Rep, 86; Mitac. Ch. II. Sec 1, pl. 39; Da. Bh. Ch. XI. Sec. 1, pl. 3, 4, 14; Coleb. Dig. Vol. III. Ch. CCCXCIX.; Strange's Manual of H. L., Sec. 315, 326, (ed. 1863), Strange's H. L, Vol. I. pp. 134-5 (2nd edit.); *ib.* Vol. II. p. 231, and the opinion of Sir Wm. Jones, cited in Strange's H. L, Vol. II. p. 250. The Sandayar Case, Coopaswamy Coolapa Naik *v.* Yatakamaul, 13th Oct. 1826, was filed in this case. See 9 M. I. A., p. 578. Macn. Wilson's ed., pp. 21, 24, 25, (2nd edit. 1862) Strange's H. L., p. 137, (2nd edit.); Mitacshara, Ch. II. Sec. 2 p. 341, *ib.* Sec. 4, p. 316; Strange's Manual of H. L., Sec. 353 (2nd edit)

Myna Bayee *v.* Oottaram, 8 M. I. A., p. 400; 1 P. C. J., p. 797; Abraham *v.* Abraham, 9 M. I. A., p. 195; 2 P. C. J., p. 10; Narsummal *v.*

29th and 30th June, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Supreme Court at Calcutta.

THE ADVOCATE-GENERAL of BENGAL on behalf of Her Majesty,* ... *Appellant*,

versus

RANEE SURNOMOYE DOSSEE, *Respondent*.

Rule as to the introduction of English law by Englishmen into an uninhabited country—Effect of the permission to Europeans at the early settlement in India, to use their own laws within the factories, upon natives restoring there—The English law not being applicable to Hindus—Criminal law of England, its introduction and application to natives of India considered—Suicide—English law of forfeiture of goods.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them, not only the laws, but the Sovereignty of their own State, and those who live amongst them, and become members of their community, become also partakers of and subject to the same laws.

The rule is however inapplicable to India, where the first settlement was made by a few foreign traders in a highly civilized country under the Government of a powerful Mahomedan ruler with whose sovereignty the English Crown never pretended to interfere for some centuries afterwards. The retention by the English settlers of their own laws within their factories, was not on the ground of International law or by authority of the Crown, or because the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in his Judgment in the case of the Indian Chief (3, Rob. 28).

The permission accorded by the indulgence or weakness of Eastern Potentates to Europeans settling in factories to retain the use of their own laws, does not extend those laws to Natives within the limits of those factories, who remain to all intents and purposes subjects of their own Sovereign.

The English law not being applicable to Hindoos on the first settlement the subsequent acquisition of the rights of sovereignty by the English might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged.

The English Crown had no jurisdiction over the native subjects of the Great Mogul when Charles II. granted the Company's Charter in 1661.

Neither the Charter 13, George I. nor the subsequent Charters expressly declare that the English law, civil and criminal, shall be applicable to natives within the limits of Calcutta. None of these Charters contain any forms applicable to the punishment by forfeiture or otherwise, of the crime of self-murder and with respect to other offences to which the Charters did extend, the application of the English Criminal law to non-christian natives, has been treated as subject to qualifications.

The English law of forfeiture of the personal property of persons committing suicide, inapplicable to Hindoos and Mahomedans.

Quære.—Whether the law ever had existence as regards Europeans?

22nd July, 1863.

THE consideration of the case was adjourned, and their Lordships' judgment was now delivered by

THE RIGHT HON. LORD KINGSDOWN:

The question in this case arises on the claim of the Crown to a portion of the personal estate of *Rajah Kistonauth Roy*,

* 9, Moore's I. A., p. 387.

Lutchmana Naic, 2 Strange's Mad. Cases, 16; Chellammal *v.* Garrow, 9 M. I. A., p. 159; Rajender Narain Rai *v.* Bijai Gobind Sing, 2 M. I. A., p. 181; 1 P. C. J., p. 185; Lloyd *v.* Johnes, 9 Ves. 57; Osborne *v.* Usher, 6 Bro. P. C. Cases, 20; Macqueen's "Prac. of the House of Lords," pp 242—250; Roopchund Tilukchund *v.* Phoolchund Dhurmchund, 2 Borr. Bom. Rep., 616; Loll Munee Koonwaree *v.* Rajah Nemyenerain, 6 Sel. Rep., p. 255—257, new ed. 319—321; Hurrydoss Dutt *v.* Sreemutty Uppoornah Dossee, 6 M I. A., p. 433; 1 P C. J., 561; The Zemindar of Ramnad *v.* The Zemindar of Yettiapooram, 7 M. I. A., p. 454-5.

Authorities cited by the Respondent's Counsel. 1 Strange's H. L., p. 199—225; Dhurm Das Pandey *v.* Mt. Shama Soondri Debiah, 3 M. I. A., p. 229; 1 P. C. J., p. 271; Gour Chunder Rai *v.* Hurish Chunder Rai, 4 Sel. Rep. 162, new ed. 206; Naraguuty Lutchmedavamah *v.* Vengama Naidoo, 9 M. I. A., p. 66; 1 P. C. J., 826, 1 Macn. H. L., p. 54; 1 Strange's H. L., pp. 225—27 (2nd edit.); *ib.* Vol. II., p. 333; Mitacshara, Ch. II. Sec. 12, pl. 3 and 4; 1 Morley's Dig., p. 483; 1 Strange's H. L., pp. 120, 213, 215. 218, 260, (2nd edit.) 2 *ib.* pp. 439, 441, 450, (2nd edit.) Strange's Manual of H. L., Sec. 351, p. 84 (2nd edit.) 1 Strange's H. L., p. 227, 28, 29, 30 (2nd edit.) 1, *ib.* 134; Mitac., Ch. II. Sec. 1, pl. 39; Strange's Manual of H. L., Sec. 159, p. 38; Giffard *v.* Hort, 1 Sch. and Lef, 386.

who destroyed himself in *Calcutta* on the 31st of October, 1844, and was found by inquisition to have been *felo de se*.

We understand that the *Rajah* had a residence in *Calcutta*, though his *Raj*, or *Zemindary*, was at some distance from that city. He was a Hindoo both by birth and religion.

On the morning of the day on which he destroyed himself he made a Will, by which he left a large portion of his property to the East India Company for charitable purposes.

The Will was disputed by his widow, who was his heiress, and a suit was instituted by her against the East India Company and others, to determine its validity. It was agreed between the litigating parties that the question should be tried by an issue at law. The widow insisted, amongst other objections, that the Testator was not in a fit state of mind to make a Will at the time of its execution.

The issue was tried, and a verdict was found by the Judges against the Will, upon what ground does not distinctly appear, and the verdict was acquiesced in by the Indian Government.

If the Crown, by virtue of the inquisition, was entitled to all the personal property of the *Rajah*, the validity or invalidity of the Will was, as regards his personal estate, of no importance.

Now, the inquisition had found that the goods and chattels of the *Rajah* when he committed self-murder amounted within *Calcutta* to Rs. 9,87,063, and without the town of *Calcutta* to Rs. 2,89,500; and it stated that all this property was claimed by the widow.

No claim to any part of it appears at that time to have been set up by the East India Company on behalf of the Crown, and very large sums were from time to time, by the order, or with the consent of the Indian Government, paid over to the widow in the years 1846 and 1847.

A portion, however, of the *Rajah's* personal estate, amounting to between six and seven lacs of Rupees, was secured in the Supreme Court, in order to provide for the payment of life annuities to two ladies, both then living. The existence of these charges seems to have been the only reason why this fund was not transferred to the widow with the rest of the estate.

One of the annuitants is now dead, and the fund reserved to answer her annuity is of course set free. This fund is now claimed by the Indian Government under the finding on the inquisition of 1844.

It is stated in the affidavit of a gentleman who was Manager for the widow on the death of her husband, that he was advised in 1844, by three English Counsel of eminence, whom he names, that the verdict on the inquisition might be set aside on the ground both of misdirection by the Coroner, and as being against the weight of evidence, but that proceedings were not taken for that purpose, because the Government represented, through its law agents, that no claim would ever be made under the verdict.

If the facts be such as we have stated, it is impossible not to feel some surprise at the present demand; and, if we differed from the Court below, it would deserve much consideration, whether a claim which seems to have been abandoned in 1844, ought now to be entertained. But these facts do not seem to have been noticed by the Judges in *India;* there may possibly be circumstances with which we are unacquainted to account for the course taken by the Government, and we think it better to dispose of the case on the merits.

At what time then, and in what manner, did the forfeiture attached by the law of *England* to the personal property of persons committing suicide in that country, become extended to a Hindoo committing the same act in *Calcutta?*

The sum of the Appellant's argument was this:—that the English Criminal law was applicable to Natives as well as Europeans within *Calcutta*, at the time when the death of the *Rajah* took place, and the sovereignty of the English Crown was at that time established; that the English settlers when they first went out to the East Indies in the reign of Queen *Elizabeth* took with them the whole law of *England*, both Civil and Criminal, unless so far as it was inapplicable to them in their new condition; that the law of *felo de se* was a part of the Criminal law of *England* which was not inapplicable to

them in their new condition, and that it, therefore, became part of the law of the country.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws.

But this was not the nature of the first settlement made in *India*—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in *India* they retained their own laws for their own government within the Factories, which they were permitted by the ruling powers of *India* to establish; but this was not on the ground of general international law, or because the Crown of *England* or the laws of *England* had any proper authority in *India*, but upon the principles explained by Lord *Stowell* in a very celebrated and beautiful passage of his judgment in the case of "*The Indian Chief*" (3 Rob. Adm. Rep. 28).

The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence or weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahometans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred.

But, if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question in this case is, whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in *Calcutta*.

We were referred by Mr. *Melvill* in his very able argument, to the Charter of Charles II. in 1661, as the first, and indeed the only one which in express terms introduces English law into the *East Indies*. It gave authority to the Company to appoint Governors of the several places where they had or should have Factories, and it authorized such Governors and their Council to judge all persons belonging to the said Company, or that should live under them, in all causes, whether Civil or Criminal, according to the laws of the Kingdom of *England*, and to execute judgment accordingly.

The English Crown, however, at this time clearly had no jurisdiction over native subjects of the *Mogul*, and the Charter was admitted by Mr. *Melvill* (as we understood him) to apply only to the European servants of the Company; at all events it could have no application to the question now under consideration. The English law, Civil and Criminal, has been usually considered to have been made applicable to Natives, within the limits of *Calcutta*, in the year 1726, by the Charter, 13th *Geo.* I. Neither that nor the subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

But none of these Charters contained

any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of *England* to Natives not Christians, to Mahomedans and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied.

In like manner, the law, which in *England* most justly punishes as a heinous offence, the carnal knowledge of a female under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years.

Accordingly, in the case referred to in the argument, the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mahomedans?

The grounds on which suicide is treated in *England* as an offence against the law, and punished by forfeiture of the offender's goods and chattels to the King, are stated more fully in the case of *Hales* v. *Petit*, in *Plowden's* Reports, p. 261, than in any other book which we have met with. It is there stated, that it is an offence against nature, against God, and against the King. Against nature, because against the instinct of self-preservation; against God, because against the commandment, "Thou shalt not kill," and a *felo de se* kills his own soul; against the King, in that thereby he loses a subject.

Can these considerations extend to native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced no allegiance to the King of *Great Britain?*

The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender should be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattels real and personal, but not to real estates; these distinctions, at least in the sense in which they are understood in *England*, not being known or intelligible to Hindoos and Mahomedans.

Self-destruction, though treated by the law of *England* as Murder, and spoken of in the case to which we have referred in *Plowden* as the worst of all Murders, is really, as it affects society, and in a moral and religious point of view, of a character very different not only from all other Murders, but from all other Felonies. These distinctions are pointed out with great force and clearness in the notes attached to the Indian Code, as originally prepared by Lord *Macaulay* and the other Commissioners. The truth is, that the act is one which in countries not influenced by the doctrines of Christianity has been regarded as deriving its moral character altogether from the circumstances in which it is committed:—sometimes as blameable, sometimes as justifiable, sometimes as meritorious, or even an act of positive duty.

In this light suicide seems to have been viewed by the founders of the Hindoo Code, who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well-known instances of *Suttee* and self-immolation under the car of *Juggernaut*, treat it as an act of great religious merit.

We think, therefore, the law under consideration inapplicable to Hindoos, and if it had been introduced by the Charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir *Barnes Peacock* in this case; and if it were not so introduced, then as regards Natives, it never had any existence.

It would not necessarily follow that, therefore, it never had existed as regards Europeans. That question would depend upon this, whether, when the original settlers, under the protection of their own Sovereign, were governed by their own laws,

those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace, for which he was entitled to claim forfeiture; whether the Factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of Coroners by the Act of the 33rd *Geo.* III. would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

We are not quite sure whether the Court below intended to determine this point or not. Much of the reasoning in the judgment is applicable to Europeans as well as to Natives, but the Chief Justice in his judgment says:—"At present we have merely to consider the question, so far as it relates to the goods and chattels of a Native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felo de se;* and we now proceed to deal with that question, and with that question alone" (*a*).

The point so decided we think perfectly clear, and it is not necessary to go further. Since the New Code, which confines the penalty of forfeiture within much narrower limits than existed previously to its enactment, and does not extend it to the property of persons committing suicide, the case can hardly again arise.

We have no doubt that it is our duty in this case, humbly to advise Her Majesty to dismiss the appeal, with costs (*b*).

(*a*) 9, Moore's I. A., p. 400.

(*b*) The following cases cited by the Appellant's Counsel:—

The Mayor of Lyons v. E. I. Co., 1 P. C. J., p. 107; Freeman, 1 Ibid, p. 123; Campbell, 1 Cow., p. 208; Ruding, 2 Hagg. Cons. Rep., p 383; The Attorney General, 2 Mer., p. 160; Jephson, 3 Knapp's P. C. Cases, p. 130; E. I. Co., 1 P. C. J., p. 867; Secretary of State, 1 P. C. J., p. 681; The Rajah of Coorg, 29 Beav., p. 300; Collector of Masulipatam, 1 P. C. J., p. 752; The Advocate General, Perry's Oriental Cases, p. 566; K. R. Kulvekur, 2 Borr. Bom. Rep., p. 273; Govindo Lala, 1 Strange's Mad. Cases, p. 74.

Cases cited by the Respondent's Counsel—

The Vakeel of Government, 1 Nis. Rep., p. 220; Sheeoo Suhaee, Ibid, p. 292; Thomas, Saunders, p. 363*a*; Janokey Dass, 1 P. C. J., p. 263; D'Conto, Morton's Rep., p. 356; Rex., Ibid, p. 357; The Mayor of Lyons, 1 P. C. J., p. 107; Mitford, 1 Phill, pp. 185, 192; Whicker, 7 H. L. Cases, p. 124; Attorney General, 2 Mer., p. 143; Clark's Col. Law, p. 7.

30th June, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

THE COLLECTOR OF MADURA,* *Appellant,*

versus

VEERACAMOO UMMAL, ... *Respondent.*

Polliam of Erasaca—Escheat for want of male heirs—Female succession—Custom and Usage.

Judgment of the S. D. A. Madras awarding to the Respondent possession of the *Polliam* of *Erasaca Naiknoor* upheld on the ground that there had been great delay on the part of Government in claiming the property by escheat for want of male heirs, and that the evidence on the record established the custom and usage for females to succeed to that *Polliam*.

JUDGMENTS of the Zillah and Sudder Courts.

The officiating Civil Judge, Mr. *R. R. Cotton*, pronounced judgment on the merits on the 30th of March, 1859. The material part of his judgment was in these terms:—"In the present case it appears clear, that the Plaintiff has been declared the heir and successor to her father's estate after the death of her stepmother, *Chinnammal*, and that though the first Defendant, on the plea that it was not usual for females to succeed to estates, has prevented her being put in possession of the *Erasaca Naiknoor Polliam*, he has entirely failed to show that such custom has either the force of law, or is acted up to; on the contrary, he admits in opposition to it that females have been, by order of the Revenue Board, and with his sanction, for the last eighteen years, in enjoyment of this very estate, while the Plaintiff has shown a like enjoyment by females of *Sandayoor* estate since 1824. With regard to the first Defendant's arguments,

* 9, Moore's I. A., p. 446.

that the decree in appeal, No. 20, of 1838, cannot affect the present suit, inasmuch as the Plaintiff was not a party to it, or the estate the property litigated for, the officiating Civil Judge considers them erroneous; it is evident that the Plaintiff on the death of her mother became a party to the suit, as appears from the questions put to the Pundits, and their answer in that case, and that although the suit was brought for recovery of a sum of money, the proprietary right to the estate was the basis on which the suit was brought. As regards the claim made against the second Defendant, as the lease was continued and endorsed by the first Defendant, he must be considered the responsible party. The second Defendant pleaded, that the profits were too highly calculated, and was directed to show this; he filed eight exhibits, receipts for money, which, however, do not disprove the claim of the Plaintiff, whose documentary evidence supports it. It is difficult to reconcile the fact of the first Defendant ignoring the late *Chinnammal's* right to the estate, and his acknowledging and endorsing an agreement made by her (though at most a life tenant) extending over seven years, and four beyond her decease. Under the above circumstances, the officiating Civil Judge considers that the Plaintiff is entitled to a verdict, and he, therefore, decrees, that the first Defendant do make over to her, as sole surviving heiress of her deceased father, the estate of *Erasaca Naiknoor*, and do also pay her the mesne profits sued for, and all her costs in this suit. The first and second Defendants will each pay their own costs."

From this decree the Appellant appealed to the *Sudder Dewanny Adawlut* at *Madras*, and that Court, consisting of Messrs. *T. L. Strange* and *H. Frere*, on the 10th of July 1860, pronounced the following decree—"The Court is of opinion, that the first Defendant is precluded from challenging the succession of females to the estate in issue by the act of the Revenue Board, representing the Government, in installing *Chinnammal* and *Papammal* as the legitimate heirs of the previous *Polligar*, a condition of things that was kept up unchallenged until the death of the survivor of the widows, eighteen years afterwards. It has not been shown that this recognition of the widows was made under any limitation, or reservation. It must be taken, therefore, to have been absolute. It is urged that *Polliams* of the description of that in question, namely, not assured by *Istimirar Sunnud*, are not hereditary, but are held at the will of the Government, who on each lapse may appoint thereto whom they please. This plea, the *Sudder* Court notice, was not advanced in the Court below. The plea there urged was, in fact, inconsistent therewith. It was there contended, that the estate had fallen to the Government by escheat from lack of heirs, implying, therefore, clearly that, had there been an heir, that person would have been entitled to the property. The plea is also inconsistent with the installation and recognition by the Government of *Chinnammal* and *Papammal* as heirs of the preceding *Polligar*, and with the allegation that the Plaintiff's pretensions are to be negatived, not because such is the will of the Government, but, as she is a female, a certain rule, being a rule of descent, being urged against her. The Court declines to entertain a plea thus urged upon them, not only novel in its nature, but inconsistent with the former pleadings upon which the defence has been based. The Court do not view the decrees cited by the Civil Judge as declaring the Plaintiff's heirship to be conclusive against the Government, who were no parties to the suits in which they were given, but it being clear that on the demise of *Chinnammal*, without personal heirs, the estate reverts to the line of her husband, whose daughter the Plaintiff is, it is apparent to them that the Plaintiff is the next entitled to succession. The Court, finding no ground for interfering with the decree of the Civil Judge, dismiss this appeal with costs."

The present appeal was from this decree.

As the Respondent did not appear the appeal was heard *ex parte*.

Mr. *Forsyth*, Q. C., and Mr. *W. H. Melvill*, for the Appellant.

Their Lordships, after observing upon the delay on the part of the Government in asserting their claim to the *Polliam* by

escheat for the want of male heirs, and the evidence as to the custom and usage for females to succeed to the *Polliam* in question adduced by the Respondent, expressed their opinion, that the judgment appealed from was perfectly right, and dismissed the appeal, with costs.

15th and 16th July, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

KHAJAH MOHAMED GOUHUR ALI KHAN,* ... } *Appellant*,

versus

ASHRUFOONISSA, KHAJAH WAHED HOSSEIN KHAN and WAJED HOSSEIN KHAN, heirs of KHAJAH BURKUTOOLLAH KHAN, and KHAJAH HOOBEBOOLLAH KHAN, heir-at-law of the late Khajah Wahed Ali Khan, deceased, ... } *Respondents*.

Onus probandi—Inheritance—Legitimacy.

The first Court having pronounced for Appellant without stating any grounds for its Judgment, and the second Court having found for the Respondents without allowing sufficient weight to the circumstance that they as Plaintiffs had to make out their case not only by proving their relationship (which was admitted) but also their heirship which depended on the illegitimacy of the Appellant; and the Plaintiffs being bound to adduce general evidence sufficient to throw upon the Defendant the burden of proving his legitimacy;

Case remitted to the original Court for a retrial after reception of fresh evidence, as their Lordships were unable to dispose of the case upon the evidence on record. No costs allowed in the appeal.

29th July, 1863.

JUDGMENT was reserved and now delivered by

THE RIGHT HON. LORD KINGSDOWN:

It is with great regret that their Lordships in this case find themselves unable to dispose of the case upon the evidence as it stands.

The facts on each side are such that they must, from their very nature, be capable of clear and distinct proof. If *Abdool Kadir Khan*, alias *Wuzeer Jan*, was the miserable object which has been described by the Respondents, it must have been a fact known not only to all the members of the family, but to the medical men who attended him, and to all respectable people in the neighbourhood who were in the habit of associating with him. On the other hand, if he was a married man and contracted a legal marriage with *Alarukhee Begum*, as is alleged, and the son of that marriage lived in the family, and on the death of the father was acknowledged as his heir, that is a fact which must be equally capable of proof. Unfortunately the witnesses on both sides are of such a character that it is impossible for the Court to place any reliance upon their testimony.

The Judge of the *Zillah* Court has pronounced in the strongest terms his opinion, that the Appellant in this case is entitled, and that the case against him is a conspiracy (*a*.) But instead of stating the grounds upon which he arrived at that conclusion, he confines himself to alleging that as his opinion, and that he has no doubt about it. He has not afforded to the Court that assistance which it is entitled to expect, and which I believe by the Regulations he is bound to afford. On the other hand, we cannot say that the *Sudder* Court has proceeded in a manner which is entirely satisfactory. They hardly seem to have allowed sufficient weight to the circumstance that the Respondents (who are the Plaintiffs) were the parties who had to make out the case. They have not only to prove their relationship, which is not disputed, but their heirship, which depends upon the illegitimacy of the Appellant; and they must give sufficient general evidence to throw upon him the *onus* of proving his legitimacy.

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* 9, Moore's I. A., p. 492.

(a) 9, Moore's I. A., p. 497.

Their Lordships, therefore, must advise Her Majesty to remit the case to *India*. Probably the proper Order will be, to affirm the decree of the *Sudder* Court, so far as it reversed the decree of the *Zillah* Judge, to reverse the *Sudder* decree in other respects, and to remit the cause to the *Sudder* Court, with directions that they shall send it back to the *Zillah* Court to receive such further evidence as either party may offer, and to proceed afterwards to the regular hearing and adjudication of the cause.

There will be no costs in this appeal.

16th July, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

KHAJAH MOHAMED GOUHUR ALI KHAN,* ... } *Appellant*,

versus

KHAJAH AHMED KHAN, the heir-at-law of KHUDIJAH BEGUM, deceased, } *Respondent*.

Case ordered to stand over till the decision of the other appeal by the same Appellant, remitted for retrial, as it appeared that he would have no interest in this case if he failed in the other.

THEIR Lordships, after delivering judgment in the previous appeal (*a*), said, that with respect to the decision in this case, it must stand over until the result of the proceedings in the previous case was known, the Appellant being the same in both cases; and intimated that if the Appellant did not make out any title in the other case, he would have no interest in this.

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* 9, Moore's I. A., p. 504.

(*a*) *Ante*, p. 15.

26th, 27th & 28th November, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

RAJAH LELANUND SINGH,* *Appellant*,

versus

THE GOVERNMENT OF BENGAL, KALLYPERSHAD (Ghatwal), the son and heir of BIKRUM SINGH, deceased, and GOOMAN SINGH, ... } *Respondents*.

Ghatwally Lands—Resumption by Government—Jurisdiction.

The Judges of the S. D. Adawlut, acting as Special Commissioners under Reg. III. of 1828, having decided at the instance of the *Zemindar* against the right of the Government to resume and re-assess certain *Ghatwales* lands, had also from the nature of the subject, jurisdiction to determine the title to the monies received by the Government as mesne profits from the *Ghatwals*.

Such jurisdiction is included within the admitted power of the Court to decide as to the correctness or otherwise of the resumption by Government.

The decree under appeal added to by declaring that the Court below had and have jurisdiction to decide upon the true title to the disputed funds. Case remitted to India in order to be so dealt with.

The costs of the appeal awarded against Government, to the *Zemindar* Appellant.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE:

The appeal in this case is by the *Zemindar* of *Khurruckpore*, from a portion of a decree pronounced in the year 1860, by three Judges of the *Sudder Dewanny Adawlut* at *Calcutta*, acting as Special Commissioners under Regulation III. of 1828. The Government of *Bengal*, the only party besides that has (whether both or either of the other Respondents, or no-

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* 9, Moore's, I. A., p. 179.

minal Respondents, could or could not have) appeared here, is content with the decree, has submitted to it, and desires to support it as it stands.

The matter arose thus:—Some years before the year 1855, the Government of *Bengal* claimed a right to resume or reassess lands of considerable extent and value within the *Zemindary* of *Kurruckpore* in the possession of various *Ghatwals*, who held them by *Ghatwally* tenure under the *Zemindar*. The claim was enforced by the Government, though opposed on the part of the *Zemindar*, and for some time at least on the part of some, if not all, of the *Ghatwals*. There was a great and complicated mass of litigation upon the subject before various Tribunals, with various success; sometimes one party gaining a decision, sometimes another. The suits were numerous. At last the *Zemindar* brought one of them by appeal before Her Majesty in Council, and upon that appeal (*Rajah Lelanund Singh Bahadoor* v. *The Government of Bengal*) the Judicial Committee, in 1855, decided against the *Bengal* Government on grounds fatal in principle to its entire claim of resumption and reassessment as to all the *Ghatwally* lands. That decision was in the same year sanctioned by Her Majesty. The case, with the judgment delivered here by Lord *Kingsdown* on the part of the Judicial Committee, is reported in Mr. *Moore's* Sixth volume of "Reports of Indian Appeals," p. 101, a report to which their Lordships refer, and which has, during the argument on the present appeal, been cited more than once. This decision the *Bengal* Government, or the Special Commissioners, determined very properly to consider binding as to all the *Ghatwally* lands that had been resumed, or reassessed, and the invalidity of the resumption and reassessment from the beginning may be treated as now established. But there remained a material question—the question as to the right to recover from the *Bengal* Government the large sums which, as rents, or profits, they had wrongfully or erroneously, by means of the invalid resumption, or reassessment, obtained from the *Ghatwals*. The Government had latterly not disputed, nor does dispute, its liability to make good this amount with interest to some person or persons, but for some years has, in consequence of the decision of 1855, considered itself as owing the amount with interest to or holding it for some person or persons. After the judgment of 1855, the *Zemindar* instituted, or continued a proceeding before the Judges of the *Sudder Dewanny Adawlut*, as Special Commissioners, for the purpose of obtaining the benefit of that judgment, and payment of the principal and interest of the sums which in respect of the lands or part of the lands the Government had wrongfully or erroneously received. This proceeding was brought to a hearing in 1860, and upon it the Judges made the decree now under partial appeal as already stated. The material portion of it is as follows:—"The Government Pleader argues that it is nowhere contended that these lands when resumed were not in the possession of the *Ghatwals*, who paid, in some instances, a small quit-rent to the *Zemindar*, and in others, nothing at all; but they were bound in either case to render certain public services, as the conditions of holding their tenures. That, as the services of the *Ghatwals* were excused during the resumption of their lands, they might, with some reason, claim a refund of the past collections on the release of the lands, minus the value of the services they would have performed if no resumption had taken place; that the landlord cannot, however, under any circumstances, be entitled to this refund; that, moreover, the *Ghatwals* themselves have raised no claim for refund, and are not represented before the Court; and as the *Zemindar* has paid nothing, he has no right to demand the *wasilat*. It appears to us that, under the circumstances thus disclosed in the statements of the parties before us, the applications for a review of the several judgments passed by this Court, as Special Commissioner, at different times in the eighty-three cases now under consideration, should be granted; and, as the only point for determination is the applicability of the decision passed by the Privy Council on the 13th of August, 1855, in case No. 2045, to the cases now before us, and that point is conceded by the Government, who has also intimated to us, through the

Government Pleader, that out of deference to the decision of that High Court of appeal, the lands have been already restored to the *Ghatwals*, it seems to us unnecessary to postpone judgment in these cases. On the authority, then, of the Privy Council's decree, and for the reasons set forth therein, we reverse the decision passed in the several cases brought up for revision before us, and direct that the resumed lands be released from assessment. As to the *wasilat*, which has been taken by the Government from the parties in possession, if the contest before us was confined to the simple question whether the Government was liable or not to the *Zemindar* for the amount, we should have no hesitation in declaring, that as the Government Officers are held to have had no valid ground for the proceedings under which they resumed and assessed the lands dispensing with the services previously rendered by the *Ghatwals*, and not showing that any expenditure was made for the employment of others in their place and vocation, so they cannot be allowed to appropriate these collections for the benefit of the State, on the grounds and assignments set up by the Government Pleader in this case. But the contest is not confined to this question, but involves the rights of the Applicant and others, the *Ghatwals*, not now before the Court, whose rights are altogether denied by the *Zemindar* to receive the refund. Now, *primâ facie*, the right to receive the sums collected, with deductions for quit-rent due to the *Zemindar*, is with the *Ghatwals*, and not with the Applicant before us. But, be that as it may, it is not within the competency of this Court, acting as Special Commissioners, under Reg. III. of 1828, sec. 3, summarily to determine a question of disputed private right of this nature, the more especially when one of the parties interested has not appeared before us, and is probably ignorant that such a question would be mooted in these proceedings. Such question must be left to be decided by the regular Civil Courts of the country. It is only necessary to add, that as the resumption proceedings have been determined to be contrary to law, we award to the *Zemindar* the entire costs of these proceedings in the resumption Courts, with interest thereon, from the date on which he filed his application for review of their judgment. Copy of this Order to be filed in the other eighty-two cases, to which it equally applies."

The *Zemindar* complains here of the omission to decide as to the right to the fund, which, as has already been mentioned, the Government did not then and does not now claim to retain for its own use, and contends that it ought to have been wholly adjudged to him. The *Bengal* Government, on the contrary, supports the title or alleged title of the *Ghatwals*, or their representatives, to receive back the money which was unduly, or in an improper manner, taken from them. To this appeal one *Ghatwal* and a purchaser from him have been added, at least nominally, as parties Respondents. Neither of them, however, has appeared here, nor are their Lordships convinced that without the consent of the *Zemindar*, either of them would have been allowed to appear as a Respondent on this appeal.

Part of the fund claimed was, during a period of temporary success on the *Zemindar's* part against the Government, paid to the *Zemindar* under an express liability to pay it back if there should be a subsequent decision against him, as there was, and he paid it back, and with regard to this portion of the fund claimed it has been, in an especial manner, strongly urged for him that it ought clearly to be now restored to him, whatever may be done as to the rest. Their Lordships, however, considering the circumstances in which the amount received by him came to his hands and left them again, are of opinion that both portions of the fund ought to be dealt with on one and the same principle. Their Lordships are also of opinion, that the Judges who pronounced the decision now under appeal, though acting as Special Commissioners, had, from the nature of the subject, jurisdiction to direct payment of the whole money in dispute, with interest, to the person or persons entitled; that jurisdiction their admitted power of deciding as to the correctness or incorrectness of the resumption appears to us to have included. The Judges, therefore, who made the decree of 1860, should, in their Lordships' view of

the matter, have not been silent as to the title to the money, but have declared and acted on it, if able, from the materials and parties before them to do so, or if not so able, have directed an inquiry to ascertain the person or persons entitled. Now, the *Ghatwals* were not represented, or were imperfectly represented, before the Court, when the decree of 1860, was made, and their Lordships from the materials before them are not satisfied that a portion at least of the fund does not belong to the *Ghatwals* from whom it was received, or their representatives. In using these expressions their Lordships treat the controversy as extending to all the sums received by the Government under the resumption or reassessment, though their conclusion would be substantially the same if it were treated as confined to the fund strictly subject specifically to the particular proceeding in which the Order of 1855, or the decree of 1860 was made. That a portion of the fund belongs to the *Zemindar* their Lordships think highly probable, if on account only of his quit-rent or quit-rents, fallen into arrear, but possibly also he may have a just claim on more than this portion, or even the whole fund, in respect of services which the *Ghatwals* were, or had been, under an obligation to perform. and have, from any cause whatever, not performed. Subject to that deduction, or those deductions, as the case may be, in favour of the *Zemindar*, there appears to their Lordships a title fit to be considered to the whole fund in the *Ghatwals* who were in the actual enjoyment of the lands, or their representatives. But their Lordships are of opinion, that they have not, and that in 1660, the Judges of the *Sudder Dewanny Adawlut* (the Special Commissioners) had not before them, sufficient materials to enable them to direct safely, or without hazard to justice, the payment, apportionment, or distribution of the fund or any part of it, and that accordingly the decree of 1860, should be added to, and that it should be declared that the Special Commissioners, the Judges of the *Sudder Dewanny Adawlut*, had and have jurisdiction to decide upon the true title to the funds in question upon this appeal, and to direct the payment and disposition of those funds, with interest, accordingly, but that, at the hearing on which the decree under appeal was made, it did not sufficiently appear who was or were the person, or persons, justly entitled to the money, and that an inquiry ought to have been directed by the Court on that subject; and that with this declaration the case should be remitted to *India*, in order to be further dealt with by the Special Commissioners on that footing. We conceive that the Government ought to pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

30th November, 1863.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

MOHUN LALL SOOKOOL,* ... *Appellant,*

versus

GOLUCK CHUNDER DUTT, son of DABEE DOSS, deceased, and others,... *Respondents.*

Settlement of issues under Beng. Reg. XVII. of 1806—Service of the notice of Foreclosure—Mortgage Account.

A mortgaged certain estates to *B*, who, when he filed his notice of foreclosure in September, 1850, not only had notice that the interest of *A* had been taken in execution, but was actually disputing in a summary suit the right of the decree-holder to put up that interest for sale. Both the suit and the appeal from it were decided against *B* on the 8th of January, 1851, and the equity of redemption was sold to *C*, the Appellant, on the 7th of April, 1851. *C* was afterwards declared entitled to redeem, without making any payment, by the *Zillah* and the appellate Court, on the ground, that *B* had fully paid himself by receipt of rents and profits; the Courts apparently having no proof of the actual collections which were, or ought to have been made by *B*, but upon materials greatly speculative and conjectural. On special appeal by *B*, *C*'s suit was dismissed with costs, the *Sudder* Court holding that certain proceedings taken by *B* with a view to

* 10, Moore's I. A., p. 1.

foreclosure effectually barred the equity of redemption. On appeal, the Judicial Committee remitted the case to *India*, holding—

1. That there had been no such trial of the question of foreclosure as *Beng.* Reg. XVII. of 1806, sec. 8, prescribing the statement of formal issues and indeed substantial justice required; and that the question of foreclosure ought to be further and fully tried upon an issue to be regularly settled;

2. That the mortgage account whether as incidental to the question of foreclosure or to the question of redemption ought to be properly taken; and

3. That it was clear upon authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice to be effectual must have been served upon the purchaser, and in the circumstances above stated, it ought to have been served upon the decree-holder.

1st December, 1863.

JUDGMENT was delivered by

THE LORD JUSTICE KNIGHT BRUCE.

This appeal arises on a litigation which commenced, at the latest, in the year 1852, but in a sense earlier, on the question whether a mortgage continued subject to redemption; and if it did, what, if anything, was due upon it: a litigation that might and ought to have been less complex, less prolix, and less tedious than it has unhappily been. That there was a mortgage is plain; it may be taken also as equally plain that if it is redeemable, the present Appellants (for it may be considered that there are two Appellants) are the persons entitled to redeem, and that the Respondents are the actual Mortgagees in possession, who, if the mortgage is redeemable, are liable to be redeemed.

By two decrees, dated respectively the 31st of December, 1855, and the 9th of December, 1857, the latter being made on the appeal of the Mortgagees from the former, the Mortgagors' representatives (the Appellants) were not only declared entitled to redeem the mortgage, but were also declared entitled to do so without making any payment; and this on the ground that, as then decided, the Mortgagees in possession had fully paid themselves by receipt of rents and profits.

These *Zillah* decisions, the Mortgagees having been dissatisfied with them, led to a special appeal on their part to the *Sudder Dewanny Adawlut* at *Calcutta*, which Court in 1859 reversed them, upon the ground (which was in fact the only question before the Court on the special appeal) that certain proceedings taken by the Mortgagees with a view to foreclosure had effectually barred the equity of redemption, and, consequently, that the Appellants' suit ought to be dismissed with costs.

That led to the present appeal, in which the Appellants contend for the relief given to them by the decrees of 1855 and 1857, or at least for something less disadvantageous to them than the decree of 1859.

Upon the materials before their Lordships, their opinion is not in favour of the decrees of 1855 and 1857, or either of them, nor is it in favour of the decree of 1859. They conceive that the materials before the Court which pronounced the decree of 1855, or before the Court which pronounced the decree of 1857, were not nor are sufficient, as to the matter of debt, to support either of those decrees; and that, on the other hand, the Court which pronounced the decree of 1859 was not, by the state of things then before it, enabled to make that decree.

Their Lordships consider that it did not appear sufficiently before the Court in 1855, or before the Court in 1857, that, on the assumption of the redeemable condition of the mortgage, there was not anything then due to the Mortgagees on their security.

The *Zillah* Courts, in coming to this conclusion as to the state of the accounts, seem to have proceeded not upon proof of the actual collections which were or ought to have been made by the Mortgagees, but upon materials which were in a great measure speculative and conjectural. And this objection to the mode of taking the accounts has in fact been taken by the Appellants' Counsel at their Lordships' Bar, when contending against the application by the *Sudder* Court of the account so taken to the question of foreclosure.

The other objections taken to the decree of 1859 are—first, that the *Sudder* Court ought not to have decided the cause on the question of foreclosure, because that question, though raised upon the pleadings, had not been made one of the issues settled in the Court of First Instance, where alone evidence could be taken; and, secondly, that the Court came to an errone-

ous conclusion in treating the proceedings of which there was any evidence as an effectual bar to the Appellants' right of redemption. Their Lordships consider both these objections to be well founded. It is clear that there has been no such trial of the question of foreclosure as the Regulation which prescribes the statement of formal issues, and indeed substantial justice, require. And in dealing with this question the *Sudder* Court seems to have directed its attention to the erroneous reasons assigned by the *Zillah* Judge for holding that no right of foreclosure existed rather than to the effect of the proceedings proved.

In September, 1850, when they filed their notice of foreclosure, the Mortgagees not only had notice that the interest of the original Mortgagor had been taken in execution, but were actively disputing in a summary suit the right of the decree-holder to put up that interest for sale. There had been a decision against their objection, and their appeal against that decision was pending. The appeal was decided against them on the 8th of January, 1851, and the equity of redemption was sold to the Appellants on the 7th of April, 1851. It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser; and, in the circumstances above stated, their Lordships conceive that it ought to have been served upon the decree-holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original Mortgagor.

Their Lordships, therefore, think that the question of foreclosure ought to be further and fully tried upon an issue to be regularly settled; and that the mortgage account, whether as incidental to the question of foreclosure or to the question of redemption, ought to be properly taken. They desire, however, to leave undisturbed the findings of the *Zillah* Courts upon the title of the Appellants to sue as the representatives of the Mortgagor, and upon the extent and nature of the lands which are the subject of litigation.

Their Lordships are of opinion, that each of the three decrees of 1855, 1857, and 1859 should be discharged, and that the cause should be remitted to *India*, and that the High Court at *Calcutta* or, under its direction, the proper *Zillah* Court, should inquire whether the Appellants' right, or equity of redemption, as concerning the mortgaged estates in question, or any and what part of them, has become foreclosed or barred; and if it has not become so as to the whole of the estates, then to take an account of what, if anything, is due to the Respondents, or any of them, on the security, and for that purpose to take the usual accounts as to rents and profits and disbursements, with just allowances, and upon the result of that account to deal with the matters in dispute accordingly. The parties respectively to be at liberty to adduce evidence, in addition to that now before us, upon these issues, upon the determination of which the final decision of the cause must depend. The costs of the trial, including those of this appeal, to abide the event.

3rd and 4th February, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

RAMALINGA PILLAI,* ... *Appellant*,

versus

SADASIVA PILLAI, ... *Respondent*.

Hindu Law of Adoption—Evidence.

Where there is sufficient evidence of a fact, it is no objection to the proof of it, that more evidence might have been adduced.

Held that the depositions of the Appellant's father wherein the Respondent was described as the adopted son of *Shanmuga Pillai* amounted to a complete admission of the whole title of the Respondent, both in fact and in law; for if there were no adoption at all, or if the actual adoption were for any reason

* 9, Moore's I. A., p. 506.

legally invalid, he would not be entitled to that designation.

On the evidence it was proved that the adoption took place after the expiry of the period for pollution on account of the death of a relative of the adopter.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. LORD CHELMSFORD:

This is an appeal from the decree of the *Sudder* Court at *Madras*, affirming a decree of the Civil Court of *Cuddalore*, by which the Respondent was declared to be entitled, as the adopted son of *Shanmuga Pillai*, to a moiety of certain family property, both real and personal. The only question argued before us has been, whether there was a valid adoption of the Respondent. The Counsel for the Appellant not only questioned the fact of the adoption, but also contended, that no legal adoption could have taken place, as at the time it is alleged to have occurred, *Shanmuga Pillai* was under pollution in consequence of the recent death of a relative, *Sinivassa Pillai;* and they also alleged, that the adoption was illegal, as the Respondent was the adopter's sister's son,—but upon this latter objection very little was said. Upon the fact of the adoption, it appears from the evidence, that *Shanmuga Pillai* having been attacked with cholera at *Neyvasal*, where he had gone a few days previously, the parents of the Respondent, hearing of the illness, took the Respondent, then an infant of a year and a half old, to *Neyvasal*, where on the day previous to the death of *Shanmuga Pillai*, certain ceremonies were proved to have taken place which were sufficient to constitute an actual adoption. Several witnesses, whose testimony is not directly impeached, deposed to these facts, but it was urged in argument, that many other persons were present on the occasion who ought to have been produced on the part of the Respondent. Where, however, there is sufficient evidence of a fact, it is no objection to the proof of it, that more evidence might have been adduced. There is not only no impeachment of the credit of the witnesses who speak to the fact of the adoption, but the circumstances under which they allege it to have taken place are highly probable. It appears, that there had been some promise made by the parents of the Respondent that they would give their son to *Shanmuga Pillai* for adoption, and nothing is more natural than that hearing of the illness of *Shanmuga Pillai*, they should have taken the infant to him in order to secure the adoption, which had been previously proposed. There can be no fair ground, therefore, for discrediting the witnesses who prove the actual adoption.

But the Appellant's Counsel contended, that assuming the fact of an adoption of the Respondent, it could have no validity on account of his being the son of a sister of *Shanmuga Pillai*, and also because *Shanmuga Pillai* was under pollution in consequence of the death of his relative, *Sinivassa Pillai*. It appears that the period of pollution, according to Hindoo law and custom, is sixteen days, and proof was given that the death of *Sinivassa Pillai* took place a month before the act of adoption of the Respondent. The Appellant, on the other hand, proved by several witnesses, that *Sinivassa Pillai* died only six or seven days before *Shanmuga Pillai*, and he produced to the same effect a copy of a leaf from a Book kept by the Brahmins for recording the time of the deaths of persons for whom annual ceremonies were to be performed. There was thus a conflict of evidence as to the time of *Sinivassa Pillai's* death, and it was for the Courts below to determine upon which set of witnesses they could best rely. There are, however, certain documents produced in evidence, which, if genuine, would appear to leave little doubt upon which side the balance ought to incline. These consisted of three depositions made by the Appellant's father upon the occasion of his becoming surety for persons appointed to the office of *Sheristadar*, in all of which, in answer to inquiries directed to ascertain the value and other particulars relating to the lands offered as security, he stated that "the Respondent was the adopted son of the deceased *Shanmuga Pillai*, and that there were no other co-parceners." The Appellant's father, however, upon being

called as a witness by the Plaintiff (the Respondent), and these documents being shown to him, swore that the signatures to them were not his, and upon looking into the depositions themselves, said as to each, that "as to the deposition stated about adoption," it was not made by him. The learned Counsel for the Appellant disputed the genuineness of the documents on another ground. In the course of the proceedings in the Courts in *India*, alleged copies of these documents were put in evidence, which, though substantially agreeing with the supposed originals, yet varied in certain particulars as to the signatures and as to the names and number of the witnesses.

It should be observed that these discrepancies between the copies and the originals, which at present are inexplicable, were not pointed out to the Courts in *India*, where possibly a satisfactory explanation might have been given of them. It is difficult to understand, however, what bearing these variations in alleged copies can have upon the genuineness of the original documents, nor is it easy to discover when and how and by whom the alleged fraud upon the originals could have been committed. In the opinion of the Judge of the Civil Court, the documents bear no traces of having been tampered with or fabricated, and the Appellant's father swears that they were not signed by him, therefore, it must be supposed that the official persons who took the securities from the Appellant's father after he had signed the depositions substituted others for them, or that afterwards the Respondent, or some one on his behalf, induced the person who had the legal custody of them to give them up, and receive the fabricated ones in their stead. The Appellant's Counsel also contended, that the documents are shown not to have been genuine, from the fact of the securities having been taken from the Appellant's father alone; and they referred to a Circular Order containing instructions to the Collectors, as to the security to be given by public servants, in which they are required "to ascertain whether the property offered in security is free from mortgage, lien, &c., and whether the cousins (of the persons offering securities,) if there be any, are willing to tender such securities and obtain from them *Karanamahs* to the same effect," and urged, that as the depositions produced show that there was an adopted son who was a co-parcener with the Appellant's father, it was not likely that the Collectors would have so entirely disregarded their instructions as not to have obtained additional security. If, however, the Collectors were satisfied that the portion of the property belonging to the Appellant's father was an ample security, they might be a little remiss in this respect; but at all events if the choice as to the integrity of these documents lies between a slight dereliction of duty on the part of the Collectors, or a gross fraud committed by them, or by some other persons for the benefit of the Respondent, there is little difficulty as to the conclusion which ought to be adopted. If the genuineness of the depositions is established, of which their Lordships entertain no doubt, they are decisive of the case. In them the Appellant's father three times deliberately styles the Respondent an adopted son. Now, if there were no adoption at all, or if the actual adoption were for any reason legally invalid, the Respondent would of course not be entitled to that designation. They amount, therefore, to a complete admission of the whole title of the Respondent, both in fact and in law, and show that the objections which have been urged to his claim, in the opinion of the Appellant's father, who probably was well acquainted with all the circumstances, and may be assumed to have known the Hindoo laws and customs, had no foundation. Their Lordships, therefore, will recommend to Her Majesty to affirm the decree appealed from, and to dismiss the appeal, with costs (*a*).

(a) One of the objections taken to the validity of the Respondent's adoption was that amongst *Vaisyas* the adoption of a sister's son was forbidden as detailed in 1 Strange's "Hindu Law," pp. 83-84. (2nd ed.), referring to *Datt. Mim.*, sec. ii., para. 32, and note on *Id.* § 102. The judgment records that upon this objection, "very little was said." The objection has not been dealt with on the merits by this judgment, which is mainly based on the conclusiveness of the admission of the Respondent's title by the Appellant's father.—ED.

15th and 16th February, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

JOYKISHEN MOOKERJEE,* ... *Appellant*,

versus

THE COLLECTOR OF EAST BURDWAN AND BRIJO ROY, Phareedar, ... } *Respondents.*

Resumption of Chakeran lands—Right of appointing Chowkeedars—Village Watchmen—Tannahdary lands.

Where the purchaser, in a sale for arrears of rent, of a *Putnee* granted by the *Rajah* of *Burdwan*, claimed to resume as *Gram Surunjamee* (rent-free village lands) certain lands situate in the *Talook* and in the occupation of persons described as *Tannahdar*, from before and since the Decennial Settlement, in lieu of wages for duties partly police and partly *Zemindary*,—*Held*, affirming the judgments of the Courts below,—

That the *Chakeran* lands of the description were not held as *Tannahdary* lands in the strict sense of the expression, as such lands had already been resumed by the Government under *Beng.* Reg. I. of 1793, sec. 8, cl. 4; but as *Chowkeedary* lands:—lands appropriated to the maintenance of an officer, who performed, and was liable to perform, duties as a village watchman;

That they were not to be included in the *Malguzary* lands for the purpose of increasing the *junma*, because the *Zemindars* had not the full benefit of them; but that they were to be included in the *Malguzary* lands, under *Beng.* Reg. VIII. of 1793, sec. 41, for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest;

That the *Talookdar* had no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they are subject; and

That the right of appointing such officer belonged to the *Talookdar*, and that such officer was liable to the performance of such services to the *Talookdar* as, by usage in the *Zemindary of Burdwan*, *Chowkeedars* had been accustomed to render to the *Zemindar*.

* 10, Moore's I. A., p. 16.

5th May, 1864.

THE consideration of the appeal was reserved: judgment was now delivered by

THE RIGHT HON. LORD KINGSDOWN:

The question in this case relates to a small quantity of land, consisting of nineteen *beegahs* and some *cottahs*, in the *Talook* of *Gobindopore*. This *Talook* originally formed part of the great *Zemindary* of *Burdwan*, and previously to its purchase by the Appellant it had been granted in *Putnee* by one of the *Rajahs* of *Burdwan*. In the year 1852 it was put up to sale by the Collector of the *Zillah* of *East Burdwan*, under the provisions of *Ben.* Reg. VIII. of 1819, in order to realize the amount of arrears of rent due from the then *Putneedar*. The Appellant became the purchaser, and entered into the receipt of the rents and profits of the *Talook*, and it must be assumed that, as *Putneedar*, he became entitled to the same rights in the subject-matter of the suit which were enjoyed by the *Zemindar*.

At this time the lands now in dispute were in the possession of a person named *Ahmed Buksh*, who paid no rent for them either to the Government or to the *Talookdar*, but, instead of rent, performed certain services. What was the nature of those services is one of matters now in question. Another is, what is the character of the lands thus held by these services; are they legally appropriated for the performance of these services, or are they lands which are the free and absolute property of the *Talookdar*, and which he is at liberty to resume and dispose of as he may think fit, either dispensing altogether with the services, or providing from other sources for the performance of these services if he be under any obligation to secure their performance?

On the 11th of January, 1855, the plaint in the present suit was filed, and the Collector of *East Burdwan*, as representing the Government, was made a Defendant. The plaint insisted that the lands in question were part of the *Talook*; that the lands were what are called "*Mal Surunjamee*" or "*Gram Surunjamee*" held for

the performance of services personal to the *Zemindar*, and for the protection of his property; that *Ahmed Buksh* had ceased to perform any *Zemindary* services; and that the Plaintiff had appointed another person to perform such services, and was entitled to resume possession of the lands.

On the 9th of January, 1856, the Collector of *East Burdwan* filed his answer, and he thereby insisted, "that the land in question was not *Mâl Surunjamee* (service land for taking care of the *Mal* or *Zemindar's* property), but *Chakeran* land for the performance of Police or *Chowkeedary* duties; that the land being *Chowkeedary Chakeran* land, the *Zemindar* has no power to interfere with the property as long as the Policemen carry out their various duties."

The main issue raised between the parties, therefore, was as to the nature of the tenure on which the land was held: the contention on the part of the Appellant being that they were of one description and subject to the performance of no Government services, and the contention of the Respondent that they were of another description and subject to the performance of no services to the *Zemindar*. Shortly before the Collector put in his answer, the *Foujdary* Court of *East Burdwan* had issued an order "that a *Perwannah* be sent to all the *Darogahs* of this jurisdiction, that the *Chowkeedars* under their control be instructed not to attend to *Zemindary* duties."

It appears that these *Zemindars* were entrusted, previously to the British possession of *India*, as well with the defence of the Territory against foreign enemies, as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of *Tannahdars*, or a general Police force, and other officers in great numbers, under the name of *Chowkeedars*, *Pykes*, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the *Zemindar*, the collection of his revenue, and other services personal to the *Zemindar*.

All these different officers were at that time the servants of the *Zemindar*, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent free or at a low rent in consideration of their services.

The land so enjoyed were called *Chakeran* or service land. These lands were of great extent in *Bengal* at the time of the Decennial Settlement, and the effect of that Settlement was to divide them into two classes:—

First. *Thannahdary* lands, which, by *Ben.* Reg. I. of 1793, sec. 8, cl. 4, were made resumable by the Government; the Government taking upon itself the maintenance of the general Police force and relieving the *Zemindar* from that expense.

Second. All other *Chakeran* lands, which by *Ben.* Reg. VIII. of 1793, sec. 41, were, whether held by public officer or private servants, in lieu of wages, to be annexed to the *Malguzary* lands, and declared responsible for the public revenue assessed on the *Zemindars'* independent *Talooks* or other estates, in which they were included in common with all other *Malguzary* lands therein.

It is clear upon the evidence, and in fact was not disputed at the Bar, that the lands in question are *Chakeran* lands of the second class, and it follows that, if resumable at all, they are resumable by the Appellant; and secondly, that if the services on which they are held are Police services at all, they are the services of *Chowkeedars*, or village watchmen.

The *Zemindar* had an interest in the performance of the duties of the village watchmen, inasmuch as they protected his property; but the public also had a great interest in their maintenance, and in the peace and good order which they were employed to preserve, and the Government, as representing the public, reserved therefore a strict control over them.

Accordingly, various Regulations were passed for the purpose of enabling the Government to effect this object. Registers were required to be kept of the different persons filling these offices in each *Zemindary*, with a statement of the funds allotted for their support. The officers themselves were made subject to the orders of

the *Darogah*, or Superintendent of the Police of the District. The *Zemindar* was required to remove them on complaint of their misconduct by the *Darogah*, and, finally, they were made removable by the Magistrate on sufficient cause. But we can find nothing in these Regulations which takes from the *Zemindar* the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the *Chowkeedar* such services as he was bound by law or usage to render to the *Zemindar*. It might well happen that, either by long usage or by the original contract, when the lands were granted, the village watchman might become liable, in addition to his Police duties, to the performance of other services personal to the *Zemindar*, as the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to us to recognize the interests both of the *Zemindars* and the public in lands of this description. They were not to be included in the *Malguzary* lands for the purpose of increasing the *jumma*, because the *Zemindars* had not the full benefit of them; but they were to be included in the *Malguzary* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest.

Such being in our opinion the general law, let us look at the facts of this particular case. It is found by the *Zillah* Judge (*a*) that the duties performed by the persons in possession of these lands, both before and since the Decennial Settlement, have been partly Police and partly *Zemindary*, as follows:—*Zemindary*: First (personal to the *Zemindar*). To collect or enforce collection of rents; to guard *Mofussil* treasuries, and perhaps to escort *Mofussil* treasures. Second (common to the village community). To keep watch at night, and to secure the harvests. Police: To maintain the peace; to apprehend offenders under the orders of the *Tannahdar*; to report criminal occurrences; to convey public money to the *Sudder* Treasury (this duty has ceased since the Decennial Settlement); to serve as guides to travellers. The Judge adds:—"I may add that it is notorious, and in my certain knowledge, that most of these duties are at this time performed by the village watchmen in *Burdwan*."

From this finding their Lordships see no reason to dissent.

But it may well be that although these lands have been held by the predecessors of the Defendant, *Ahmed Buksh*, and were held by him as *Chowkeedar*, liable to perform services to the public as well as to the *Zemindar*, yet that there has been no legal appropriation of the land for that purpose, and that the Appellant may be entitled to recover the land, though he may be under an obligation to provide for the performance of such services as a *Chowkeedar* is liable to perform for the public.

The evidence appears to stand thus:—

At the time of the Decennial Settlement, though these lands were included in the *Zemindary*, their annual value does not seem to have been taken into account in fixing the *jumma*. This is consistent at least with the hypothesis that they were then appropriated to the payment of some officers whom it would be necessary for the *Zemindar*, either for his own or for the public interest, to maintain. We find that in 1813, the particular lands in question were in this *Talook* held by *Srishteedur*, who is described as *Tannahdar*, and they appear ever since to have been held by persons succeeding him in the same character. They were not held as *Tannahdary* lands in the strict sense of the expression—lands of that description had already been resumed by the Government—but as *Chowkeedary* lands: lands appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. We think that these circumstances are sufficient to warrant the inference that the lands in question were at the time of the Decennial Settlement ap-

(a) 10, Moore's I. A., p. 29.

propriated, and still are liable, to the maintenance of such an officer, and that the *Talookdar* has no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they are subject.

On the other hand, it is established by the evidence that the *Chowkeedars* in this district have always been accustomed to perform services personally to the *Zemindar* as well as to the Police. This is distinctly stated to be the fact by Mr. *Skipwith*, the officiating Collector in 1837, and by the Judge of the *Zillah* Court in the present case, and it is admitted by the Government. We think, therefore, the order of the *Foujdary* Court in December, 1855, forbidding the performance of *Zemindary* services by the *Chowkeedar*, was without any warrant in law.

Cases of this description must, as it seems to us, depend mainly if not wholly for their decision upon the question, what was the tenure or character of the lands at the time of the Decennial Settlement, and how they were dealt with in that settlement.

In this case the result, in our opinion, is, that both parties have insisted on more than they were entitled to. One side has contended that the holder of these lands is liable to the performance of none but *Zemindary* duties; the other, that he is liable to the performance of none but Police duties.

Under these circumstances, we feel considerable difficulty as to the course which we ought to take. If we advise the affirmance of the judgment, we may seem to countenance the opinion that the Government has the right to take possession of these lands, and to appoint a person to perform, as *Chowkeedar*, general Police duties, to the exclusion of duties to the *Talook* and the *Talookdar;* and this is very far from being our opinion.

On the other hand, we think that we cannot advise the reversal of the judgment, having regard to the form of the pleadings, without maintaining the position assumed by the Appellant, that these are *Gram Surunjamee* lands, not liable to the performance of any but personal services to the Appellant; and from this opinion also we dissent.

The state of the pleadings prevents us from reaching the real merits of the case. It is not for us to say how these merits may best be reached. It may be that the Appellant having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, may be entitled to recover the land for the purpose of its being held by the person so appointed, or it may be that the person so appointed may himself be entitled to recover the land. On these points we give no opinion. But on the whole, having regard to the Appellant being Plaintiff in the suit, and having failed to make out the case which he set up, we think that we shall best discharge our duty by humbly advising Her Majesty to affirm the judgment complained of, but without giving any costs, and to declare that the lands in question are to be considered as appropriated to the maintenance of a *Chowkeedar* or village watchman in this *Talook*, and that the right of appointing such officer belongs to the *Talookdar*, and that such officer is liable to the performance of such services to the *Talookdar* as, by usage in the *Zemindary* of *Burdwan*, *Chowkeedars* have been accustomed to render to the *Zemindar*, and to declare that the affirmance of the judgment is to be without prejudice to any (if any) other suit which the Appellant may think fit to institute in respect to the matters in dispute in this cause.

16th and 17th February, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Supreme Court at Bombay.

VENAYECK ANUNDROW and others,* ... } *Appellants*,

versus

LUXUMABAEE and others, *Respondents*.

Hindu Law—Bombay—Sister inherits.

According to the Hindu law in *Bombay*, sisters succeed to the estate of their brother, if the estate has been separately acquired by their father, in preference to their father's brothers' sons.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE:

The question raised by the demurrer, the subject of this appeal, is, whether the Plaintiffs in the suit, the Appellants, have by the statements in their Bill shown any interest in the estate of *Bhugwantrao*, the Testator in the cause, or any concern with it. If they have not, the demurrer was rightly allowed.

Bhugwantrao was a Hindoo, resident at *Bombay*. He died in the year 1851, having made his Will in the English language, in that year. He appointed his wife, one of the Respondents, now his widow, sole Executrix, and in addition to some directions, which need not be now particularly mentioned, he expressed himself thus:—"All the outstanding debts due to me must collect, and after paying legal debt due by me, and the expense of the funeral and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, &c., I give and bequeath to *Luxumabaee*, my dearly beloved wife, and my little son, *Gujanon*, an infant." Then follows an expression which has with propriety been the subject of observation, namely, the expression, "the joys, &c., I have made for my wife and children, they belonging themselves respectively." Their Lordships, however, consider that the word "respectively" has no application to the gift of the residue, but refers only to whatever may have been meant by "the joys, &c."

The Testator, as has been said, died in the same year, survived by his wife, the Executrix, one of the Respondents, and her three daughters by him, who are also Respondents, and by the infant son, *Gujanon*, who died in the year 1853, a child under four years of age.

Observations have been very properly made concerning the true construction of the words of the gift of the residue—whether as giving, or not giving, an absolute interest, and whether as giving, or not giving, an interest in the nature of what English lawyers call a joint tenancy in common. In the circumstances that happened, their Lordships do not think it necessary to give an opinion upon that point or those points of construction, for whether the gift was absolute or not absolute, whether in common, as we call it, or in joint tenancy, upon the Testator's death, the widow and his son took the whole between them, at least in possession, and upon the death of the son, an infant of tender years, the widow became in every possible view entitled to the whole, at least for her life. There is no possible claim to an interest in possession in the Appellants.

Their claim is thus founded. They contend that upon the death of *Gujanon* the absolute interest in the whole, or a moiety, subject to a life interest in the widow, devolved upon his heirs, and that those heirs were the Appellants, and not the three daughters of the Testator, the co-Respondents with the widow. They make out, they say, that proposition by the nature of their relationship, namely, that they were the sons of the brother of the Testator, and being so related in the male line they excluded by law, they say, the sisters of *Gujanon* from the heirship to him, a proposition which the Respondents deny.

* 9, Moore's I. A., p. 516.

Now, upon the question of the capacity of the sisters to be heirs to their brother, different views of the law appear to have been taken in different parts of *India*, and a general leaning in favour of excluding the sisters in such a case appears to prevail in *Bengal*, but appears not to prevail in the territories of *Bombay*. It is a point upon which, probably, it may be said, that a reasonable difference of opinion may be entertained; but the authorities most regarded in *Bombay*, whence this case comes, seem to be in favour of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice in giving his judgment in the present case, quotes a Book with which we are not familiar here, but which seems to be well known in *Bombay*, and to be considered and treated as an authority there. He says (*a*), "Supposing, then, *Luxumabaee* to take a life estate only in the descended inheritance, the reversion vests in the next heir of *Gujanon*, and, upon the best authorities recognized in this Presidency, that heir is his sisters, who are Defendants in this suit. This appears, from *Mayucha*, ch. iv., p. 19, where, after enumerating the mother (see pp. 14 and 15), the uterine brother and his sons (secs. 16 and 17), the paternal grandmother (sec. 18)—and no paternal grandmother of *Gujanon* is shown to be in existence on the face of this Bill—the Commentator, in section 19, proceeds thus:—'In default of her (the paternal grandmother) comes the sister, under this text of *Menu*. To the nearest *Sapinda* (male or female) after him or her in the third degree, the inheritance next belongs; and thus of *Bruhuspitia*, where many claim the inheritance of a childless man, whether they may be paternal or maternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate.' And the next rank is hers (the sister's), both from her being begotten under the brother's family name, and there being no further reservation with respect to the gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds. Considering the high authority of the *Mayucha* on this side of *India*, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the *Mitacshara*, the sister comes next in order of inheritance after the brother. The passage in the *Mitacshara* is contained in the first paragraph of ch. II., sec. 4: 'On failure of the father, brethren share the estate.' *Nanda Pandita* and *Balam-Bhatta*, says Mr. *Colebrooke*, in his note to this passage, consider that as including 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of grammar. They observe, that the brother inherits first, and in his default the sisters; this opinion, Mr. *Colebrooke* states, is controverted by *Camalacara* and the author of *Mayucha*. It certainly is so in sec. 16 of chapters iv. and viii. of the *Mayucha*, p. 105; but it should be observed, that in p. 15 of the same Commentary, the doctrine of the *Mitacshara*, now generally regarded as established as to the word 'parents' including both 'mother and father,' is controverted, and on precisely the same grammatical grounds."

Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in *Bengal* upon this subject, or upon the construction of the word "brethren," is wrong; but certainly neither are they satisfied that the construction put by the passage in the *Mitacshara*, which has been mentioned, and generally adopted as it seems in *Bombay*, is wrong. Their Lordships come to the conclusion that the general rule in *Bombay* has long been, and is, to treat the sisters as heirs to the brother rather than the paternal relatives of the description of the present Plaintiffs. Accordingly their Lordships think that they may safely and properly, in the present instance, adopt or accept that rule. They consider that in *Bombay*, at least, the sisters, in such a case as this, are the heirs of the brother. The consequence is, that in whatever possible manner the Will of the Testator is read, the entire interest in the property in question must, we think, be viewed as

(a) 9, Moore's I. A., p. 525.

vested in the widow and her daughters, or some or one of them, and that, therefore, the Appellants here, the sons of the brother of the Testator, are suing in a matter in which they have not shown the slightest interest, nor with which they have any concern. The result is, in their Lordships' opinion, that the demurrer was rightly allowed, and that the appeal should be dismissed, with costs.

It ought to be added, as to the argument that the marriage of the daughters and their marriage portions excluded them from participation, that their Lordships think there is no ground for that argument either in principle or otherwise.

4th June, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

GOUR MONEE DEBIA,* ... *Appellant,*

versus

KHAJAH ABDOOL GUNNEE, *Respondent.*

Costs—Practice.

Leave to appeal having been granted by the Judicial Committee, on the condition of the Appellant depositing with the Registrar of the Privy Council the sum of £300, for costs, the sum was accordingly deposited, the record was transmitted from *India* and the Respondent lodged his printed case; but the Appellant, though served with peremptory notice to lodge his case, took no step to bring the appeal to a hearing. In such circumstances, on the Respondent's application, the appeal was dismissed and the residue of the sum, after payment of the Respondent's costs, was directed to be paid over to the Appellant.

IN this case leave to appeal had been granted by the Judicial Committee in December, 1860, upon the terms of the Appellant giving security in the sum of £300, for the costs, in case the appeal should be dismissed. This sum was deposited with the Registrar of the Privy Council, and the transcript of the record transmitted from *India*. The Respondent lodged his printed case; but the Appellant, although served with peremptory notice to lodge his case, took no step to bring the appeal to a hearing.

In these circumstances,

Mr. *Cave*, for the Respondent,

Moved to dismiss the appeal, and for payment of the Respondent's costs out of the £300, deposited with the Registrar of the Privy Council; and

Their Lordships made an Order in those terms, directing the residue of the sum, after payment of the Respondent's costs, to be paid over to the Appellant.

The Respondent's costs were taxed, and the residue of the £300, paid to the Appellant's Solicitor.

17th and 18th June, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

RANEE SURNOMOYEE,* ... *Appellant,*

versus

MAHARAJAH SUTTEESCHUNDER ROY, BAHADOOR, ... } *Respondent.*

Enhancement of rent, non-liability of an ancient sub-tenure Mouroosee Istemurarree to—Auction Purchaser at a revenue sale, power to cancel sub-tenures or leases—Construction, secs. 5 and 7, Beng. Reg. XLIV., 1793—Evidence, Forged Document.

Suit for enhancement of rent by a *Zemindar* against a *Talookdar* holding as a mouse tenant a

* 10, Moore's I. A., p. 59.

* 10, Moore's I. A., p. 123.

portion of the *Zemindary*, in which the Appellant Defendant contended that she was not merely a *Mouroosee* tenant, *i. e.*, one holding by hereditary tenure, but that she held at a fixed rent (*i. e.*, was an *Istemrardar*), and pleaded protection from the enhancement upon the facts that the tenure had been created by grant prior to the commencement of the present century and descended successively to five tenants at a fixed rent, dismissed.

Sec. 5, Reg. XLIV., 1793, provides that when a *Zemindary* is sold at a public sale for discharge of arrears due from the proprietors to the Government, "all engagements which such proprietors shall have contracted with dependent *Talookdars*, whose *Talooks* may be situated in the lands sold, as also all leases to under-farmers and *Pottahs* to *Ryots* (with the exception of the engagements, *Pottahs*, and leases specified in secs. vii. and viii.,) shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent *Talookdars*, and from the *Ryots* or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *Pergunnah* or District in which such lands may be situated had the engagements so cancelled never existed." And sec. 7 of the same Regulation provides, that sec. 5 is not to authorize the assessment of any increase upon the lands of such dependent *Talookdars*, as were exempted from increase at the Decennial Settlement of 1793.

Some time before 1843, the Government revenue payable by a *Zemindary* falling into arrears, the property was put up to public auction and was sold to *S.*, who thereby acquired such rights to cancel &c. as the then subsisting Regulations gave to a purchaser at such a sale; but neither *S.*, nor any one of the subsequent purchasers from *S.*, attempted to disturb a mesne tenure or increase its rent till 1856, when the then *Zemindar* first instituted a suit to increase the rent:—*Held*, reversing the decrees of the *Zillah* and *Sudder* Courts,—

I. That the existing interest of the mesne tenant did not, *ipso facto*, cease to exist without any act done by the purchaser in the Government sale in 1843, as the language of sec. 5, read with the exception in sec. 7, *Beng.* Reg. XLIV., 1793, showed that what was meant by sec. 5, was not the destruction of tenure, but the increase of rent, under certain specified and equitable limitations.

Quære.—Whether sec. 5, *Beng.* Reg. XLIV., 1793, is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the *Zemindary*, which passed to subsequent purchasers.

II. That it was manifestly unjust to allow the Respondent to disturb the tenure, considering that, during the long period for which the property had been held at a small unvarying rent, it had been bought and sold, and changes and improvements had been made, no doubt at a considerable expense, and upon the faith of the rent to the *Zemindar* remaining unchanged, and that the Respondent himself had purchased for a price presumably calculated accordingly.

Their Lordships arrived at the above conclusion, although they believed the parol evidence of the Appellant and the confirmatory *Pottah* produced by her as having been granted by *S.*, to be forged, ruling that,—

When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself; but that if there is other evidence not depending in any degree for its credibility or weight on such witnesses, or document and a just case, foolishly and wickedly attempted to be supported by false evidence, the misconduct must not mislead them in the advice their Lordships will have to tender to Her Majesty.

23rd July, 1864.

THE judgment of the Lords of the Judicial Committee, after being reserved, was now delivered by

THE RIGHT HON. THE LORD JUSTICE TURNER:

This was an appeal from a decree of the *Sudder Dewanny Adawlut* at *Calcutta* of the 26th of March, 1859, from a decree of the Judge of the *Zillah* Court of *Nuddea*, in *Bengal*, of the 21st of July, 1858, confirming substantially, a decree of the Principal *Sudder Ameen* of *Nuddea*, in *Bengal*, of the 19th of November, 1857. The suit was originally brought by the Respondent's father, and the relations of the parties to each other were those of *Zemindar* and *Talookdar*, the Appellant holding as mesne tenant a portion of the *Zemindary*. The object of the suit is to enhance the rent at which the Appellant holds that portion, and no question is made upon the Respondent's general title, nor upon the relation in which the Appellant stands towards him. She does not dispute his right, under other circumstances, to bring this sort of action against her, and their Lordships, therefore, do not enter into the question whether the action has been properly so brought. They give no opinion on that point. What the Appellant insists upon is, that this present action must fail because her tenure is hereditary and at a fixed rent, which the *Zemindar* has no power to enhance.

It will be convenient in the first place to state what, upon the evidence, their Lordships consider to be established as to the Appellant's title, omitting for the present some parts of the evidence on which she relies, and to which too much importance has been, as it appears to their Lordships, attached in the Courts below. The interest which she represents was first created by grant in favour of a Mr. *Seaton* at some date prior to the commencement

of this century. On parts of the land comprised within his grant he laid out gardens and erected factories and other buildings, but there is no direct evidence that the grant was made for these purposes. He appears to have been a Civil Servant of the East India Company; and after some years, when leaving *India* for *England*, he sold the whole property to the grandfather of the Appellant's husband; on his death it descended to the father, and thence in due course to her husband, from whom she has inherited it as his widow. A portion of the land during this course of years has been granted to the Government, and a public College erected thereon. And during the whole time of the occupation of these five tenants, the same rent has always been paid. Upon this state of facts the Appellant contends that she is not merely a *Mouroosee* tenant, that is, one holding by hereditary tenure, but that she holds at a fixed rent, and under such circumstances as protect her from any enhancement of it.

The state of facts on the part of the Respondent is this: It appears that while *Hurrenauth Roy, Bahadoor*, the father of the Appellant's husband, was in possession, the Government revenue payable by the *Zemindary* fell into arrear, and the property was, therefore, put up to public auction; one *Muddoo Soodun Sandial* became the purchaser, and he acquired the rights which the then subsisting Regulations gave to a purchaser at such a sale. After some time he sold the *Zemindary* by private contract to Mr. *Harris*, from whom, on his death, it passed to his widow; from her it was purchased by the *Maharajah Srees Chunder Roy*, now deceased, who in August, 1856, commenced the present suit, and on his death the Respondent, inheriting the *Zemindary*, has continued it.

Upon this state of facts the Respondent contends, that as he claims under *Muddoo Soodun Sandial*, he has acquired all rights which *Muddoo Soodun Sandial* had, and that as he purchased at a Government auction, he was entitled by the Regulations then in force to cancel the lease under which the Appellant's ancestor was holding, and of course to impose new terms as to the rent.

It is, as it seems to their Lordships, necessary to the Respondent's success, that *Muddoo Soodun Sandial* should have had in him, at the time when he sold to Mr. *Harris*, the rights above stated, so that he himself might at that time have enhanced the rent of these lands; that these rights should have passed to Mr. *Harris*, and the subsequent purchasers of the property down to and including the Respondent's father; and that they either could not have been or have not been in fact waived by the Respondent's father or by any one of the prior owners, for unless this be the case, their Lordships see no ground on which the hereditary tenure could be disturbed or the rent enhanced.

The reliance of the Respondent is on some one of the Regulations which have been made at different times in regard to purchasers at Government auction sales in the case of *Zemindaries*, from which the Government income has not been duly paid. These Regulations have been couched in different language, but all with the same policy in view, as regards the present question. It has been assumed, as the foundation of them, that the default of the *Zemindar* may have been occasioned by improvident grants of *Talooks* and other subordinate tenures at inadequate rents: that this was in breach of the condition on which the fund was originally created by the Sovereign Power; and the purchaser, therefore, has been set free from the obligation of these grants, with certain specified exceptions, and with certain limitations of his power as to new tenancies to be created. These laws, however, cannot but occasionally operate very hardly on the grantees of subordinate interests, and they have, therefore, been materially modified by an Act of 1859, not in force when this decree was made, and not, therefore, directly applicable to it; but such Regulations must on general principles receive a strict construction. There seems to have been doubt in the minds of the Respondent's advisers on which of these Regulations his case could safely be rested, and it would appear from the proceedings in the Court below that it was intended to rest it on Regulation Act, No. I. of 1845, which certainly would not

have supported it, because the sale relied on was not effected under that Regulation, and its provisions are limited to sales so effected. Upon the argument before their Lordships the Counsel for the Respondent relied on the fifth section of Regulation XLIV. of 1793, which is the earliest of the Regulations on this subject, and they contended that, although subsequent Regulations upon the subject have been passed in different language and repealed, this fifth section of Regulation XLIV., 1793, has never been repealed, but was in force at the time when the sale in question was made and this action was commenced. Whether upon the true construction of all the Regulations taken together this particular section ought to be taken to have been repealed or not, their Lordships do not think it necessary to determine. They assume in favour of the Respondent that it stands unrepealed and in full force, and will deal with the case upon that footing. The language of this section is no doubt favourable to the Respondent's case. It provides that when a *Zemindary* is sold at a public sale for discharge of arrears due from the proprietors to the Government, "all engagements which such proprietors shall have contracted with dependent *Talookdars*, whose *Talooks* may be situated in the lands sold, as also all leases to under-farmers and *Pottahs* to *Ryots* (with the exception of the engagements, *Pottahs*, and leases specified in sections vii. and viii.,) shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent *Talookdars*, and from the *Ryots* or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *Pergunnah* or District in which such lands may be situated had the engagements so cancelled never existed." But the seventh section of this same Regulation provides, that this is not to authorize the assessment of any increase upon the lands of such dependent *Talookdars*, as were exempted from increase at the Decennial Settlement of 1793.

Their Lordships do not, upon any evidence in the case, on which they think it safe to rely, see their way to the belief that the Appellant brings her case within the seventh section, but they cite it because it may have a bearing on the construction of the language of the fifth section. The Respondent contends that by the operation of the words "stand cancelled from the day of sale," the existing interests of the *Talookdar*, *ipso facto*, ceased to exist, without any act done by the purchaser; that it was incapable of confirmation or being set up by him or his successors; and that where, from the acquiescence of the purchaser or those claiming under him, the possession had remained in the *Talookdar* and those claiming under him undisturbed, and the original rent had been received, no matter for how long a period, or through whatever number of mesne conveyances, it still remained a bare possession at the will of the *Zemindar* for the time being, and the rent always liable to enhancement. In this hard and literal construction of the words cited above, their Lordships do not concur. They think, that their meaning is properly to be collected from the policy and intent of the Regulation, from the language used in other parts of the same section, and from the seventh section, which creates an exception out of the provisions of that section. English lawyers are familiar with this principle of construction applied as early as the time of Lord *Coke* (see 1st Inst. 45) to the disabling Statute of 1*st Eliz.*, c. xix. sec. 5, and in several modern reported cases between landlord and tenant, on clauses of forfeiture in leases. Words which make a Bishop's grant "utterly void and of none effect to all intents, constructions, and purposes," have been held not to prevent the grant from being good and binding on the grantor, and in some cases confirmable by the successor; and so a proviso in a lease, that it should be void altogether in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. Their Lordships do not cite these as authorities governing this case, but mention them only as illustrating a general principle of construction which for its justice, reasonableness, and convenience, must be considered of universal application. In the present case the object of the Go-

vernment was that the *jumma* should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants of the *Zemindars* who had made default; but cases of default might often arise where no improvident grant had been made, where the *Talookdars* and the *Ryots* held at proper rents, and the default was owing to extravagance, mismanagement, or other causes,—in such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests. It is true that the section makes no distinction in terms between the two classes of cases, and it would be unsafe in construction to make any such; but the consideration furnishes reason for such limitation, both as to time and extent of operation, as the words will admit, indeed seem to require, in order to give effect to the whole sentence. Now, looking at what follows in the same clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the *Talookdars* and the *Ryots* to remain in all respects as before, except that they become liable to a certain limited increase of rent, "according to the established usages and rates of the *Pergunnah* or district;" words in themselves showing, that the section was directed to cases in which grants had been made with reservations of rent below those usages and rates. It is to be observed also that in terms this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation. The language of the exception, too, in section seven shows, that what was aimed at by section five, was not the destruction of tenure, but the increase of rent, under certain specified and equitable limitations.

The conclusion at which their Lordships have arrived as to the construction of the section is this—that a power was given by it to the purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the *Pergunnah*, or District, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have had none, when the existing rent was already according to the usages and rate of the *Pergunnah*.

This conclusion is of great importance in the determination of the remaining questions. The sale to *Muddoo Soodun Sandial*, according to the Respondent's own case, took place some time before 1823, and he found those under whom the Appellant claims holding the land at an old rent of Rs. 64. 1 an. 12 p.; he did not attempt to disturb the occupation or increase this rent but received it during all the time he remained owner. He sold by private contract to Mr. *Harris*, from whom it passed to his widow, Mrs. *Harris*, and from her again by private contract to the Respondent's father, *Maharajah Sreesh Chunder Roy*, as has been already stated. During all this time (and for a considerable period before, so far as appears indeed from the very creation of the tenure—more than sixty years ago), the same rent has always been paid; and there is no evidence that when first imposed—nay, even when the purchase was made, it was not a perfectly adequate rent for the property. Great changes in the value of property have now arisen, and the Respondent demands by his plaint an annual rent of Rs. 1,470, or nearly twenty-three times the amount of the original rent, according, as he states it, to the actual rate current in the village.

If the section in question did not authorize the purchaser to disturb the possession, and left him an option to confirm the existing rate of rent, there seems to be the strongest evidence that he exercised that option in favour of the *Talookdar;* and even if the same rights passed from him unimpaired to Mr. *Harris*, and in succession to those who claim under him, the evidence is equally strong—nay, as regards Mrs. *Harris* personally, it is stronger. It is, therefore, unnecessary to decide whether the section is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the *Zemindary*, which passed to subsequent purchasers. Their Lordships, moreover, observe that the power given is to collect what the former proprietor would have

been entitled to demand, if the cancelled engagement had never been made; words which seem to point to something to be done on the change of ownership, not to something to be done after any indefinite lapse of time; and, as before remarked, in terms the power is given only to the purchaser himself, as to whom reasons might apply which would not extend to subsequent purchasers from him. Their Lordships, however, pronounce no opinion on this question, it not being necessary to decide it. They say no more than that a construction which would render the title to property unnecessarily uncertain, ought not, in their judgment, to be given to a power of this description.

On examining the Regulations their Lordships are satisfied that the Respondent's case can rest only on the powers given by the section in question; and they are of opinion that those powers, assuming them to be in force, will not support the present action. They are glad to find that it is not their duty to support a claim which appears to them to be unjust. During the long period for which this property has been held at a small unvarying rent, it has been bought and sold, and changes and improvements have been made, no doubt at a considerable expense, and upon the faith of the rent to the *Zemindar* continuing unchanged: he has purchased while that state of things existed, and it must be presumed for a price calculated accordingly; and it is manifestly unjust that he should be allowed to disturb it.

It will have been observed that their Lordships have arrived at their conclusion without considering either the parol evidence of the Appellant, or a confirmatory *Pottah* produced by her as having been granted by *Muddoo Soodun Sandial*, which, if received by the Courts below, would have concluded the case in her favour. Both these Courts, however, treated the whole of the parol evidence as unworthy of credit, and the *Pottah* as a forged instrument; and their Lordships regret that on the fullest consideration they are not prepared to differ from them in these conclusions. When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself; and if the evidence on which their Lordships act depended in any degree for its credibility or weight on such witnesses, or document, they would have paused as to their conclusion. The fact is not so, however, in the present case; their Lordships believe they have to deal with a just case foolishly and wickedly attempted to be supported by false evidence. This misconduct must not mislead them in the advice they will have to tender to Her Majesty, which will be that the appeal be sustained, the decrees complained of reversed, the plaint in the suit dismissed, and any costs which may have been paid by the Appellant in the Courts below refunded, but that no costs of the appeal, or of any of the proceedings below, be allowed to the Appellant.

27th and 28th June, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

THE ZEMINDAR OF RAMNAD,* *Appellant*,

versus

THE ZEMINDAR OF YETTIAPOORAM, ... } *Respondent.*

Presumption of title from long possession.

Dispute arising as to certain boundary lands between the *Zemindaries* of *Yettiapooram* and *Ramnad*, the disputed lands were attached by the Government to prevent, it would seem, the breach of public peace. In a suit then instituted by the *Zemindar* of *Yettiapooram*, the Plaintiff, Respondent, neither party could make out any clear title, but the facts went to show that both at, and long prior to, the time of the attachment, the disputed lands were in the possession of the Plaintiff, Respondent. *Held*, affirming the decision of the Courts below, that the title of the Respondent must be preferred and the appeal dismissed with costs.

THE RIGHT HON. LORD KINGSDOWN:

This suit was instituted for the purpose of establishing the right of the Plain-

* 10, Moore's I. A., p. 47.

tiff to certain lands which he said belonged to his *Zemindary* of *Yettiapooram*. The result of it was, that neither the Plaintiff nor the Defendant could make out any clear title, and the Plaintiff was only able to establish that he had had possession of the property at the time of, and prior to, the attachment by the Government. Under these circumstances, the Civil Judge thought that the best course to be adopted was to restore possession of the lands to those from whom it had originally been taken.

It was an uncultivated district, lying between the *Zemindaries* of *Yettiapooram* and *Ramnad;* and it would seem that in the year 1819, the *Ramnad Zemindar* complained that, although the land in question belonged to her village of *Paralachi*, it had been encroached upon by the *Ryots* of *Budalapuram*, a village belonging to *Yettiapooram*, to the extent of 550 *kurukhams*. An inquiry was ordered by the Collector of *Madura*, the result of which appears to have shown that the *Ryots* were only doing that which they had always been accustomed to do.

No further steps were taken, and the party complaining seems to have been satisfied that there was no sufficient case, and the lands in question continued to remain in the possession and enjoyment of the *Zemindar* of *Yettiapooram*. In the year 1825 another complaint was made to the Collector of *Madura*, by the *Zemindar* of *Ramnad*, of another encroachment upon land belonging to the village of *Paralachi*. An Officer was deputed to make inquiries. He proceeded to the village of *Budalapuram*, and commenced an investigation. Notice was given of the purpose for which he had arrived, but no one attended on behalf of the *Zemindary* of *Ramnad ;* so that the Officer was obliged to go away without hearing anybody in support of the complaint.

There is no reason to doubt that at this period the lands were occupied by the *Zemindar* of *Yettiapooram*. In 1829, a complaint was again made by the *Zemindar* of *Ramnad* of encroachments on his territory, and again, although he received due notice, he neglected to proceed with his complaint. Then, in the year 1834, proceedings were had with reference to the eastern lands, and the *Zemindar* of *Ramnad* appears to have abandoned all claims to the northern lands. Mr. *Blackburne* then makes his award in favour of the *Zemindar* of *Ramnad*, and the *Zemindar* of *Ramnad* on this revives the dispute as to the northern land, and thereupon the lands were attached by the Government in 1836, and have since remained in their hands. These facts, in our opinion, go to show that in 1836, at the time when the lands were attached by the Government, and long prior thereto, the lands in dispute were in the possession of the *Zemindar* of *Yettiapooram*. We think that the title of the Respondent must be preferred, and their Lordships will, therefore, advise Her Majesty to dismiss this appeal with costs.

5th and 6th July, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir Edward Ryan.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

PAKALA BALAKRISTNAMA PATRULU,* ... } *Appellant,*

versus

SREE NARAINA MARDARAZ DEVU, ... } *Respondent ;*

AND BETWEEN

PAKALA BALAKRISTNAMA PATRULU,* ... } *Appellant,*

versus

SREE NARAINA MARDARAZ DEVU, ... } *Respondent.*

Pleading—Fraud—Razinamah—Madras Regulations not applying to proceedings before the Tribunals in the District of Ganjam—Evidence—Arzees.

Where the Courts of Justice are not subject to the rules prescribed by the Government Regula-

* 10, Moore's I. A., p. 60.

tions for the guidance of the Tribunals in more settled and civilized parts of the country, it is not to be required or expected that the proceedings should be conducted with all the attention to technical rules which might be reasonably demanded from Courts differently constituted. It is sufficient if the proceedings have been such, in point of form, as to enable each party fairly to bring forward and establish his case, and if the decision appears to be consistent with law and justice.

So ruled by their Lordships in certain appeals from the District of *Ganjam* within the Presidency of *Madras*, governed by an Officer called the Agent of the Governor of *Madras*, who appeared to exercise both judicial and revenue authority within the District.

A *Razinamah* to compromise a suit instituted by the Appellant against the Respondent, and an instrument called an "Instalment Bond" being a sale contract of one-fourth share of a certain *Talook*, were declared null and void as having been obtained by fraud and intimidation practised on the Respondent by the Appellant, who was then the cheif manager of the 'Agent's Court at *Ganjam*;' the Appellant's brother, too, being a *Moonshee* to one of the assistant Agents, and the instruments having been executed while the Respondent was under arrest and in custody.

Held that, in the circumstances of the case, *Arzees* or Memorials presented to the Government by the Respondent complaining of the acts of violence and threats by the Appellant, before the execution of the instruments in dispute, though no proof of the facts alleged in them, were, even in the absence of direct evidence of their being ever communicated to the Appellant, sufficient evidence of the influence of the feelings by which the Respondent had been induced to grant the instruments.

23rd July, 1864.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. LORD KINGSDOWN:

These appeals arose out of certain transactions which have taken place between the Appellant and the Respondent, in the District of *Ganjam*, within the Presidency of *Madras*.

Ganjam is situate in a remote and wild part of that Province, and is governed by an Officer called the Agent of the Governor of *Madras*, who appears to exercise both judicial and revenue authority within the district.

The Courts of Justice there are not subject to the rules prescribed by the Government Regulations for the guidance of the Tribunals in more settled and civilized parts of the country; and, under such circumstances, it is not to be required or expected that the proceedings should be conducted with all the attention to technical rules which might be reasonably demanded from Courts differently constituted. It is sufficient if the proceedings have been such, in point of form, as to enable each party fairly to bring forward and establish his case, and if the decision appears to be consistent with law and justice.

In the year 1855, the Appellant was the chief manager of the Agent's Court at *Ganjam*. His brother held the office of *Moonshee* to one of the assistant Agents.

The Respondent is a *Zemindar* of wealth and considerable position within the District. He seems at this time to have been a very young man, and to have been acting in the management of his affairs under the advice of his uncle, *Sree Ramchunder Manasing*, who liyed with him in his palace.

The questions in these two appeals are, whether certain instruments executed by the Respondent in favour of the Appellant were obtained from him fairly, or were the result of fraud and intimidation practised on him by the Appellant.

The facts appear to be these:—

In the year 1854, the Respondent purchased at a public auction the *Talook* of *Aragada*. The property was put up for sale by the Government in consequence of the failure of the former *Talookdar* to make payment of the revenue due from him. The purchase-money paid by the Respondent was Rs. 1,51,000.

In 1855, it was agreed between the Appellant and the Respondent that the Appellant should become the Manager of this *Talook* on behalf of the Respondent. The Appellant alleges, that the offer was made to him by the Respondent and that he accepted it, and gave up his situation under the Government in order to take this office, but that when in the year 1856, he came to take possession of it, the Respondent refused to appoint him; and for this breach of his agreement the Appellant demanded compensation.

The Respondent alleges, that the offer to become Manager of the *Talook* came from the Appellant, who represented that he was not willing to continue in the service of the Agent; that he, the Respondent, accepted the offer, but afterwards declined to employ the Appellant, upon

two grounds: first, because he did not come to undertake the duties of his office until, in consequence of his delay, the Respondent had been obliged to engage another Manager; and, secondly, because he had discovered that the Appellant had given up his office under the Government, not for the purpose of entering upon the management of the *Talook*, but from apprehension that he would be turned out of his place under the Government for misconduct and corruption as soon as his principal, who had been for some time absent from his office, should return to it.

In order to recover damages from the Respondent for his alleged breach of contract, the Appellant instituted a suit against him in the Civil Court of *Ganjam*, in the month of August, 1857, to which the Defendant put in a plea denying all claim on the part of the Appellant.

Nothing further appears to have been done in this suit, which in the present record is termed suit No. 29 of 1857.

In a few months afterwards, in April, 1858, the Appellant and his uncle were accused of having ill-used a native called *Madhava Dalai*, and on this charge they were both arrested and placed in custody.

On the 18th of May, 1858, while they were thus in custody, the Appellant executed two instruments, the validity of which is the subject of the present dispute.

The one related to the settlement of the suit, No. 29 of 1857, and professed to be a compromise of that suit. It is termed a *Razinamah*, and is in the form of a memorial presented to the Court in the suit by the Defendant, and assented to by the Plaintiff in these terms:—"The Defendant begs to represent that as the Plaintiff in this suit had entered into an amicable settlement, I agreed to pay him, in eight days from the date hereof, Rs. 5,441¾, made up of Rs. 3,790, the amount claimed; of Rs. 1,380, for nine months and six days from the date of the plaint, &c., the 13th August, 1857, to the present date, at Rs. 150 a month; and of Rs. 271¾, the value of the stamp for the plaint and other costs. Further, under the conditions entered into by me, to continue paying to the Plaintiff for his life, at Rs. 150 a month, in consequence of my having effected his removal from the office of Manager of the Agent's Court, I agree to pay to the Plaintiff for his life, on or before the 19th of every consecutive month, Rs. 150 a month, from the 19th instant, without regard to the service held by the Plaintiff or any business carried on by him. In the event of my not paying the same the Court is at liberty to collect the amount by enforcing this *Razinamah*, and pay it to the Plaintiff. Further, I have undertaken to pay my own costs. I, therefore, request the Court will be pleased to hold diary proceedings accepting this *Razinamah*, and directing the payment of Rs. 5,441¾, being the plaint amount and others afore-mentioned, and of Rs. 150 a-month, by me to the Plaintiff for his life. The Plaintiff begs to say that as I have agreed to the conditions above-mentioned, I request the Court will enforce the same.—18th of May, 1858."

The other instrument is called an "Instalment Bond," and is in these words:—"Instalment Bond executed by *Sri Sri Sri Narayana Mardaraz Devu, Zemindar* of the *Talooks* of *Kallikota* and *Aragada*, to *Pakala Balakrishna Patrulu*, on the 18th of May, 1858. Having sold to you for Rs. 42,000, one-fourth share of the *Talook* of *Aragada*, which I have purchased in auction, and received from you the sum of Rs. 23,125, out of the said purchase-money, both of us now enter into the following settlement, *i. e.* that the sale of the one-fourth share in question should be cancelled. That on this condition I should pay you Rs. 29,000, according to the instalments hereunder specified, and obtain receipts from you. And that in the event of my paying the money without failure of instalments, and taking receipts from you, neither you, nor your heirs, should ever and on any ground claim the portion of the *Talook* from me or my heirs. I shall, therefore, pay you the said amount accordingly and take back this document. If I fail to pay the money according to the instalments, I shall receive from you the balance of the sale-amount, get the sub-division of the *Talook* registered, and deliver it over to you with the past produce. Thus I have of my free will and consent executed this instalment Bond.

"Amount to be paid in eight days from the date hereof is ... ... Rs. 18,000
Ditto to be paid in six months from the date hereof is ... ... Rs. 11,000

Rs. 29,000."

A third instrument was executed, which was an acknowledgment by the Respondent of the terms contained in the papers already stated, and an engagement to abide by them on his part, and was as follows:—"*Nadava Sunnud* (Deed of acquittance) executed by *Pakala Balakrishna Patrulu* to *Sri Sri Sri Narayana Mardaraz Devu*, *Zemindar* of the *Tulooks* of *Kallikota* and *Aragada*, on the 18th of May, 1858. As you have sold to me, for Rs. 42,000, one-fourth share of the *Talook* of *Aragada*, which you have purchased in auction, and received from me the sum of Rs. 23,125, out of the purchase-money, I have this day, as desired by you, become friend to you, and entered into the following settlement, *i. e.* that the sale of the one-fourth share in question should be cancelled. That you should pay me Rs. 29,000, according to the instalments hereunder specified. That on payment to me of the money according to the instalments, and obtaining receipts from me, I should forego my right to the said one-fourth share; and that with respect to my allowance, provision having been made in the *Razinamah*, filed in suit, No. 29 of 1857, I should have no other claim against you. Having acceded to these conditions, I have executed this deed of acquittance. On payment of Rs. 29,000, according to the instalments fixed, I shall return to you the instalment Bond you have this day executed to me, and neither myself nor my heirs shall for ever, and on any ground, claim from you or your heirs for the said one-fourth share. Thus I have executed this deed of acquittance of my free will and consent.

"Amount to be paid in eight days from the date hereof is ... ... Rs. 18,000
Ditto to be paid in six months from the date hereof is ... Rs. 11,000

Rs. 29,000."

It will be seen that by the instalment Bond a sum of Rs. 18,000, was to be paid in eight days from the date thereof. This would be on the 26th of May. On that day the Appellant and his uncle were discharged out of custody on depositing Rs. 1,000, and entering into an engagement to appear in person to answer the charges against them when required by the Government. Fourteen days afterwards the Rs. 18,000, were paid by the Respondent to the Appellant. It is fit to observe that there is no direct evidence to connect the discharge of the prisoners with the execution of these instruments and the payment of this money, but the coincidence is certainly remarkable, and considering the situation which had been held by the Respondent and the situation which was still held by his brother, it is difficult to believe that the release of the prisoners was entirely unconnected with the transactions which had then taken place, or that the Appellant had not something to do with their discharge. There seems to have been no reason why, if the accused parties were entitled to be discharged on their own recognizances on the 26th of May, they should not have been equally entitled to be released on bail when the charge was first made against them, instead of being exposed to the inconvenience, and, what they seem to have felt much more, the degradation and outrage on their personal dignity consequent upon their arrest and imprisonment.

These instruments were of a character in themselves to excite suspicion, particularly when executed by a person who at the time was under duress.

The suit, which was compromised by the *Razinamah*, had not been prosecuted. If the facts alleged by the Respondent were true, he had a complete answer to the demand. He had up to this time denied all liability to the Appellant, and yet by this document he submitted to all the demands of the Appellant in this suit, and engaged to make payments and incur obligations to the Appellant far beyond anything which any Court of Justice could have awarded to him if he had established all his allegations.

When this *Razinamah* was presented to

Mr. *Thornhill*, the Principal Assistant Agent for registration, he seems to have been so much struck by its extreme improvidence that he ordered the head of the police in *Ganjam* to see the Appellant, and learn from him whether it really was his spontaneous act. This was on the 19th of May, and notwithstanding a certificate from the police officer that he had seen the Appellant, who acknowledged that he had acted from his own free will, Mr. *Thornhill* required the personal attendance of the Appellant. The Appellant accordingly, after some remonstrance, attended, and was examined, and after this the *Razinamah* was allowed to be filed, and the Rs. 5,441¾ mentioned in it were paid, but Mr. *Thornhill* seems still to have been far from satisfied, for the order for registration was in these terms:—"22nd June, 1858.—The *Zemindar* having personally appeared before me and assured me that he agrees to these terms, this *Razinamah* may be filed; but the settlement as to the filing of this *Razinamah* being very dubious, it cannot burden the estate with this allowance after the death of the *Zemindar*."

The effect of these acts of recognition we will consider when we have dealt with the case as to the instalment Bond.

With regard to the instalment Bond, it seems that the Respondent refused or neglected to pay the instalment of Rs. 11,000, which, by the conditions of that instrument, were due on the 18th of November, 1858. On the 13th of January, 1859, the Appellant filed a plaint, dated the 18th of November, 1858, against the Respondent, joining his uncle as a Defendant, on the ground that he was aiding and abetting the Respondent. The plaint stated the effect of the instalment Bond, and insisted that the Respondent had forfeited his right to repurchase the quarter share of the *Talook*, by reason of his neglect to pay the second instalment on the day, and he prayed to have a conveyance of the quarter share, together with mesne profits from the year 1855.

It is obvious that the Appellant's title to this relief depended entirely upon the truth of the facts which are recited in the Bond. If there had been such a purchase of the quarter share as is therein stated, and such a payment as was therein alleged to have been made of part of the purchase-money, there was nothing unreasonable in the subsequent agreement. It amounted only to this, that the Appellant consented to give up his purchase on the condition of receiving a certain premium for doing so, with a right to retain his purchase if the conditions of the Bond were not performed.

His right, therefore, in this suit rested entirely on the first agreement, and not on the second. The instalment Bond was, in truth, according to the Respondent's construction, at an end. The Appellant insisted that, by the failure of the Respondent to perform its conditions, he, the Appellant, was remitted to his original rights. The matter for him to prove, therefore, was the first contract.

Now, the Respondent by his defences asserted, that the recital in the instalment Bond was a pure fiction, and that there had been no such sale by the Respondent, and no such payment by the Appellant, as were stated in the Bond, and he insisted that if there had been any such sale, a Bill of sale must have been executed on stamp paper, and that the Plaintiff should prove that a proper stamp had been purchased. Likewise, that if the Plaintiff had paid Rs. 23,000, he would have obtained a receipt, and the receipt should be produced. He alleged, also, that both this instrument and the *Razinamah* had been obtained from him under circumstances of pressure and intimidation while he and his uncle were both in custody on a false charge; that such charge had been contrived and instigated by the Appellant in order to force the Respondent to comply with his unjust demands; that he had required the Respondent not only to pay him a large sum of money, but also to give him a share of the *Talook*; that he had threatened, with this view, to set up false charges against both the Respondent and his uncle, and that the Respondent was induced to execute these instruments by threats and promises of the Plaintiff, in the hope of relieving himself and his uncle from this persecution.

On the 29th of June the Judge of the Court gave out to the parties a statement

of the points which each should endeavour to prove.

The Plaintiff was to prove the due execution of the alleged sale contract, and the payment by him of Rs. 23,000 on account of the purchase-money and the Bill of sale, and receipts were to be produced in Court.

The Defendant was to prove his statements regarding the threats and promises used by the Plaintiff in the interview during which the Bond was executed; secondly, to put in a concise statement of the grounds on which he believed the criminal charge against his uncle and that on which he was himself then under trial to have been the work of the Plaintiff; thirdly, to state briefly the nature of his connection with the Plaintiff, and the cause and date of the rupture between them.

As regards the Plaintiff, he failed to give any proof whatever of the execution of any sale contract or of the payment of any sum of money whatever on account of it, or to produce any document purporting to be such Bill of sale or receipt, or to show, as he had been challenged to do by the Defendant, that any stamp paper had been purchased on which the Bill of sale could have been written.

On the other hand, the Defendant proved by a return from the proper officer that no sale appeared to have been made at the Stamp Office for this district of a stamp applicable to this transaction between the months of July and September, 1855, the Bill of sale being alleged to have been made on the 28th of September, 1855.

The Plaintiff had alleged in his replication that the Bill of sale and other documents were in the possession of the Defendant, but he gave no evidence of this fact, nor did he either prove, or indeed allege, any circumstances which could reasonably account for such an unusual circumstance as the delivery to the vendor of the title-deed of the purchaser.

Destitute of all other proofs, the Plaintiff relied entirely on the evidence afforded by the recital in the Bond, and the circumstances under which it was executed and afterwards recognized. Now, with respect to the circumstances under which it was executed, it appears that on the 17th of May, the Defendant, being in custody on the charge already alluded to, signed a paper addressed to Mr. *Thornhill*, the principal Assistant Agent, in these words:—"I have to speak to *Pakala* (describing the Appellant) touching the matter of the suit No. 29 of 1857, on the file of the Agent, and, therefore, request you will be pleased to direct the *Circar Peons* watching at my gate not to prevent *Pakala* from coming in." It will be observed that this note makes no allusion to any dispute about the sale of any share of the *Talook*, but is confined to the suit of 1857. The Judge in the *Zillah* Court considers this application to have been a contrivance on the part of the Appellant to obtain access to the Respondent, and not the spontaneous act of the Respondent. But however this may be, it certainly does not indicate that at this time he was contemplating any arrangement with respect to the *Talook*, of which he had been for years, according to his representations to the Agent, resisting the attempts of the Appellant to obtain a share.

Yet we find that, without any intermediate communication, this note having been sent on the 17th of May, an interview takes place on the 18th between the parties, and the result of that interview is, that the Respondent signs this Bond, by which he recognizes the right of the Appellant to one-fourth part of the *Talook*, and agrees to pay Rs. 29,000, for its repurchase.

It seems very much as if these two papers must have been taken, ready prepared, by the Appellant to the Respondent, and no evidence is given to explain under what circumstances or with what assistance the Respondent consented to sign them. The only fact relied on by the Appellant is this—that more than once after the execution of the instruments, and after the Respondent had been discharged out of custody, he expressly recognized them, and paid a sum of Rs. 5,411¼ on account of the *Razinamah*, and Rs. 18,000, on account of the instalment Bond.

But if the account given by the Respondent be true of the influence under which he acted, that influence continued at the time when the recognition took place, and under such circumstances re-

cognition goes for very little. His object was not merely to get out of custody, but to relieve himself from the persecution to which he and his uncle had, as he conceived, for two years been subjected by the Appellant in consequence of their refusal to comply with his demands.

With respect to the proof which the Respondent was called upon to give, he did not offer any evidence of the threats and promises alleged to have been used by the Plaintiff at the interview during which the Bond was executed, but he put in the statement required by the Judge, and also various documents in support of it.

The statement contained detailed particulars of the constant intrigues which he alleged to have been carried on against him and his uncle by the Plaintiff from the time of the rupture between them in 1856, and of the reasons by which he was led to believe that the charge by *Madhava Dalai* had been concocted at the Plaintiff's instance.

The documents which he put in to support this statement consisted of a great number of *Arzees*, or Memorials, presented by him to the Government during the year 1856, and subsequent years, and of other *Arzees* presented by his uncle on the same subject. The earliest of these papers seems to have been dated on the 25th of July, 1856, and the latest in 1858, and they contain statements of alleged acts of violence and threats by the Appellant against the Respondent and his uncle, of the arrest and conviction of the uncle on a false charge, which conviction was afterwards reversed by the Agent; this and other acts being attributed to the contrivance of the Appellant, and to the abuse by the Appellant's brother of his authority as *Moonshee* to one of the Assistant Agents. These *Arzees*, supposing them to be true, would abundantly support the charges brought forward in the pleadings and subsequent statements.

But it is urged, and with truth, that these *Arzees* are no proof of the facts alleged in them, and that there is no direct evidence that they were ever communicated to the Appellant. But for the purposes of this suit, the important question is, what was the impression on the Respondent's mind and under which he acted, rather than whether the impression itself was or not well founded; and we think that the *Arzees* contain sufficient evidence that at the time when the Respondent executed the instruments in dispute he was really under the influence of the feelings by which he alleges that he was induced to grant them, viz. that he believed that it was in the power of the Appellant, through his own influence and that of his brother with the Government authorities, to injure and to ruin him, and that for two years he had been suffering under such influence, and that the only way of relieving himself would be to comply with the exactions of the Appellant.

When regard is had to the nature of these instruments, and to the relative situation of the parties when they were executed, we think that more evidence would justly have been required to support them than was produced in this case by the Appellant, even if the transactions had taken place in Europe. But here they took place in a wild part of *India*, where exaggerated notions are entertained by the natives of the extent of power possessed over them by the Officers of the Government, and no great confidence seems to be felt in the honesty of the subordinate Officers, or the vigilance with which they are controlled by their superiors.

Now, upon these important points the Judge of the *Zillah* Court must be far more competent to form a correct opinion than persons unacquainted with the district; and in his judgment in both the cases he expresses himself in the strongest terms upon the subject. In one of his judgments he uses these expressions: "It is clear from the public records that the *Zemindars* of *Ganjam* entertain the belief that the public servants possess the power of injuring or befriending them, and they have been in the habit of furnishing their local Agents with large sums to secure their goodwill. Hence the Defendant's plea that he feared the influence of a man like the Plaintiff, conversant with all the details of public business, and enjoying the confidence of the then authorities, is consistent with the ideas and practice of his class." He then remarks (a fact which

must be within his own knowledge) that the Respondent first began to dispute the validity of these instruments about the time when the Appellant had fallen under the displeasure of the Agent on account of his intrigues in other *Zemindaries*, and when, therefore, the terror occasioned by his supposed influence with the Government authorities was removed, or at all events diminished, in the mind of the Respondent.

The Judges of the *Sudder* Court, who are gentlemen also well acquainted with the modes of thought and feeling amongst the natives of *India*, have unanimously concurred in the judgment appealed from, and on application for a review have persisted in their opinion.

It was said that in the *Razinamah* suit there was really no evidence. In strictness that seems to be so. But the suits were substantially suit and cross-suit, and the evidence in the one might very properly be looked at in the other. The effect of the decision in the *Razinamah* suit is only to remit the Appellant to the prosecution of his original claim, towards satisfaction of which, if he has any just demand, he seems already, under the *Razinamah*, to have received between Rs. 5,000 and Rs. 6,000.

Upon the whole, we must humbly advise Her Majesty to affirm both the decrees complained of, with costs.

28th November, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Ryan.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

RAJAH PERLADH SEIN,* ... *Appellant*,

versus

BABOO BHOODOO SINGH, *Respondent*.

Practice—Special leave to appeal—Staying proceedings in Court below—Ex parte application.

An appeal to *England* from an order of remand for trial *de novo* by the *Sudder* Court at *Calcutta* to the *Zillah* Court, was, after refusal, upon special application, admitted by the Judicial Committee of the Privy Council; whereupon the Appellant applied to the *Calcutta* High Court to stay proceedings pending the appeal to *England*, on the ground, that the decision of the Appellate Court would govern the question at issue, but his application was refused. A petition and an *ex parte* application for the same relief were then presented to Her Majesty in Council, but the Judicial Committee, in the Respondent's absence, refused to make any order, though without prejudice to the Petitioner's further application when he had served the Respondent.

BY an Order in Council, dated the 27th of July, 1863, special leave was given to appeal from a decree of the High Court of Judicature at *Calcutta*, dated the 7th of February, 1863, refusing an appeal from a decree of the late *Sudder* Court of the 27th of September, 1860. By this latter decree the Court remanded the suit to the *Zillah* Court to be tried *de novo*; the question at issue being the validity of a deed of sale and an account.

The Appellant, after the admission of the appeal in *England*, presented a petition to the High Court of Judicature at *Calcutta*, setting out the Order in Council allowing the appeal, and submitted that the decree of the 27th of September, 1860,

* 10, Moore's I. A., p. 78.

having been appealed from, could not be carried out against the Order in Council of the 27th of July, 1863. This application came on for hearing before the High Court on the 16th of September, 1864, when the Respondent appeared and objected to the proceedings being stayed, and the Court was of opinion, that there were no sufficient grounds for staying the further execution of the decree of remittal.

The Appellant now presented a petition to Her Majesty in Council praying that the proceedings in *India* might be stayed, pending the appeal; and submitted, first, that the hearing of the suit in the *Zillah* Court, if proceeded with under the remand, would involve much litigation and expense, and might turn out wholly unnecessary, as the validity of the instrument of sale would in fact depend upon the decision come to upon the appeal; and secondly, that the proceedings by the High Court under the remand of the suit, as well as the refusal to stay proceedings and the execution of the decree, was a violation of the Order in Council granting him leave to appeal; and he prayed that the proceedings ordered to be taken before the *Zillah* Judge under the remand by the decree of the 27th of September, 1860, as well as execution thereof, might be stayed, pending the appeal, and until the same had been heard.

The Respondent, being in *India*, was not served with notice of the application, which was made *ex parte*.

Mr. *Leith*, for the Petitioner,

Urged the above grounds, and, by analogy, referred to the practice of the House of Lords, *Macqueen's* Prac., pp. 236—8, in staying execution of proceedings pending an appeal to that House.

THE LORD JUSTICE KNIGHT BRUCE:

Their Lordships feel great difficulty in making any Order upon this petition. It is an *ex parte* application, novel in its circumstances and nature. Upon the whole, they think the petition must be dismissed; but, if the Petitioner desires it, his petition may stand over, with a view to enable him to try to bring the Respondent here, by serving him in *India*. If the Petitioner desires it a fresh application can then be made.

Mr. *Leith* elected to adopt this course,

And by an Order in Council, it was ordered, that the petition be dismissed, without prejudice to any further application to their Lordships.

2nd, 3rd, 5th, 6th, 7th, 8th, 9th, & 10th December, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

RAJAH LELANUND SINGH BAHADOOR,* ... } *Appellant,*

versus

MAHARAJAH MOHESHUR SINGH BAHADOOR, and by revivor, MAHARAJAH LUKHMISSUR SINGH, his son, MAHARAJAH RUHMUT ALI KHAN and others, and the Government, ... } *Respondents.*

Boundaries—Title—Evidence, Onus Probandi—Practice—Remittal to India for further enquiry—Costs.

In a case of disputed boundaries, the judgment of a majority of *Sudder* Judges, being, in the circumstances of the case, final and conclusive, and not as one in ejectment would be, and the effect of the judgment being to give some things to the Defendant which, on the evidence, belonged to the Plaintiff;—*Held* that the Judges were wrong in determining the case upon the mere failure of the Plaintiff on his part to support the burthen of proof cast upon him, even though the Plaintiff had failed to prove that no part of the disputed territory was included in what was claimed by the Defendant, and had been unable to prove by independent evidence his right to recover certain *Mouzahs* specified in the plaint; and

That the case should be remitted for further enquiry, but that the burthen of proof should nevertheless still rest upon the Plaintiff, as enough of Defendant's possession had been proved for the purpose.

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* 10, Moore's I. A., p. 81.

Upon a reversal of the decree of the *Sudder* Court, costs of the suit already paid by the Appellant ordered to be refunded, and the Court below directed to deal with such costs and all other costs of the suit, including those of the appeal according to the result of the said inquiry.

6th May, 1865.

THE case after argument stood over for consideration. Their Lordships' judgment was pronounced by

THE RIGHT HON. THE LORD JUSTICE TURNER:

The outline of this case is as follows:—At the time of the perpetual Settlement, the large *Zemindary* known as the *Khurruckpoor Mehals* in *Zillah Bhagulpoor* was settled with *Maharajah Kadir Ali Khan*, who in or before the year 1790 was in possession of it. It consisted of twenty-six *Pergunnahs*, of which five were alleged to be and were then held as *Lakhiraj*. Of these alleged *Lakhiraj Pergunnahs* it is only necessary to specify *Pergunnah Khurruckpoor Havelee*, which has throughout the argument before us been conveniently called "*Havelee*." Of the *Malguzary*, or revenue paying *Mehals*, it is sufficient to name *Pergunnahs Suhrooe*, *Sukrabadee*, and the most important of all, *Purbutparah*, which was sub-divided into *Tuppahs*, *Lodhwah* and *Semroum*, *Daygee*, *Mullia*, and *Bhudra*.

The Settlement above-mentioned was made, as in other cases, by *Pergunnahs*, without any survey or measurement of the lands comprised in them; and as this vast *Zemindary* included a great deal of wild, uncultivated mountainous and forest land, it may be supposed that, however well ascertained may have been the boundaries of the whole, those of its component parts, or *Pergunnahs*, *inter se*, were not very clearly defined. The effect of the Settlement was to fix permanently and for ever the revenue payable in respect of the *Malguzary*, or, as they are termed in these proceedings, "the *Nizamut Mehals*," and to leave the *Lakhiraj Mehals* free from the payment of revenue, but subject to the right reserved to the Government by *Ben.* Reg. XIX. of 1793, to resume and assess the lands, should the tenure, under which they were claimed to be held *Lakhiraj*, thereafter be found to be invalid. *Kadir Ali Khan* on his death was succeeded by his eldest son, *Ikbul Ali Khan*, who also died some time before the year 1836, and was succeeded by his brother *Ruhmut Ali Khan*.

In 1836, the Government impeached the *Lakhiraj* title of the *Zemindar*. *Pergunnah Havelee* was resumed and separately settled. The proceedings which resulted in the settlement of it will hereafter be fully considered. At present, it is sufficient to say that they began in the year 1836, and continued until the 9th of April, 1844, when a temporary settlement for twenty years was made with the *Maharanee Wujhoonissa*, to whom the interest of her husband, *Ruhmut Ali Khan*, had been transferred.

Pending the proceedings for the resumption and settlement of this *Pergunnah*, *Ruhmut Ali Khan* suffered the Government revenue on the *Nizamut Mehals* to fall into arrear, and these *Mehals* were accordingly sold by public auction for such arrears, and on the 11th of August, 1840, were purchased by the Appellant's father, *Rajah Bidianund Singh*, and another person, who afterwards transferred his share to *Rajah Bidianund Singh*. This sale, of course, put an end to the unity of ownership of the *Nizamut Mehals* and of *Havelee*; *Rajah Bidianund Singh* thenceforward being the *Zemindar* of the former, with all the rights possessed by the original *Zemindar* at the date of the perpetual Settlement; whilst the latter, subject to the rights of Government in respect of the revenue to be assessed thereon, continued to belong to *Ruhmut Ali Khan*, and after him to *Wujhoonissa*.

In 1845, *Wujhoonissa* having failed to pay the revenue assessed on *Havelee*, that estate was also sold for the arrears, and was purchased by *Maharajah Rooder Singh*, the grandfather of the present Respondent, *Lukhmissur Singh*, on the 5th of November, 1845.

The estates having thus become separate, boundary disputes took place between the owner of the *Nizamut Mehals*, or his tenants on the one side, and the owner of *Havelee*, or her tenants, on the other. It may be necessary hereafter to refer more

particularly to the proceedings to which these disputes gave rise. At present, it is sufficient to say that the controversy was continuing during the proceedings of the Government surveyors engaged in making a topographical survey of the *Zillah Bhagulpore* in the years 1846 and 1847.

It appears to have been the duty or practice of the Officers employed in this survey, or lay down the boundaries of estates or other divisions of land, where there was any dispute concerning them, according to the evidence which they might find of the actual possession of the lands. In the present case they had to deal with a controversy touching the boundary line between *Havelee* and *Pergunnah Purbutparah*, and the other *Nizamut Mehals* contiguous to it. The owner of the latter, on the one hand, insisted that this had been conclusively determined at the time of the settlement of *Havelee* by a map prepared after actual survey and admeasurement by a Captain *Ellis*, under the instructions of the settlement officers. The owner of *Havelee*, on the other hand, disputed the accuracy of Captain *Ellis's* map, if it purported to be a map of the entire *Pergunnah Havelee*, and questioned the intention to include the whole of *Havelee* in that map. The Officers of the survey, relying for the most part on the evidence which they had, or thought they had, of actual possession, came to a conclusion adverse to the Appellant's ancestor, and prepared the map known in the proceedings as "Captain *Sherwill's* map," by which upwards of 175,000 *beegahs* of land in excess of that comprised in Captain *Ellis's* map was attributed to *Havelee*, and taken out of the *Nizamut Mehals*, as laid down in that map. The effect of these proceedings was to leave somewhat doubtful the question, whether this land was included, or intended to be included, in the settlement of 1844, or whether it was a *Towfeer* or surplus which the Government was still entitled to assess *de novo*.

Some further proceedings afterwards took place in the *Foujdary* Courts and elsewhere, touching the right to the possession of this land; but the effect of these proceedings was to remit the Appellant, or his father, *Rajah Bidianund Singh*, to a regular suit, in which alone the title could be litigated.

The suit out of which this appeal has arisen was accordingly instituted by the Appellant on the 5th of June, 1851. Its object is to recover as part of the *Nizamut Mehals* the 175,000 *beegahs* of land laid down by *Sherwill's* map as within *Havelee*, in excess of the land attributed to *Havelee* by *Ellis's* map; but the plaint divides this land in certain proportions between certain specified *Mouzahs*, the names of which occur in the lists of the villages, comprised in *Pergunnahs Purbutparah* and *Sukrabadee*, which were prepared at the time of the perpetual Settlement, or shortly subsequent to it. The Defendants to the suit, the Respondents to this appeal, are the Government, *Maharajah Lukhmissur Singh*, and some of his tenants, and they insist that the 175,000 *beegahs* of land in question properly belong to *Havelee*.

The suit was heard first by the Principal *Sudder Ameen* of *Bhagulpore*, who by his decree, dated the 9th of July, 1855, dismissed the suit on the ground that the Plaintiff had failed to establish a title to recover the lands in question. This decision was based upon proceedings of the Government surveyors, and seems to imply that the land was *Towfeer*.

On appeal to the *Sudder Dewanny Adawlut*, that Court, by a majority of two Judges to one, confirmed the decision of the Principal *Sudder Ameen*, but did not adopt its grounds. The two Judges appear to have held that something in excess of the lands comprised in Captain *Ellis's* map was included in the *Havelee* settlement, that the extent of that excess was undetermined, and that it lay upon the Plaintiff to show what he was entitled to recover, which he had failed to do. The dissentient Judge, on the contrary, held that no part of the land in dispute was included in the settlement of *Havelee*; that, therefore, *ex necessitate*, the whole must be taken to form part of the contiguous *Nizamut Mehals*, and that the Plaintiff had established his title to recover it.

According to the view, therefore, both of the affirming Judges and of the dissentient Judge, the decision of this suit de-

pended on the question whether the land claimed, or any, and if any, what defined part of it, was included in the *Havelee* settlement; and we think that this was a correct view of the case. It was incontestible that the land in question formed part of the *Zemindary* which by the perpetual Settlement was assured to *Kadir Ali Khan;* but that *Zemindary* consisted partly of the *Nizamut* or revenue-paying *Mehals*, in respect of which the revenue payable by the *Zemindar* was then finally settled, and partly of the *Mehals*, including *Havelee*, which were alleged to be *Lakhiraj*, and on which, therefore, no revenue was assessed. The land in dispute is so situated that it must necessarily belong either to *Havelee* or to the contiguous *Nizamut Mehals;* but the perpetual Settlement unfortunately omitted to define the boundary line between *Havelee* and these *Mehals;* had it done so the question in the cause could not have arisen, since, we need hardly say, no Court would disturb what had been fixed by the perpetual Settlement. The resumption of *Havelee* afforded a fresh occasion for the definition of these boundaries, even whilst both *Havelee* and the *Nizamut Mehals* belonged to the same owner; because Government, by virtue of the resumption, acquired the right of assessing revenue upon all that lay within the boundaries of *Havelee*, whilst it had no right to assess any fresh revenue upon a single *beegah* of land within the *Nizamut Mehals*. Subsequent events severed the ownership of *Havelee* from that of the *Nizamut Mehals*, and the question of boundary then arose in this suit, not as a question of revenue between the Government and a *Zemindar*, but as one of title to land between the *Zemindars* and proprietors of two contiguous and separate estates, the *Nizamut Mehals* and *Havelee*.

In dealing with this question it must, as we have said, be assumed that so much of the land in dispute as was not included in *Havelee* belongs to the *Nizamut Mehals;* and in considering what was included in *Havelee* the Court below could only deal, as we upon this appeal must deal, with the *Havelee* settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting. If the boundaries of *Havelee* ascertained by it are at all capable of being corrected, they certainly cannot be corrected in a suit of this nature. All that we can determine in this suit is whether, according to the true construction and effect of the *Havelee* settlement taken as it stands, the whole, or what part of the lands in question, belongs to *Havelee*, or the whole, or what part of them, is included in the lands which were the subject of the perpetual Settlement.

In considering this question three views of this *Havelee* settlement present themselves for our consideration.

The first is that it included, and was intended to include, the whole of *Pergunnah Havelee*, and that all which it did include is within the limits of *Ellis's* map. The second is, that it included, and was intended to include, the whole of *Pergunnah Havelee*, but that some portion of what it did include lies beyond the limits of *Ellis's* map, and is to be found in the district of which the ownership is now in dispute. The third is, that it did not include the whole of *Pergunnah Havelee*, but that, either from accident or design, the large district in question, or some undefined portion of it, was omitted from the settlement, as well as from the map, and is now what in these proceedings is called a *Towfeer* or surplus.

We proceed, therefore, to consider the intention, extent, and effect of the *Havelee* settlement proceedings with reference to these views.

The first of these proceedings is that of the 1st of July, 1836. By it Mr. *Travers*, the Deputy Collector of the *Zillah Monghyr*, on grounds which, for the purposes of this suit, must be deemed sufficient, decided against the claim of *Ruhmut Ali Khan* to hold *Havelee* and the other four *Pergunnahs* to which we have before referred *Lakhiraj*, and affirmed the right of Government to resume and assess them.

There was an appeal against this Order, pending which the Government, not being able to effect an arrangement with the *Zemindar* as to the intermediate collections of *Havelee*, assumed the management of it by a *Tehsildar* of their own appointment. The appeal was dismissed on the

30th of November, 1837, by a Special Commissioner acting under *Ben.* Reg. III. of 1828, and the title of Government to assess the whole of *Havelee* thus became complete.

It then became the duty of the Deputy Collector, or the Settlement Officer, under *Ben.* Reg. II. of 1819, sec. 21, cl. 4, "to ascertain the limits of the land" (*i. e.* of the whole of *Pergunnah Havelee*), and to fix the assessment; and various proceedings were had with this object. Most of these proceedings are found *in extenso* in the first volume of the printed record, and we must refer to the more important of them.

On the 9th of April, 1838, Mr. *Farquharson*, described as the Superintendent of the *Khas Mehals*, but acting as the Settlement Officer in the case, held a proceeding as to *Havelee*. After reciting that the *Surhudbundee* and *Rookbabundee* (the specifications of boundaries and area) were not with the record, it ordered *Ruhmut Ali Khan* to file a list of the villages of *Havelee*, and also of *Pergunnahs Suhrooe*, *Sukrabadee*, *Singhool*, and *Luckhunpore*, *Pergunnah Purbutparah* (these being doubtless assumed to be the contiguous *Nizamut Mehals*), accompanied by a *Surhudbundee* thereof. It also ordered the *Putwarrees* to file the *Surhudbundee* and *Rookbabundee* of their respective *Mouzahs*. The object obviously was to obtain a definition by metes and boundaries both of the whole *Pergunnah* and of its component villages.

In the proofs and documents filed by the Plaintiff we have the actual process issued in respect of *Rounuckabad*, a principal village of *Havelee*, under this order, and the return to it. The dates are the 17th of April and the 31st of May, 1838, and there is a proceeding in the office of *Khas Mehals* of the 14th of April, 1838, before Mr. *Farquharson*. It complains of the omission of a village named *Bheembandh*, though part of *Havelee*, and that two other villages have been returned as waste, though in fact they were inhabited. It directs the attachment of *Mouzah Bheembandh* as far as *Koh Marug*, *Tappah Dighee*, and gives other directions that are not material to the present question. It orders notice to be sent to *Ruhmut Ali Khan* that no settlement will be concluded with him unless he file correct *Jummabundee* papers.

On the 11th of November, 1838, *Mootee Lall*, the *Tehsildar* appointed by Government, reported to Mr. *Farquharson* that two *Mouzahs* adjoining *Bheembandh*, one named *Goormah*, the other *Pakum*, were west of *Bheembandh* in the hills, and asked for an inquiry concerning them.

This led to Mr. *Farquharson's* proceeding of the 23rd of January, 1839. In that, after stating that it had come to his knowledge that two villages (there called *Tolahs*) are situate in *Bheembandh*, but had not been attached, he directs the issue of a *Purwannah* to *Mootee Lall*, ordering him to bring these *Tolahs* under collection, and to explain why they had not been resumed along with *Bheembandh*.

Then we have the report of *Mootee Lall*, the *Tehsildar* of *Khas Mehal*, in answer to this order; it is dated the 8th of April, 1839. It appears to be indorsed on the *Purwannah*, and reports that after the issue of it, Mr. *Farquharson* had arrived at *Khurruckpoor* and had given a verbal order to relinquish *Mouzah Kormaha* (which is obviously the same place as that previously called *Goormah*), and to have the survey of *Kita Bakum* (before called *Pakum*) made with *Bheembandh*; that afterwards a *Purwannah* of the 23rd of March, directing a separate survey of *Bakum*, had arrived, and that accordingly *Mouzah Kormaha* had been relinquished, and *Mouzah Bakum* would be surveyed. On this report Mr. *Farquharson* has indorsed "That this be put up with the record: May 16th, 1839."

Intermediately Mr. *Farquharson* seems to have taken the depositions of *Meer Dad Khan*, a former *Tehsildar* of *Havelee*, and of *Bhowanni Lall*, described as an inhabitant of *Havelee*, but *Peshkar* of *Pergunnah Purbutparah*. The former was taken on the 8th of April, 1839, the other was taken on the 15th of March, 1839. They may have conduced to Mr. *Farquharson's* determination to relinquish *Kormaha*.

In the evidence there are detailed measurements of the lands of *Mouzahs Rounceekabad*, *Bheembandh*, and *Mudhobun*. The

second alone is dated, and as the date is the 24th of March, 1839, it may be inferred that *Kita Bakum*, which by the report of the 8th of April is treated as about to be separately measured, was not included in this measurement.

On the 15th of April, 1839, *Ruhmut Ali Khan* who describes himself as *Malik* or *Zemindar* of the entire *Mehals* of *Khurruckpoor*, presented a petition, which, as we understand it, is confined to *Bakum* as a *Kita* or part of his *Nizamut Mouzah Bhorebhundaree*. He protests against its inclusion in *Havelee*. The petition seems to have been presented to Captain *Ellis*, then engaged in surveying *Havelee* and making his map. He on the 22nd of April, 1839, directed a copy to be sent to the Settlement officer (Mr. *Farquharson*), who on the 6th of May, 1839, directs the officer (*Ellis*) to be informed that the case is pending in that *Cutcherry*. The decision was adverse, for we have a further petition from *Ruhmut Ali Khan*, which (and as it seems wilfully) confounds *Bakum* with *Kormaha*, alleging that the former though relinquished had been separately surveyed by *Mootee Lall*; that the measurement papers of *Havelee* are being prepared and *Kita Bakum* inserted in the English map, and stating that he objects to take attested copies of the English map because *Kita Bakum* (a *Nizamut Mehal*) is inserted in it. The order indorsed on this petition is dated the 8th of July, 1839, and is, that i be rejected.

On the 14th of September, 1839, a summary settlement was concluded by Mr. *Farquharson* with *Ruhmut Ali Khan* for one year, *i. e.* from the 1st of May, 1839, to the 30th of April, 1840, and this by a subsequent order was confirmed and extended to April, 1841.

It was during the currency of this temporary settlement that the *Nizamut Mehals* were sold, and *Ruhmut Ali Khan's* interest became limited to the resumed *Mehals*.

It is also probable that during the same period Mr. *Beddon*, who had succeeded Mr. *Farquharson*, began the investigation which resulted in the proposal for a permanent Settlement, next to be considered, and that, in aid of that investigation, Captain *Ellis*, by his proceeding of the 30th of June, 1840, directed "the measurement papers of the *Mouzahs* of *Havelee*, filed by the *Ameens*, which had on comparison with the English measurement papers been found to correspond," to be forwarded to the Superintendent of *Khas Mehals*.

Mr. *Beadon's* final settlement proceeding is dated the 16th of December, 1841. It gives a summary of the former proceedings, and states that "whereas a perpetual Settlement of that *Mehal* (*Havelee*) was proper, and the *Mehal* having been surveyed by the Revenue Surveyor (who from the mention of his name in the next paragraph is clearly Captain *Ellis*), the measurement papers are forthcoming in the office. Hence, after inquiring into the *Jummabundee*, from the statements and papers of the cultivators and *Putwarrees*, a perpetual Settlement had been, conformably to Regulation VII. of 1822, concluded from the 1st of May, 1841."

The proceeding then details at great length the principles upon which this Settlement had been effected. It seems sufficient to state that Mr. *Beadon* took the area as measured at 123,207 *beegahs* and a fraction. From this he deducted 60,433 *beegahs* and a fraction as absolutely jungle, waste, and unculturable, leaving a balance of 62,774 *beegahs* and a fraction. This again, when sub-divided, was found to consist of 18,998 *beegahs* and a fraction of land actually cultivated, and producing, or capable of producing, rent; and of 43,775 *beegahs* and a fraction of land which, though not cultivated, he describes as "culturable." The annual revenue derivable from the cultivated land he estimated at S. Rs. 15,517, to which he added S. Rs. 738. as. 2, the amount of *Sayers* or miscellaneous revenue (a description of revenue which will require further consideration), making the total revenue S. Rs. 16,255. as. 6. The moiety of this, being, when converted from sicca Company's rupees, 8,666 and a fraction, he fixed as the revenue payable perpetually, abandoning all further claim to revenue from either the 43,775 *beegahs* of culturable, or the 60,433 *beegahs* of unculturable land.

It is to be observed that *Bakum* (spelt

Bakhum) is included in the list of villages, its measured area being stated to be 129 *beegahs* 19 *biswas*. It follows, therefore, that whether the *Bakum* resumed by Mr. *Farquharson* be in *Ellis's* map or not (a question hereafter to be considered), its measured area is included in the 123,207 *beegahs*, the basis of the Settlement.

It is further to be observed that there is no trace of *Goormah* or *Kormaha* in this or the subsequent Settlement proceeding.

Again, it is to be observed that the total of the miscellaneous revenue, *Sayers*, or cesses, was taken by Mr. *Beadon* to be S. Rs. 738. as. 2, of which S. Rs. 576 consisted of rents payable by the lessees of the *Sayer Mehal*, according to the deposition of *Ameen Dad Khan*, taken on the 14th of March, 1841, and the rest consisted of the *Sayers* returned by the *Putwarrees* and *Ameens*. We may here observe, too, that in the S. Rs. 576 is included an item of S. Rs. 400 payable by *Rujjib Ali* as farmer of "*Ghauts Marug* and *Kurrailee*, &c.," touching which we have also his deposition, taken the 24th of March, and the *Ummulnameh* of 1248 (1841), a document which may be of some importance with reference to the present inquiry; for whilst it gives the names of various *Ghauts*, as proposed to be included in the lease to which it refers, it seems to indicate that the lease was to comprise not only such tolls as may be conceived to be leviable from persons passing the *Ghauts*, but *Bunkur*, which properly is a right of cutting wood, and *Phulkur*, a right of gathering fruit—rights indicative of a certain dominion over the soil in a given locality.

On the 16th of September, 1843, Mr. *Beadon's* proposal of a permanent Settlement on this basis was overruled by the Commissioner, who, on the 25th of the same month made over the estate to Mr. *Joachim Piron*, to be settled *de novo*.

Shortly before this, and on the 13th of June, 1843, the transfer of *Havelee* from *Ruhmut Ali Khan* to *Wujhoonissa* had taken place.

Mr. *Piron's* first step was to ask whether he was to make a new measurement. He was told to test the former measurement; to adopt it if he found it to be correct; to make a new one if he found it to be incorrect.

Mr. *Piron's* general report bears date the 20th of June, 1844; his settlement proceeding of the same date: the *Doul* Settlement. The report states that he made a settlement for twenty years with *Wujhoonissa*, of which the other papers give the details and the principles. His report also states expressly that the measurement which he tested was that completed under Captain *Ellis*; that he found it correct in every instance; and that his only objection to the former survey regarded the classification of the various qualities of land and the rates assessed thereon.

The result of Mr. *Piron's* settlement was somewhat different from that of Mr. *Beadon*. But it is perfectly clear that both Officers dealt with the same measured area, viz. the 123,207 *beegahs* and a fraction defined by Captain *Ellis*. Mr. *Piron*, however, making a somewhat different classification of the lands, fixed the amount of revenue derivable therefrom by the proprietor of *Havelee* at S. Rs. 20,678-3-17½. In this he included the sum of S. Rs. 2,336-8-9¾ for *Sayers*, cesses or other miscellaneous revenue. Instead of leaving, as Mr. *Beadon* had done, free from any direct assessment of revenue 60,443 *beegahs* of unculturable + 43,775 *beegahs* of culturable land, making together 103,209 *beegahs* of land, he excludes from assessment only 4,447 old fallow land, + 35,051 rocks with jungle, + 42,586. 8. 4 of jungle, making a total of 82,084 *beegahs* and a fraction of land free from assessment.

The result of Mr. *Piron's* proceedings was a settlement with *Wujhoonissa* for twenty years at the moiety of the gross rental as estimated by him, which, when converted into the Company's rupees, amounted to C. Rs. 11,028-12-10.

The documents by which this arrangement was carried out with her, and her petition, *Kabooleat*, and Mr. *Piron's* final order, all of the 9th of April, 1844, are all among the papers in the case. In the *Kabooleat* she describes herself as occupier of the entire *Pergunnah Havelee*, and says "123,186 *beegahs* and a fraction of land of the *Pergunnah* have been taken by me

from you under temporary settlement at an absolute sum of C. Rs. 11,128-12-10, being a moiety of the *jumma*, including *Tulkur*, *Bunkur*, *Phulkur*, &c."

We stop at this point in order to state the conclusions at which we arrive from the proceedings and documents above referred to, in so far as they do not relate to the *Sayers* or cesses, or miscellaneous revenue—conclusions which in our judgment are no way affected by what has already appeared, or by what we shall presently state, as to these *Sayers* and cesses, or miscellaneous revenue. We are satisfied from these proceedings and documents that the settlement officers throughout intended to resume and settle and assess the revenues of the whole of *Pergunnah Havelee*, and that they throughout proceeded on the assumption of the correctness of the survey, measurements, and map made by or under the inspection of Captain *Ellis*. Looking to the great care and the minute attention which was given to the settlement of this *Pergunnah*, it cannot be supposed that any portion of it was designedly omitted from the settlement; and if any portion of it was omitted by accident, this is not a suit in which the accident can be set right. We think, therefore, that the third view of this settlement, to which we have above referred, may for the purposes of this suit be laid out for consideration, and that no part of the district in question can for any of those purposes be considered as *Towfeer*, or surplus. We are also satisfied from the evidence afforded by these proceedings that *Bakum* was included not only in the measured area of 123,186 *beegahs*, but also in *Ellis's* map. The objection expressed by *Ruhmut Ali Khan* in his rejected petition, to take attested copies of the map because it included, or was about to include, *Bakum*, is, we think, sufficient to prove this to have been the case.

Again, we are satisfied from these proceedings, and especially from the report of *Mootee Lall*, and Mr. *Farquharson's* mode of dealing with that report, and from the absence of all mention of *Goormah* or *Kormaha* in the subsequent settlement proceedings, that that village was advisedly relinquished by Mr. *Farquharson* as part of the *Nizamut Mehals*, and probably as part of *Mouzah Bhorebundharee* in *Pergunnah Purbutparah*.

It may be convenient also here to add, although it has no immediate reference to the foregoing proceedings, that from the proceedings by Mr. *Beadon*, officiating special of Deputy Collector of the 27th of August, 1841, the case of *Mouzah Ghorakhore* appears to have been solemnly decided in favour of the *Nizamut Mehals*, and that, in our opinion, the proceedings of the officers of survey, of the 11th and 24th of June, 1848, are not entitled to weight as against that decision. We think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to *Havelee*, and what to the *Nizamut Mehals*.

It results from what we have already stated that, looking at this case without reference to the *Sayers*, cesses, or miscellaneous revenue, we should have come to the conclusion that *Havelee* as settled consisted only of the measured area of 123,186 *beegahs*; that this was all comprised within *Ellis's* map, and that the Appellant, by showing this, had at least shifted the burthen of proof, and established a good *primâ facie* title to recover the whole of the disputed territory; but it certainly cannot be denied that what appears upon the record before us as to these *Sayers*, or cesses, and this miscellaneous revenue, raises a very serious question whether some territory in excess of the measured area, and beyond the limits of *Ellis's* map, does not belong to *Havelee*, and was not included in the settlement of it. It is necessary, therefore, to see how the case stands as to these *Sayers*, or cesses, or miscellaneous revenue. By Mr. *Beadon's* settlement the revenue derived from these sources is stated to amount to S. Rs. 738-2; and we have already shown how that sum was made up. By Mr. *Piron's* settlement the *Sayers* or cesses are stated as amounting to Rs. 2,336. 8 as. 9¾ p., made up partly of the sums returned by the *Putwarrees* and *Ameens* as the *Sayerat* of their respective villages, and partly of sums aggregating S. Rs. 1,116, which were not so returned; this last-mentioned item being thus entered in the settlement proceed-

ings :—" *Bunkur* and *Boondee Mehals*, besides the *Putwarree's* paper, whatever came to light by the depositions of farmers and persons informed, and by the perusal of *Pottahs*, &c., S. Rs. 1,116." We have here, therefore, some, at least, of these *Sayers*, or cesses, described as *Bunkur* and *Boondee Mehals;* and other parts of this voluminous record contain the same or a similar description of them. We are of necessity, therefore, led to inquire what these *Bunkur* and *Boondee Mehals* really were; and to some extent, at least, the evidence leaves no doubt upon this point.

Mr. *Piron* himself says that the S. Rs. 1,116 was made up of S. Rs. 785 inserted in the *Pottah* of *Peer Khan Soobahdar;* of S. Rs. 251 inserted in the deposition of *Rajee Singh*, son of *Durshun Singh ;* and S. Rs. 80, inserted in the deposition and *Pottahs* of *Posun Pasee* and others.

Now, we have *Peer Khan Soobahdar's* examination, which seems to have been taken on the 20th of January, 1844. He is described as farmer of *Mehal Bunkur* and *Boondee Koh Marug*, and *Kurrailee*, &c., *Pergunnah Havelee*. He professes to hold, but in the name of his son, *Wahid Khan*, *Ghauts Marug*, *Kurrailee*, *Tabawee*, *Khuru Khataun*, *Hursa Poteeah*, *Burramupea*, *Shakole*, and several other hills and *Ghauts*, for the names of which he refers to the *Pottah*, at a rent of S. Rs. 785, and to pay the rent to *Ruhmut Ali Khan*.

Again, we have the examination of *Rajputee Singh*, the son of *Durshun Singh*, taken on the 30th of January, 1844, from which and the proceeding of Mr. *Piron* of the 26th of that month, we learn that *Durshun Singh* was farmer of *Mehal Bunkur Ghaut Koolhurhea*, attached to *Mouzah Mudhoobun*, *Pergunnah Havelee;* that he, during the subsistence of his lease, paid a *jumma* of S. Rs. 251 to *Ruhmut Ali Khan*, who on the expiration of the lease in April, 1844, was about to bring that *Bunkur Mehal* under his personal collection.

The S. Rs. 80 " inserted in the depositions and *Pottahs* filed by *Posun Pasee* and others" we have been unable to trace in the record.

Again, Mr. *Quintin*, who was the Superintendent of surveys of *Zillah Bhagulpore*, in his letter of the 19th of October, 1848, addressed to Mr. *G. F. Brown*, the Commissioner of Revenue for the division of *Bhagulpore*, refers to a variety of *Ghauts* as included in *Piron's* settlement; and so far as we can see they can have been so included only under the head of *Bunkur* and *Boondee Mehals*.

Again, it is clear upon the evidence that *Ghauts Marug* and *Kurrailee*, and possibly other *Ghauts* held by *Peer Khan Soobahdar* in the name of *Wahid Khan* at the date of Mr. *Piron's* settlement, were, at the date of Mr. *Beadon's* settlement, held by *Rujjib Ali*, and, indeed, that the whole of the property, whatever it was, the revenue of which Mr. *Beadon* estimated at S. Rs. 576, is included in the property of which the revenue was estimated by Mr. *Piron* at S. Rs. 1,116.

It is clear, therefore, that Mr. *Piron's* settlement did include under the head of *Bunkur* and *Boondee Mehals* the revenue coming from certain *Ghauts*, of which the most prominent are *Ghauts Marug* and *Kurrailee;* and that Mr. *Piron* was right in including rights in these *Ghauts* as part of the assets of *Havelee* is, we think, almost proved to demonstration by the village papers in the second and third volumes of the Appendix to which Mr. *Melvill* directed our attention.

Some of these are produced by the Appellant, others by the Respondent, and the two classes show, with a correspondence in minute details that proves their genuineness, that long before the resumption the proceeds of these *Ghauts* were uniformly treated by the owners of the whole *Zemindary* as part of the revenue of the *Lakhiraj Mehal*, *Havelee*. Against this evidence it is vain to set the award of *Ruhmut Ali Khan* of the 13th of April, 1837, after the date of the resumption, or the *Kabooleats*, or the occasional entry in the village accounts of *Morkhut* as *Marugkhat*. They would at most support the theory that there may have been more than one *Ghaut* of the same name, or different rights resulting from the same *Ghaut;* the two former classes of evidence may, indeed, more plausibly be referred to the desire, after the resumption, to claim these *Ghauts* for

the *Nizamut Mehals*, which, until the sale of those *Mehals*, it was *Ruhmut Ali Khan's* interest to do.

It must be taken, then, that Mr. *Piron* not only included, but properly included, the revenue arising from *Ghauts Marug*, *Kurrailee*, and other *Ghauts* in his settlement; but then the question is, What was this property, and does the ownership of it imply the ownership of any land in excess of the measured area, and beyond the confines of *Ellis's* map?

There is much evidence bearing more or less directly upon this point. There is the *Ummulnameh*, to which we have already referred, and there are the various suits and proceedings arising out of the long-continued litigation concerning these *Ghauts*.

The earliest of these proceedings which we find is under date the 12th of March, 1842. It was before the Magistrate in the Criminal Court under Act, No. IV. of 1840, and arose out of the alleged forcible dispossession of *Rujjib Ali*, the farmer under *Ameer Buksh*, of *Ghaut Bhoondee*, and *Koh Marug*, &c., by *Munniar Rae*, claiming the same subjects under a *Pottah* granted by *Ruhmut Ali Khan*, in his capacity of *Zemindar* of the *Nizamut Mehals*. *Rajah Bidianund Singh* intervened in the suit, objecting that it was brought in collusion with the former proprietor of the *Nizamut Mehals*, *Ruhmut Ali Khan*. This may have been the case, but the very objection shows that there was then a dispute whether the parcels in *Rujjib Ali's* farm, or some of them, belonged to *Havelee*, or to the *Nizamut Mehals*. The decision as to possession was in favour of *Rujjib Ali*.

The proceeding of the 24th of March, 1841, before Mr. *Beadon*, shows that during the investigation which led to his settlement there were disputes between the auction purchaser and the owner of *Havelee* touching certain stone quarries stated to be with the hill *Mar* and part of the *Boondee Mehal*. The report of *Roushun Lall*, Record Keeper of the *Khass Mehal* department, of the 21st of September, 1841, was obviously made in answer to a reference made in some suit arising out of the same dispute touching these *Ghauts*, which we have been unable to trace. It shows that as early as the 21st of September, 1841, Mr. *Beadon* had included the *Ghauts* held by *Rujjib Ali* in the settlement of *Havelee*.

The question, whether these *Ghauts* belonged to *Havelee* or to the *Nizamut Mehals* continued to be litigated in one shape or another during the whole period which elapsed between the dates of the settlement by Mr. *Beadon* and that by Mr. *Piron*.

One instance is the suit of *Kishna Tewarry*, of which the final proceeding is that of the 12th of June, 1845, which gives the history of the whole litigation. It began with a summary suit brought before the Collector by the *Naib* of the auction purchasers of the *Nizamut Mehals* (we presume in their name) against the Plaintiff for rent. The Collector has under the Regulations no jurisdiction to entertain such a suit unless the relation of landlord and tenant subsists between the parties. He, nevertheless, made a decree against *Kishna Tewarry* for the sum sued for. Thereupon *Kishna Tewarry*, alleging that he was not the tenant of the purchasers of the auction *Mehals*, but a sub-tenant of the owners of *Havelee*, brought his suit in the Civil Court (the *Moonsiff's*) against *Rajah Bidianund Singh* to quash the Collector's decree as made without jurisdiction. The *Moonsiff* decreed in his favour. There was an appeal to the Principal *Sudder Ameen*, who was against him. This was followed by a special appeal to the *Sudder Dewanny Adawlut*, which Court remitted the cause back to the Principal *Sudder Ameen*, with directions to try the proprietary right. This protracted and animated litigation, ostensibly for a sum of less than Rs. 7, was obviously made a mode of trying the question of title between *Rajah Bidianund Singh* as the purchaser of the *Nizamut Mehals*, and first *Ruhmut Ali Khan* and afterwards *Wujhoonissa* (each of whom intervened in the suit as an objecting party), as the owner of *Havelee*. The proceedings show that the real issue was, whether certain subjects, as to which all parties were agreed, including *Ghauts Marug* and *Kurrailee*, belonged to *Havelee* or to the *Nizamut Mehals*. The proceeding and report of the 9th De

cember, 1843, are set fully forth in the evidence, showing that *Ghauts Marug, Kurrailee*, &c., were included in Mr. *Beadon's* settlement, were before the Court. The decision was, that the *Moonsiff's* decree should be upheld, and that it was impossible to determine the proprietary right except in a regular suit, in which the two claimants should be Plaintiff and Defendant. Not the least important part of this proceeding is that *Rajah Bidianund Singh*, in his answer in the suit, alleged that the *Ghauts* did not appertain to the rent-free *Pergunnah Havelee*, that the Revenue Surveyor had excepted them from the measurement. The objectors do not contest this last proposition, but insist that they are attached to *Havelee*, and do not belong to *Purbutparah*. Both sides, then, seem to admit that the subject of dispute was beyond the measured area and the confines of *Ellis's* map. There are similar decisions to the above in other suits specified and set forth in the Court below. The last is as late as the 15th of July, 1847.

Another instance of litigation involving the same issue is that in which *Syud Reaz Ali*, claiming as farmer of *Tuppah Lodwah*, was the suing party. By a proceeding of the 20th of November, 1843, the Collector of *Monghyr*, before whom this person had brought a summary suit to recover rent alleged to be due from one *Omachurn*, then an occupier of part of the *Boondee Mehal*, the Defendant having pleaded that the property in respect of which he was sued was part of *Havelee*, and had been settled with *Ruhmut Ali Khan*, called for the Settlement proceeding, and, in its absence, for a report from the Collector of *Bhagulpore* whether *Mehal Boondee* of *Ghauts Kurrailee* and *Komaruk* (obviously the same as *Kohmarug*) was comprised within the Settlement rights of *Ruhmut Ali Khan*, or was appended to any other *Mehal*.

There is a report of the Record-keeper which purports to bear date the 13th of November, 1843, which was apparently made in answer to this requisition, though there is an inaccuracy in the printed date. It confirms the fact of the settlement as alleged by the Defendant. On this coming in, the suit was finally disposed of by Mr. *Vansittart*, the Collector, who dismissed the suit as one which he was incompetent to try, with liberty to the Plaintiff to sue in the Civil Court, if so advised. By this proceeding, it appears that *Wahid Khan*, the then farmer of *Ghauts Marug, Kurrailee*, &c., under *Havelee*, had intervened in the suit against his sub-tenant.

Again, the proceedings of the Collector of *Bhagulpore* of the 11th of November, 1843, those of the 9th of December in the same year, and the proceeding of the 19th of March, 1844, on the petition of *Syud Reaz Ali*, a farmer of *Tuppah Lodwah*, all point to the conclusion that during the investigation which led to the settlement of Mr. *Piron*, *Meaz Reaz Ali*, claiming title under *Rajah Bidianund Singh*, if not *Rajah Bidianund Singh* himself, was unsuccessfully resisting the inclusion of the *Bunkur* of *Ghauts Marug, Kurrailee*, &c., in the settlement of *Havelee*. The proceeding of the same Collector of the 11th May, 1844, is also some evidence of this.

It appears that *Peer Khan Soobahdar* delivered over possession of *Ghauts Marug, Kurrailee*, and the other *Ghauts* comprised in his firm, to the purchaser of *Havelee* at the sale for arrears of revenue in November, 1845, or attorned as tenant to him.

These contentious proceedings certainly afford a strong inference that *Ghauts Marug, Kurrailee*, and others, which were included in the settlement, were something beyond the limits of the measured area and Captain *Ellis's* map. It is impossible to read them without believing that the parties knew well what they were disputing about, and that each was claiming the same things. It is not probable that these things were within the measured area. *Rajah Bidianund Singh* could hardly push his pretensions so far as to claim anything within that area. On the contrary, as we have seen in *Kishna Tewarry's* case, his contention was that the things claimed were beyond the measured area, and, therefore, belonged to him, and the opposite party seems to have admitted the fact and denied the consequence. Had one of the parties been claiming a *Ghaut* in one part of a mountain range, and the other insisting on his right to retain a *Ghaut* of the same name in another part of the range,

it is inconceivable that there should be no trace of such a mistake in the pleadings of the parties, the reports of the Collectors, and the judgments of the Courts. In truth, the mention of the farm sometimes of *Rujjib Ali*, sometimes of *Wahid Khan*, in these proceedings, almost establishes the identity of the subject in dispute with the subject of the settlement.

The proceedings of the Officers employed in the topographical survey also bear upon this point.

Of the reports of *Talib Kurreem* and *Syud Hossein, Thachabust Ameens*, dated respectively the 28th of February and the 10th of February, 1847, both in answer to the petitions from *Rajah Bidianund Singh* and the orders thereon, it is sufficient to say that if they have no other value, they at least prove that when these persons passed from admitted portions of *Pergunnah Purbutparah* in the course of their survey into the disputed territory, they were met by claims on the part of *Rooder Singh* and his tenants; and a *bonâ fide* contention whether the land on which they stood, which they went to survey, and as to the locality whereof there could be no mistake, belonged to the *Nizamut Mehals*; or, as appertaining to some of the *Ghauts* in question, was part of *Havelee*.

Then came the proceeding of Mr. *John Brown* on the 5th of April, 1847, in which both the parties were in presence. Mr. *Brown's* conclusion is no doubt against the view contended for by the Respondent, that the ownership of the revenue of these *Ghauts* imports the ownership of land in excess of the measured area, but his proceeding sufficiently shows that what the parties were claiming was in the disputed territory; one witness at least (*Lushkurree Lall*) connects the property claimed with the former holding of *Soobahdar Khan*; and though Mr. *John Brown*, in his eighth reason, suggests that the *Ghauts Marug* and *Kurrailee*, that were settled, are within the measured area, he does not point out where they are situated. Nor was there any suggestion on the part of the opposite party that *Rooder Singh* had shifted the locality of the property, so long in dispute between *Havelee* and the *Nizamut Mehals*. Mr. *Brown's* decision seems to have been overruled by Mr. *Quintin*, mainly on the ground that it proceeded on his construction of the settlement without regard to the evidence of possession.

Then followed the proceeding of the Deputy Collector, *Surfraez Ali*, of the 29th of December, 1847, in which there may be some false reasoning as to some of the points before him, but which clearly establishes that the *Ghauts* there claimed as comprised in the settlement of 1844, were the *Ghauts* of those names in the disputed territory, and were sworn to by *Soobahdar Khan*, who seems to have ceased to have any interest in the question, to be the *Ghauts* that were comprised in his lease. It seems very difficult to question the finding of this Officer making a local investigation, that the identity of the *Ghauts* claimed with those settled was made out.

Again, Captain *Sherwill*, the Revenue Surveyor, was a European officer of rank and of scientific reputation. He is at least entitled to credit for knowing his own business of topographer. He seems to have come by another road to the same conclusion as the *Ameens*, viz. that a large hilly district belonging to *Havelee*, and comprising these *Ghauts*, had been omitted from *Ellis's* map. He may be no authority touching questions of property, but he must at least be taken to have laid down accurately in his map the positions of the *Ghauts* known in the district as *Marug*, *Kurraille*, and by other names, about which the parties were disputing before the *Ameen*. His personal examination of the district is recorded in Mr. *Quintin's* final proceeding of the 24th June, 1848, at p. 171. On the other hand it is to be observed that Captain *Ellis's* map does not profess to fix the sites of these *Ghauts*. Their existence within its boundaries is mere matter of speculation suggested by the ingenious and able argument of the Attorney-General, who did not attempt to point out precisely where they were situate.

This evidence, however, seems to us to point for the most part rather to what was claimed as belonging to *Havelee* than to the nature and character of the *Bunkur* and *Boonder Mehals* above-mentioned,

and of the revenue arising from the *Ghauts*, of which, in part at least, they consisted; and certainly it does not satisfy us that *Havelee*, if entitled to any part, was entitled to the whole of the land in question in right of these *Bunkur* and *Boondee Mehals* and *Ghauts*. It is to be remembered that we have here to deal with a tract of land of enormous extent surrounded by *Havelee* and other *Pergunnahs*, and it is not easy to suppose that so large a tract of land should have escaped the attention of Captain *Ellis*, if the whole of it belonged to *Havelee* at the time of its being resumed; neither can we easily suppose that this large tract of land could have been intended to have been included in *Havelee* settlement under the description of *Sayers* and cesses, when we find that other land of precisely the same quality and character was in that settlement described as land. We find, too, that the Officers of the survey have, as we have already pointed out, given to *Havelee* more than in our opinion belongs to it, and looking to the whole of the evidence in the case, we cannot see our way to conclude judicially that they have been right in giving to it the rest of land in question.

We agree, indeed, with the majority of the *Sudder* Judges, that the Appellant has failed to prove that no part of the disputed territory was included in the Settlement, and that he has failed to prove by independent evidence his right to recover the *Mouzahs* specified in the plaint; but we cannot think that they were right in determining the case upon the mere failure on his part to support the burthen of proof cast upon him. Their judgment is not like one in ejectment under the old procedure; it is as final and conclusive between the parties as an adjudication on the merits would be. And its effect, as we have shown, is to give to *Havelee* some things which, on the evidence, we think belong to the *Nizamut Mehals*.

In these circumstances, the case, we think, is one which calls for further inquiry; but in saying this we by no means mean to intimate that the Appellant can be relieved from the burthen of proof. On the contrary, we think that there has been so much of possession on the part of *Havelee* that the burthen of proof must still rest upon the Appellant.

For the reasons which we have given, we think that this decree cannot be supported in its integrity, and the Order which we shall humbly recommend Her Majesty to make upon this appeal will be,—

To reverse the decree, but without prejudice to any question which may arise upon the inquiries to be made as after directed;

To declare the Appellant entitled to the *Mouzahs Goormah* and *Ghorakhore*, and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as are not included in the settlement of *Havelee*;

To declare that the settlement of *Havelee* comprises only the measured area of 123,207 *beegahs*, and so much of any of the land in dispute as upon the inquiries after directed may appear to belong or be properly attributable to the *Bunkur* and *Boondee Mehals* in the pleadings mentioned, or to the *Ghauts*, of which the same in part consist; and that the rights of *Havelee* in respect of *Bakum* do not extend beyond the 129 *beegahs* and 19 *biswas* mentioned in *Beadon's* settlement, and which are included in the 123,207 *beegahs*;

To inquire what is the nature and character of the *Bunkur* and *Boondee Mehals*, and of the *Ghauts* comprised therein respectively which are included in *Piron's* settlement, and are therein estimated at S. Rs. 1,116; and whether the same, or any, and which of them, included any and what part of, or any and what right or interest in the land in question in this suit;

To declare that so much of the land in question in this suit as may upon such inquiry appear to be comprised in the said *Bunkur* and *Boondee Mehals* or *Ghauts* belong to *Havelee*, and that the Appellant is entitled to recover the residue of the land in question, and to direct the Court to proceed in the suit as upon the result of such inquiry may appear to be just;

To direct any costs of the suit already paid to be refunded, and the Court to deal with such costs, and all other costs of the suit, including the costs of this appeal, as

may seem just, having regard to the declarations aforesaid, and to the result of the said inquiry;

To declare that this Order is to be without prejudice to any proceedings which may hereafter be taken for the settlement of *Havelee*.

12th December, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Master of the Rolls (The Right Hon. Sir John Romilly).

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Court of the Judicial Commissioner of the Province of Oude.

SALIGRAM and HURNARAYUN,* ... ... } *Appellants*,

versus

MIRZA AZIM ALI BEG, ... *Respondent*.

Construction, Circular Order, No. 104 of 1860, secs. 9 and 10, applying to the Province of Oudh—Limitation.

Sec. 9 of the Circular Order No. 104 of 1860 applying to the Province of Oudh which has reference to suits in which the period of limitation is to be three years, and which is in these terms:—"Suits for money lent for a fixed period, or for interest payable on a specified date or dates, or for breach of contract, unless there is a written engagement or contract, and where Registry Offices existed at the time such engagement was registered within six months of its date, and signed by the party to be bound thereby, or his duly authorized agent" construed to apply where there is a written engagement, and where, there being a written engagement, it is registered within six months of its date in cases in which a Registry Office existed at the time of the engagement.

Sec. 14, and not the above sec., held to apply to a case where there was a written engagement and no Registry Office at the date of the engagement; the sec. 14, which is in these terms:—"All suits on Bonds registered within six months of their date, or on Bonds formally attested when there were no means of registering, and all other suits for which no other limitation is expressly provided by these rules," having reference to suits in which the period of limitation was to be six years.

Quære.—Whether the Regulation of limitations could or could not be made available without being pleaded.

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* 10, Moore's I. A., p. 114.

THE RIGHT HON. THE LORD JUSTICE TURNER:

THERE are some points in this case upon which their Lordships do not think it necessary to give any opinion.

They give no opinion upon the question whether the Regulation of limitations could or could not be made available without being pleaded; or upon the question whether this Bond ought to be considered as a Bond "formally attested" within the meaning of the Circular Order, No. 51 of 1859, or upon the question whether there is or is not in force, in the Province of *Oude*, any period of limitation.

These points may, as their Lordships think, be laid out of the case; and as to the Circular Order No. 51, they are of opinion, that it cannot be restored to or applied in the present case, because there was a proclamation on the 31st of July, 1860, before this action was brought, by which that Circular Order was expressly repealed.

The Circular Order, No. 51, being then out of the case, the question to be decided must depend upon the Act of the 4th of May, 1859 (No. XIV. of 1859,) or upon the Circular Order, No. 104 of 1860.

As to the Act of the 4th of May, 1859, it is clear, in their Lordships' judgment, that it cannot affect the question, because it was not to come into force in any non-Regulation Province until two years after a period to be fixed by proclamation, and those two years had not elapsed when the plaint was filed.

The case, therefore, is reduced to the single point, what is the effect of the Circular Order, No. 104?

Now assuming, as their Lordships do (that being the view most favourable to the Respondent), that this Order was in force (and their Lordships observe that it was upon this Order the case appears to have been considered in the Court below to depend), its effect must, in their Lordships' judgment, rest entirely on the 9th and 14th sections of the Order; the 10th section, which was referred to in the argument, relating exclusively to "suits for money lent for no definite period," and it being clear that this suit was for money

lent for a definite period. Let us consider, then, first, the effect of the 9th section, which has reference to suits in which the period of limitation is to be three years. It is in these terms: "Suits for money lent for a fixed period, or for interest payable on a specified date or dates, or for breach of contract, unless there is a written engagment or contract, and where registry offices existed at the time such engagement was registered within six months of its date, and signed by the party to be bound thereby, or his duly authorized agent."

Their Lordships understand this section, especially when contrasted with the 10th section, to mean that the rule referred to in it, is not to apply where there is a written engagement, and where, there being a written engagement, it is registered within six months of its date in cases in which a Registry Office existed at the date of the engagement; and there being, in this case, a written engagement and no Registry Office at the date of the engagement, they think that the section does not affect the case.

Then section 14, which has reference to suits in which the period of limitation is to be six years, is in these terms: "All suits on Bonds registered within six months of their date, or on Bonds formally attested when there were no means of registering, and all other suits for which no other limitation is expressly provided by these rules."

Now, as their Lordships have said, they give no opinion upon the question whether this is to be considered as a Bond "formally attested when there were no means of registering." If, on the one hand, it be so considered, the case clearly falls within the first branch of the section; but if, on the other hand, it be not so considered, the case as clearly falls within the other words of the section, "all other suits for which no other limitation is expressly provided by these rules."

Upon this ground, therefore, their Lordships are of opinion, that the judgment appealed from ought to be reversed, and that judgment should be entered for the Plaintiffs in the action. It may be right to add, that the Circular Order, No. 181, has not been overlooked, but that their Lordships do not consider it effectual to alter the view which they have taken of the case. The Plaintiffs are, in their Lordships' opinion, entitled to judgment for the debt and costs, and they must have the costs of the appeal. Their Lordships will humbly recommend Her Majesty so to order accordingly.

12th and 13th December, 1864.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Master of the Rolls (The Right Hon. Sir John Romilly.)

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALAR,* ... } *Appellant,*

versus

CHINNA NAYANA CHETTI, *Respondent.*

Special appeal, admission of—Construction—Act, No. XVI. of 1853, c. 4—Evidence—Onus Probandi—Title, presumption of, arising from long possession—Forged Document.

In a suit by *S.* to recover possession of a village held without disturbance for 44 years, on the ground that *P.*, an ancestor of the present Defendant, was but a usufructuary mortgagee put in possession by an ancestor of *S.*,—*Held* that the burthen of proof lay on *S.*, and that he must succeed by the strength of his own title, and not by reason of the weakness of the opponents.

If the evidence which is not susceptible of being forged is *primâ facie* strongly in favour of a party the mere production of a forged document by him in support of his own title, will not justify the transfer of a property of which he and those through whom he claims have been in possession at the date of suit for 44 years, to another who has not established any right to it himself.

Held that the provision of cl. 4, Act, No. XVI. of 1853,—that no special appeal shall lie, nor shall any decision be reversed, altered or remanded by any of the *Sudder* Courts, upon the ground that the decision of any question of fact is contrary to, or not warranted by, evidence taken, or any probability deduced from the record,—should be carried to its

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10, Moore's I. A., p. 151.

full legitimate extent, and that no appeal should be allowed on account of difference of opinion as to the value of evidence, unless the decree of the inferior Court is founded on an inference of law, when a special appeal will lie to the *Sudder Dewanny Adawlut.*

Where the *Sudder Dewanny Adawlut* allowed a special appeal, when the Judge of the inferior Court stated the inclination of his opinion to be, that the evidence produced proved a sale, but that the Defendant could not rely on that evidence by reason of his having relied on a forged Bill of sale, and that, if there was no sale, the estate must have been mortgaged, as contended by the Plaintiff; and affirmed the decree of the lower Court without taking further evidence;—*Held*, that such judgment was not in their Lordships' opinion, a finding of fact, but an inference of law, and analogous to the misdirection of a Judge to a jury.

THEIR Lordships' judgment was delivered by

THE MASTER OF THE ROLLS:

Their Lordships are of opinion that the decree of the *Sudder Dewanny Adawlut* must be affirmed.

Two questions are raised in this appeal; first, whether the *Sudder Dewanny Adawlut* had power under the Act, No. XVI. of 1853, to permit a special appeal in this case; and secondly, whether on the merits, the decision of the inferior Court was correct. On both these points their Lordships concur with the *Sudder Dewanny Adawlut;* but in order to explain the view they take of the application of the Act, No. XVI. of 1853 to this case, it will be convenient to refer to the facts of this appeal, and in doing so to consider the merits of the case.

It is a suit instituted by the Appellant in September, 1849, to recover possession of a village which has been held without disturbance since the year 1805. The Appellant alleges, that in the month of May in that year *Tayilaya*, the widow of the former owner, *Valogi Gopalar*, who had no power to sell, made a mortgage of this village for 300 *pons* to *Palaniyappa Chetti*, and put him into possession on an agreement that the usufruct of the village should be set off as against the interest on the mortgage.

To succeed in such a case as this, it is obvious that the burthen of proof lies on the Appellant.

A Plaintiff who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason of the weakness of his opponent's. It would be contrary to all principles of law and justice, that upon such an allegation, a Plaintiff should be able to require the present possessor to prove his title, and if he failed in doing so to dispossess him of the land in question.

The first material thing, therefore, is to examine how far the Plaintiff's evidence establishes the fact of the mortgage. The original mortgage is not produced; no copy of it is produced; it never was registered. The whole of the evidence respecting it is that of three witnesses, *Ananda Pillai*, 76 years, *Tambi Sarvagaram*, sixty-eight or sixty-nine years, and *Venkatasesha Ayyar*, seventy years, who all swear that a mortgage of the village in question, for 300 *pons*, was executed by *Tayilaya*, in her house, at 10 or 11 o'clock in the morning, and that she received the 300 *pons* in *Tanjore fanams*.

Notwithstanding the minute accuracy of these witnesses' recollection, their Lordships are of opinion, that it would be too dangerous to act upon this evidence, if unsupported by any other testimony, in order to disturb an uninterrupted possession of forty-four years.

There is also evidence of some applications by the Plaintiff, and by the preceding alleged owners of the equity of redemption, to redeem the mortgage. But with this exception, the Plaintiff's case is in fact wholly unsupported by any other evidence adduced by him. The Court of original jurisdiction seems indeed principally to have relied on the Defendant's evidence for the support of the Plaintiff's case. It may undoubtedly sometimes happen that the evidence adduced by the Defendant, instead of supporting his case, may establish that of his adversary. It remains to be examined whether that is so in the present instance. The Defendant alleges that *Valoji Gopalar* sold the village to *Palaniyappa Chetti*, through whom the Defendant claims. He puts in evidence a Bill of sale purporting to be executed by

Valoji Gopalar and supports it by many witnesses. This document is clearly shown to have been a forgery, and it is not only sufficient to destroy this supposed Bill of sale, but to throw discredit on the oral testimony which the Defendant adduces. But their Lordships are of opinion that it goes no farther, and that it does not follow, because the Bill of sale adduced by the Defendants is forged, that the evidence adduced by the Plaintiff must be correct. It might be possibly an advantageous rule if, as Mr. *Scott* expresses in his judgment, that where a party "has resorted to forgery to establish his claim, he must take the consequences of his own act, and that the Court is not at liberty to assume for him a position which he has himself rejected"(*a*).

But their Lordships are unable to arrive at that conclusion, and are apprehensive that if such was the practice adopted, some cases might occur in which the Court could not determine the point in issue in favour of either party. We think also, that in this case, even if this rule were adopted, it is pushed too far, as, though the Bill of sale is found to have been forged, the knowledge of the forgery is not brought home to the Defendant. We find also in a recent case, *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (*b*), this Committee gave effect to the Defendant's title, although a document by which she sought to strengthen it was found to be a forgery.

The evidence which is not susceptible of being forged is *primâ facie* strongly in favour of the Defendant.

Possession of the village, by persons through whom the Defendant claims, is proved by accounts registered in the years 1805, 1806, 1807, 1829, 1839, 1844. An *arzee* of 23rd of March, 1816, addressed by the *Tashildar* of *Mannargudi* to the Collector of *Tanjore*, and the answer of the Collector of the 2nd of April following, speaks distinctly of the village having been sold to *Gopalar Chetti* in 1804, a year previous to the period alleged by the Plaintiff as the date of the mortgage by the *Tayilaya*.

(*a*) 10, Moore's I. A., p. 155.
(*b*) 10, Moore's I. A., p. 124.

We think the preponderance of evidence is in favour of the Defendant, even if the burthen of proof lay on him. However much the want of trustworthiness in the evidence of cases from *India* is to be regretted, we cannot by reason of the proof that a document adduced by one party is forged, transfer the property in which he and those through whom he claims have been in possession at the date of the suit for forty-four years, to another, who has not, in the opinion of their Lordships, established any right to it himself. If, therefore, the case had come before their Lordships, unfettered by any question on the Act, No. XVI. of 1853, they would have had no hesitation in concurring with the *Sudder Dewanny Adawlut*, in holding that the Plaintiff had not established his case, and that his plaint ought to be dismissed.

The remaining point on which the Appellant mainly relies is, however, one of great importance; and, if determined in his favour, supersedes the question of merits.

The point is that by reason of the proviso in the 4th paragraph of the 4th clause of the Act, No. XVI. of 1853, the *Sudder Dewanny Adawlut* had no power to admit the special appeal. The words of the clause are these: "Provided always, that no such special appeal shall lie, nor shall any such decision be reversed, altered, or remanded by any of the said *Sudder* Courts, upon the ground that the decision of any question of fact is contrary to or not warranted by the evidence duly taken in the cause, or any probability deduced from the record."

Their Lordships think it of great importance that this provision should be carried to its full legitimate extent, and that no appeal should be allowed on account of difference of opinion as to the value of evidence. But their Lordships concur with the *Sudder Dewanny Adawlut* that this is not the present case. Mr. *Scott*, whose judgment is appealed from to the *Sudder* Court, does not find, as a fact, that the Plaintiff had proved the mortgage he alleged. On the contrary, he states the inclination of his opinion to be, that the evidence proved a sale, but that the Defen-

dant was not at liberty to rely on that evidence by reason of his having adduced and relied on a forged Bill of sale. What Mr. *Scott* does find is a conclusion of law. His words are these: "The Appellant has failed to show that the village was sold to *Palaniyappa Chetti*, and if it was not sold, it must have been mortgaged, as contended by the Plaintiff, and I must, therefore, affirm that part of the decree of the lower Court which decides that the village was mortgaged" (*a*).

The *Sudder Dewanny Adawlut* considered this not to be a finding of fact, but an inference of law, and accordingly allowed a special appeal. Their Lordships concur in this view. By way of testing the accuracy of it, it may be supposed that the case had been tried before a jury in this country, and that the Judge had directed the jury in the words of the Civil Judge which I have just read, namely: "The Appellant has failed to show that the village was sold to *Palaniyappa Chetti*, and if it was not sold it must have been mortgaged, as contended by the Plaintiff. It is your duty, therefore, to find that the village was mortgaged."

Their Lordships entertain no doubt that a Bill of exception or misdirection to the jury would have been sustained if such direction had been given. That is, that such a statement would have constituted a misdirection in point of law, upon the reliance of which, the jury found the fact of the mortgage.

Their Lordships, therefore, are of opinion, that the Act, No. XVI. of 1853, does not prevent a special appeal in this case, and that the *Sudder Dewanny Adawlut* was right in admitting the appeal, and dismissing the Plaintiff's plaint. This appeal will be dismissed, with costs.

(a) 10, Moore's I. A., p. 155.

24th and 26th February, 1863; and 1st and 2nd March, 1865.

PRESENT:

At the hearing of the first appeal: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

At the second appeal: The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

JOSIAH PATRICK WISE AND AYNUN BEBEE,* } *Appellants*,

versus

BHOOBUN MOYEE DEBIA CHOWDRAINEE AND RAJENDUR KISHORE ACHARJ, ... } *Respondents*.

Purchaser at a revenue sale under Reg. XI., 1822, powers of—Resumption of a Shikmee Talook held from before the Decennial Settlement at a fixed rent; non-liability to—Limitation under Beng. Reg. III. of 1793—Minority—Genuineness of Document, presumption in favour of.

A purchaser of a *Zemindary* at a sale by public auction to satisfy arrears of Government revenue under *Beng.* Regulation XI. of 1822, is entitled (1) to the immediate possession of such lands as at the time of the sale were in the possession of the *Zemindar*, and (2) to set aside by suit all subtenures created since the Decennial Settlement by the *Zemindar* or any of his ancestors.

Mouzahs, forming a *Shikmee Talook* created before the Decennial Settlement, and held of the *Zemindar* by *Mocurrery* tenure, *i. e.*, at a fixed rent not liable to alteration, are not liable to resumption by a purchaser under *Beng.* Regulation XI. of 1822.

A *Zemindary* was purchased at a revenue sale in 1833, and persons claiming as *Talookdars* certain *Mouzahs* within the *Zemindary* were by order of the *Sudder* Court put in possession in 1841, about

* 10, Moore's I. A., p. 165.

which time the purchaser died, leaving a widow, who adopted an infant son under a power from her deceased husband, and instituted a suit in 1853 for the recovery of the *Mouzahs*:—*Held* that the death of the purchaser and the minority of the heir would clearly take the case out of the Regulation of Limitation III. of 1793

The presumption in favour of the genuineness of documents, offered in evidence in *India*, is very weak; but still the presumption is not in favour of forgery.

When, therefore, a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the adverse party's commencement of title, evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony.

UPON the hearing of the first appeal,

The Solicitor-General (Sir *R. Palmer*) and Mr. *Leith*, appeared for the Appellants; and

Mr. *Rolt*, Q. C., and Mr. *Field*, for the Respondents;

When their Lordships reserved judgment until the hearing of the second appeal. On the second case coming on.

The Attorney-General (Sir *R. Palmer*) and Mr. *Leith*, again appeared for the Appellants; and

Mr. *Rolt*, Q. C., and Mr. *W. H. Melvill*, for the Respondents.

Their Lordships' judgment having been reserved, was now delivered by

THE RIGHT HON. THE LORD JUSTICE TURNER:

In the month of December, 1833, a *Zemindary*, called *Tuppah Cooreekhuy*, in the Collectorate of *Zillah Mymensingh*, was put up for sale by public auction to satisfy arrears of Government revenue under Regulation XI. of 1822.

It was purchased by or on behalf of *Bhobanny Acharjee Chowdry*, and it was not disputed that the purchaser acquired whatever rights in the *Zemindary* belonged to the *Zemindar* at the time of the Decennial, or Perpetual Settlement. He was entitled to the immediate possession of such lands as at the time of the sale were in possession of the *Zemindar*, and he had a right under the Revenue sale law to set aside by suit all sub-tenures created since the Decennial Settlement by the *Zemindar*, or any of his ancestors.

Within this *Zemindary* were certain *mouzahs*, which, or portions of which, are the subject of the two suits now in appeal. These suits relate to different parts of the same property, are between the same parties, depend on the same evidence, and are substantially one suit.

The *mouzahs* in question were alleged by persons now represented by the Appellant to form a *Shikmee Talook* created before the Decennial Settlement held of the *Zemindar* by *Mocurrery* tenure, *i. e.* at a fixed rent, not liable to alteration.

The purchaser, on the other hand, whose interests are now represented by the Respondents, insisted that these *mouzahs* were part of the *Zemindary*, and were held *khas* by the *Zemindar* at the time of the sale, and that the purchaser, therefore, became entitled to them. Possession of the *Zemindary* was ordered to be delivered to the purchaser, and his agent was put into possession of the lands in question as part of the *Zemindary*. His possession, however, was disputed on the grounds already stated by the persons claiming as *Talookdars*, who insisted that they were in possession of the lands in that character at the time of the sale. After much litigation, the *Sudder* Court was of opinion, that the *Talookdars* had been in possession at the period in question, and ordered the possession to be restored to them, the purchaser being left to institute a regular suit to set aside such possession.

Under this order the persons claiming as *Talookdars* were put into possession of part of the lands in dispute in December, 1840, and of the rest early in 1841, as appears by certain *dakalnamahs* in evidence in this case.

This decision left the right undetermined, and settled only the question of possession, and it became necessary for the purchaser of the *Zemindary*, if he meant to institute any suit for the recovery of the lands, to institute it within twelve years from this time. But about this time, that is, in the year 1840 or 1841, *Chowdry*, the purchaser, died, leaving a widow, and the widow and the mother of *Chowdry* became his representatives. The widow, as she alleges, under a Will made by her husband, had power to adopt, and adopted, a son, and neither the validity of

the Will nor the fact of adoption is in controversy in this case. She instituted a suit in 1853 for the recovery of this property, which failed upon merely technical grounds, for want of a sufficient stamp on the proceedings, or for some such reason. In 1855, the first suit now under appeal was commenced. As regards any bar arising from the Regulations of Limitations, this suit must be treated as if it had begun in 1853.

The Appellants, in their pleadings insist, that the period from which the Respondents' obligation to sue commenced is to be calculated from the time of the purchase in 1833, and they, therefore, insist on the Regulation for the limitation of actions in bar of the present claim; but they do not by these pleadings insist on such bar if the period is to be calculated from the time when the possession was taken from the purchaser in 1840 and 1841; and we are clearly of opinion, that this is the period from which the time must be computed. The death of the purchaser and the minority of the heir would clearly take the case in that view out of the Regulation of Limitations. The rights of the parties, therefore, must be decided on the merits.

The real question, which is one of some difficulty, is, whether the lands in question were constituted a *Talook* previously to the Decennial Settlement in 1790-91, by the then *Zemindar*, as alleged by the Appellants, or whether they were at that time held *khas* by the *Zemindar* as part of his *Zemindary*, as alleged by the Respondents.

The title set up by the Appellants is this: they allege that the lands in question were granted by *Ghous Khan*, the then *Zemindar*, by two *Sunnuds*, one dated in 1779, and the other dated in 1784, at a fixed rent to his sister, *Amina Bebee*, as *Tulookdar*, in *mududmash*, or for her maintenance at a fixed rent.

If these documents be genuine, there seems to be no reasonable doubt about the Appellants' right.

The Judge in the *Zillah* Court was of opinion that they are genuine, and he, therefore, dismissed the Respondents' suit.

The *Sudder* Court, on appeal, was of a different opinion, and made a decree in favour of the Respondents.

The first of these suits was heard before us, on appeal, in February, 1863. It appeared that the second suit was coming on for hearing, and we were of opinion that it might be material to see some of the original documents, and also to consider other evidence not at that time before us, and we, therefore, directed that the decision on the first suit should be delayed till the second had been heard, and that the *Sunnuds* relied on by the Appellants should be sent over to this country.

Some additional evidence has been printed, and the papers purporting to be the original *Sunnuds* have been sent over, and the question now to be determined is whether, upon the whole, the Appellants have sufficiently established their case.

It is not disputed by the Appellants that these lands, being situate within the *Zemindary* purchased by the Respondents, are *primâ facie* to be considered as part of the *Zemindary*, and that it is for them, the Appellants, who insist on the separation of these lands from the general lands of the *Zemindary*, and on their settlement as *Shikmee Talook*, to establish their title.

To prove their case they produce papers purporting to be the two *Sunnuds* to which we have already referred.

Nothing has been pointed out to us in the appearance of these papers throwing any suspicion upon them, nor have we been able to discover anything which does so.

We have three deeds of sale, by *Amina Bebee*, and persons purchasing from her, professing to convey different portions of the lands as parts of a *Talook*. One of these deeds is dated in 1808, and another in 1821.

There are also produced two other *Sunnuds*, one purporting to be dated in 1813, by *Asheena Bebee*, the then *Zemindar*, to *Aymun Bebee* (a purchaser, from *Amina*,) and another in 1815 by *Ibraham Khan*, the then *Zemindar*, to *Khosh Kuddun*, a purchaser of a part of this *Talook* from *Aymun Bebee*. These *Sunnuds* purport to recognize and confirm the title of the purchasers.

In proof that *Amina Bebee* had possession of these lands as a *Talook*, in conformity with the *Sunnuds* granted, we have *Chittas*, or measurement papers, signed by

Ameens employed on behalf of the *Zemindar* to measure the lands of the *Zemindary* in the years 1787, 1788, 1789, 1790, 1791, and 1792. These *Chittas* describe the lands as the *Talook* of *Amina Bebee*.

We have further the detailed accounts of the agent in receipt of the rents of these lands in the year 1790, describing them as the *Talook* of *Amina Bebee*.

There are other measurement papers or *Chittas* affording the same evidence in the years 1807 and 1816.

There are then produced *dakhilas* or receipts for rent on behalf of the *Zemindar* for the *Talook* of *Amina Bebee* in the years 1780, 1805, 1817, 1820, and 1828.

Several other documents are in evidence showing, if they be genuine, the same fact, that at an early date and before the Decennial Settlement a *Shikmee Talook* had been constituted in favour of *Amina Bebee* at a *Mocurrery jumma*, and that the lands included in it were held by her or persons claiming under her up to the time or nearly up to the time of the sale of the *Zemindary* in 1833.

It was established by the Order of the Court restoring the Appellants to the lands in the year 1840, that they were in possession of them at the time of the sale, for the Order was made entirely upon that ground, and decided nothing as to the title.

Against this great body of evidence there is really nothing which can be called evidence on the part of the Respondents, but they allege and undertake to show that all the documents relied on by the Appellants are forgeries.

A long experience in Indian appeals has no doubt satisfied us that the presumption in favour of the genuineness of documents offered in evidence in that country is very weak; but still it must not be held that the presumption is in favour of forgery; and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the commencement of the Respondents' title by purchase in 1833, the evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony.

Still circumstances may be sufficiently strong for this purpose, and they have been held to be so in this case by the Judges of the *Sudder*.

We will remark upon the principal of these circumstances, but it is material to consider them with reference to the case set up by the Respondents.

The case set up by them is shortly and accurately stated in the judgment of the *Sudder* Court in these terms:—"The general allegation of the Plaintiff is, that *Ibraham Khan*, the proprietor of the *Zemindary*, up to the time of the revenue sale, fraudulently set up this *Talook* for his own benefit, for which purpose he has found it convenient to use the names of his relations and connections, *Aymun Bebee* (one of the alleged purchasers from *Amina*) being his wife, and *Amina Bebee*, the professed *Tulookdar* of the *Sunnuds* of 1186 (1779) and 1191 (1784), being his aunt and the sister of the then *Zemindar*, *Ghous Khan*."

If this case be true, no doubt the *Sunnuds* purporting to create this *Talook* half a century before the sale, and the various documents long before the sale referring to it, must be forgeries. On the other hand, if these documents be genuine, then the Respondents' case must be untrue.

No direct evidence is offered against the genuineness of the *Sunnuds*, but it is said that they cannot have been made at the time when they bear date, for several reasons, of which these are the principal:—

First, it is said that the *Talook* is not mentioned in the Decennial or Quinquennial Settlement as such, and that the lands are included in the Decennial Settlement, as part of the *Zemindary* for which the *jumma* is assessed on the *Zemindar*.

We have not before us the particulars of these Settlements, but assuming the statements to be accurate, the fact does not seem to afford any strong inference against the existence of the *Talook*.

If it had been an independent *Talook* it would have been liable to direct assessment by the Government, and would have been the subject of assessment on the *Tulookdar*, but being only a *Shikmee Talook*,

paying rent to the *Zemindar*, the *Talookdars* were not required to mention it, nor was it necessary for the *Zemindar* to do so.

It is then said that if the *Sunnuds* and the various instruments by which conveyances of portions of the *Talook* are alleged to have been subsequently made had been really executed, those instruments, or at all events some of them, would have been registered, and that none of them have in fact been registered.

No Regulations have been pointed out to us by which the registration of these *Sunnuds* or of this *Talook* (created, if at all, before the Decennial Settlement) was made necessary; and though the observations of the Judges of the *Sudder*, "that the deeds want the authentication which registration would have afforded," and "that the *Talook* wants the corroboration which registration and its mention in the quinquennial papers would have afforded," be perfectly well founded and entitled to weight, it must be considered whether, without this evidence, the proof be not sufficient.

A circumstance more strongly relied on by the Respondents' Counsel was this, that these *Sunnuds* were never produced or mentioned by the Appellants on several occasions on which, it is said, if they had really been in existence at that time, they ought to have been produced, and certainly would have been produced.

First, it is said that a litigation went on from the time of the sale in 1833 up to the year 1840 with respect to the possession of these lands, and that in the course of that suit no allusion was made to these documents. But the answer given to this objection much diminishes its force, viz., that the question then before the Court was not one of title but of possession, and that it was only on the question of title, as to which the Court had no power in that suit to pronounce any decision, that the production of the original *Sunnuds* was of importance. Though these *Sunnuds* were not produced, the title under them was asserted, and the *Sunnud* of confirmation of 1813 from *Asheena Bebee* to *Aymun Bebee* seems to have been actually produced on the 2nd of July, 1839.

Another objection which was much pressed at our bar was this:—These *Sunnuds* describe the lands as *La-khiraj* and *Muddudmash*, whereas it is said that they were not alleged to be *La-khiraj* at the time of the Decennial Settlement, but were included in the lands subject to assessment, and that it was not till a much later period (not very long before the sale) that they were claimed to be *La-khiraj*, and these instruments must, therefore, have been fabricated after that claim had been set up.

Now, the force of this argument depends on the allegation that these lands were not claimed or pretended by the then *Zemindar* to be *La-khiraj* before the Settlement. But of this we find no sufficient evidence. It is well known that before that time, and especially about that time, a great number of fictitious claims to exemption from assessment of lands as *La-khiraj* were set up by different proprietors, and although it was held in what is called the Alluvion suit that the lands were not in fact *La-khiraj*, and that the *Firman* of the Sultan purporting to make them so had been forged by *Ibrahim Khan*, yet that fact by no means shows that at the dates of these *Sunnuds* the then *Zemindar* did not claim or pretend them to be so. Whether they were or not included in the assessment was a question depending on the description contained in the Decennial Settlement; and though the Government officer was satisfied after much inquiry that they were in fact covered by the assessment, such descriptions are generally vague and uncertain, and the difficulty of identifying lands is greatly increased in a long lapse of years when it appears that the lands adjoin the great river *Burhampooter*, and are subject to be submerged and have their boundaries changed by not unfrequent overflows or changes in the course of the stream.

The last objection which we think it necessary to notice, and to which we confess we are inclined to attribute the most weight, is that in 1836, Mr. *Glass*, the partner, as we understand it, with Mr. *Wise*, one of the present Appellants, insisted upon a title to a portion of these lands under a lease alleged to have been granted to him by *Ibrahim Khan*, the late *Zemin-*

dar, whereas Mr. *Wise* now claims under a purchase subsequently made by him and *Glass* from *Aymun Bebee* in 1840, and insists that *Ibrahim Khan* was never in possession of the lands, and that they were not part of the *Zemindary*, except as being part of a dependent *Talook*.

Undoubtedly these two titles are inconsistent, but it is not impossible that Mr. *Glass* might first procure a lease from *Ibrahim Khan*, supposing him to be the owner, and might afterwards, when the title of the *Talookdars* was insisted on, and seemed likely to succeed, make a purchase from them, in order that he might, under any circumstances, be secure in the enjoyment of his indigo plantations.

The probability of this being so is strengthened by the statement in the petition of *Glass* to the *Suddur* Court in 1838, in which he alleges "that he had for a long time been making indigo cultivation on the lands after taking *izara pottahs* of them from the proprietors, *i. e. Talookdars* and *Zemindars*."

We are very far from thinking that the various objections thus made to the title of the *Talookdars*, and so ably urged at our Bar, are without force. But against them we must set the evidence produced by the Appellants in confirmation of their title.

Now, any evidence which proves the existence of this *Talook* at a period antecedent to that at which the Respondents allege it to have been falsely set up by *Ibrahim Khan* tends more or less strongly to disprove their case. The Appellants' evidence upon that point seems to us very strong.

In the year 1819, there is a proceeding in the appeal Court of *Jehangur Nuggur*, in which the question was, whether certain lands belonged to this *Talook* or were part of the *khas* lands of the *Zemindar*.

In 1824, we have a petition from a person complaining that *Khosh Khuddum* had agreed to sell to him a portion of his share of the *Talook*, but had refused to perform his contract.

In 1833, we find an Order made in a suit which had been instituted in the year 1831 by *Aymun Bebee* against her husband, *Ibrahim Khan*, by which a part of the lands of this *Talook* was ordered to be sold to satisfy fees due to the Pleaders.

In 1843, we find it stated upon the result of an inquiry then directed by the Civil Court of *Mymensingh*, that when the *Talook* was about to be sold the Plaintiff's *Mooktar* deposited in the Treasury of the Collectorate the sum demanded.

These proceedings are very important, not only because they show that in 1833 a portion of this *Talook* was dealt with by the Court as the property of *Aymun Bebee*, but because it makes the supposed collusion between *Ibrahim Khan* and his wife, *Aymun Bebee*, which is essential to the Respondents' case, in the highest degree improbable.

That the *Sunnuds* in question have not been fabricated since the institution of these suits is clear from the proceedings in the suit with the Government as to the alluvion lands, which are of great importance.

It appears that some time before 1843 a tract of land which had been covered by the waters of the *Burhampooter* was left dry by some change in the course of the stream. This tract was within the limits of *Cooreekhuy*. If these were new derelict lands they would be subject to assessment to the Government; but it was insisted by the purchaser of the *Zemindary* and the *Talookdars* that they were lands which had originally been part of the *Zemindary*, had been submerged and again left dry; the *Zemindars* insisting that the lands were part of the *Zemindary*, and the *Talookdars* that they were a part of their *Talook*.

After some proceedings in other Courts, which failed from some irregularity, a proceeding was instituted by the Government in the office of the Collector of *Mymensingh*, under Regulation XI. of 1819, for the purpose of determining the right of the Government. To this proceeding *Ibrahim Khan*, the present Respondent, *Bhoobun Moyee Debia*, and the Appellants, *Aymun Bebee* and *Khosh Kuddum*, were parties.

A great deal of evidence was gone into, and, amongst other documents, the *Sunnud* of 1779 now relied on, and some of the *chittas* and other papers produced by the Appellants in this suit, were put in by

them, and the same case which they now set up was stated and insisted upon.

Whether the other *Sunnuds* now produced by the Appellants and all other papers were produced, we cannot clearly make out.

The *Sunnud* of 1779 was the subject of investigation at that time, and it appears by the Order made in the proceeding, and which dismissed the claim of the Government, that on the 5th of April, 1845, in order to attest, as it is called (meaning, no doubt, to test the genuineness of,) the aforesaid *Sunnud* of 1779 (which seems to have been disputed,) the Record Keeper was directed to produce any other papers which might tend to show the truth, and the witnesses named by the Defendants to prove their case were summoned.

It is then stated, that subsequent thereto the Record Keeper filed a *Kyfeut* stating that along with the papers of *Natoora Mehal* of *Tuppah Cooreekhuy* has been found a *Sunnud* sealed by *Mahomed Ghous*, and signed by him in the Persian character, and that the seal and Persian character thereon tally with the Persian character and seal on the *Sunnud* filed in this case. It is then stated, that *Aymun Bebee* produced some *chittas* and a *terij* and *jummabundy*, and produced witnesses who deposed that *Ameena Bebee* had in the year (worm-eaten) acquired a *Sunnud* of the *Talook* of these *mouzahs* from *Mahomed Ghous*, *Zemindar*, had held possession since that year, and sold the same, and that in proportion to the said shares, *Khosh Kuddum*, *Aymun Bebee*, and *Messrs. Wise* and *Glass*, paid the rents of the *Talook* and held possession.

Now, it is said that the only question in that case was as to the right of the Commissioner to assess the lands as to which all the Defendants had a common interest, and that as co-Defendants the Respondents could not have disputed the evidence of the Appellants if they had had any interest to do so.

This may be true, although it is not easy to perceive why any inquiry into the truth of the *Talookdar's* title, or the genuineness of the documents produced in support of it, should have been made unless some contest on the subject had taken place between the *Zemindar* and the *Talookdars*. But, at least, at this time (in 1845,) the Respondents having been turned out of possession in 1840, on the grounds which we have stated, had full notice of the title set up by the Appellants and of the evidence by which it was to be supported, and were bound to bring forward their claim in reasonable time. Yet these suits are not instituted for several years; and then, after every opportunity had been afforded of giving evidence to disprove these documents, no direct testimony against them is produced, and many of the witnesses who were examined in 1845 may very probably be dead or not forthcoming. We have already expressed our opinion that, for the reasons which we have stated, the Respondents' claim is not barred by the Regulation of Limitations, but much allowance must be made for the difficulties which they have imposed on the Appellants by so long delaying a suit in a country where documentary evidence is peculiarly liable to destruction or effacement, as appears by the papers in this case.

Upon the whole, we must humbly advise Her Majesty to reverse the decrees complained of, and to restore the decrees of the *Sudder Ameen*, and we think that all the costs of these suits, subsequent to the last-mentioned decrees, including the costs of these appeals, must be paid by the Respondents. We have thought it right to go at so much length into the circumstances of the case, because we are at all times extremely reluctant to reverse a unanimous judgment of the Court below on a question of fact, and because it is due to those learned Judges to show that we have not done so without having carefully considered and weighed the evidence.

2nd and 3rd March, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

BABOO GOPAL LALL THAKOOR,* ... ... } *Appellant*,

versus

TELUCK CHUNDER RAI and others, ... } *Respondents*.

Enhancement of rent, non-liability of a Talook held at a fixed and invariable rent 12 years anterior to the Permanent Settlement—Evidence, Onus Probandi—Pleading—Practice, Appealable value.

Suits by a *Zemindar* claiming as purchaser at a sale for arrears of Government revenue, to enhance the rents of certain *Talooks*, which formerly constituted one *Talook* held, as alleged by the Plaintiff, upon payment of a rent variable according to the current rates of the district, dismissed by the *Sudder* Court, and that decision upheld, on appeal, by their Lordships, on the ground that the Defendants had established by evidence that each *Talook* had paid a fixed and invariable rent for more than twelve years anterior to the Perpetual Settlement, and was consequently not liable to further assessment.

The *onus* of proving that a *Talook* had been held at a fixed and invariable rent for more than 12 years antecedent to the Perpetual Settlement lies on the Defendants.

Objection as to the hereditary character of a tenure, not taken in the courts below, is not open to the Appellant in a suit for enhancement of rent. And such objection can hardly prevail against the evidence, that for upwards of a century the tenure has been treated as hereditary, and as such has both descended from father to son, and been the subject of purchase.

Where five suits had to be instituted to enhance the rents of five *Talooks* formerly constituting only one, by a purchaser at a revenue sale, and the amount involved in each case was below, whilst the aggregate amount involved in all of them was above that for which an appeal would lie to *England* as of right, special leave to appeal was granted, which further provided that, if the parties in *India* should consent that the Order to be made by Her Majesty in one suit should govern the others, there should be an appeal in one suit only.

* 10, Moore's I. A., p. 183.

29th March, 1865.

AFTER consideration, their Lordships' judgment was now pronounced by

THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE:

The question on this appeal, which has been heard *ex parte*, is upon the alleged right of the Appellant, as *Zemindar* of *Tuppah Nazirpore*, in the *Zillah* of *Backergunge*, and Province of *Bengal*, to reassess and increase the rents payable in respect of certain lands forming part of his *Zemindary*, which formerly constituted one, but were afterwards divided into five dependent *Talooks*.

The Appellant derives his title to the larger part of his *Zemindary* from a sale for arrears of Government revenue, which took place in 1819. Fourteen-sixteenths were thus purchased, partly by the Appellant's father and cousin jointly, and partly by one *Petumber Mozumdar*. All these shares have since, by descent or sub-purchase, become vested in the Appellant. The remaining two-sixteenths are stated to have been acquired in 1830 by private purchase from a Mr. *John Panioty* and others in whom they were then vested.

To enforce his claim to enhance the rents of the five *Talooks* it was necessary for the Appellant to institute five separate suits. The amount involved in each of them was below, whilst the aggregate amount involved in the five exceeded, the sum for which an appeal to Her Majesty in Council lies as of right. The Order of the 22nd of February, 1860, giving special leave to appeal, provided that in case the parties in *India* should consent that the Order to be made by Her Majesty in one suit should govern the others, there should be an appeal in one suit only (*a*). This consent has, unfortunately, not been given; the proceedings in all the suits have been sent home and are now before their Lordships. The argument of the learned Counsel for the Appellant embraced all the suits, and this judgment must be taken to be given in each of them.

(*a*) Reported on this point, 7 Moore's Ind. App. Cases, 548.

The five suits were commenced in September, 1855. Each was founded on the alleged right of the *Zemindar* claiming, in part at least, as purchaser at a sale for arrears of Government revenue, to enhance the rents of a *Talook* described as *Tashkhisi Zimma*, or a sub-tenure held upon payment of a rent variable according to the current rates of the district.

The title set up by the Respondents is to this effect. They allege that as early as 1704 (being the year 1111 of the *Bengal* era,) one *Mookondo Ram Chuckerbutty* took, in the name of his son, *Ram Chuckerbutty*, an *Amildari Pottah* of the lands in question in the five suits, from *Syud Shumsuddeen Mahomed*, the then *Zemindar*, and held them as one *Talook*; that, on his death, his three sons, the said *Ram Chuckerbutty*, *Gungadhur Shedhanto*, and *Gopeenath Chuckerbutty*, held the *Talook* in thirds, making a separation by guess of part of the land, but holding the other part jointly; and that in 1755 A. D. (or 1162 B. E.) they made a settlement, witnessed by the seal of *Syud Imamoodeen Mahomed*, the descendant of *Syud Shumsudden Mahomed*, whereby the rent of the waste lands being postponed for future arrangement, they undertook to pay for the remaining and productive land a joint *jumma* of Rs. 1,901. They further allege, that afterwards a complete separation between the brothers took place; that *Gungadhur* took his share of the lands held jointly, as well as those cultivated by him separately, and formed thereout a separate *Talook* called *Sheeb-Kant* (a name compounded of the first syllables of the names of his two sons;) that *Gopeenath Chuckerbutty* made in the same way a separate *Talook* out of his share, which he named *Lukhee-Kant* after one of his sons; that the remaining share continued as a third *Talook* in the possession of *Ram Chuckerbutty*, or of his two sons, *Beeshtodeb* and *Gobind Prosad*; and that this division was sanctioned by the *Zemindar*, and the consequent mutation of names effected, on the 26th of *Bysack*, 1164 (A. D. 1757,) by a writing, under the seal of *Syud Imamoodeen Mahomed*, which provided that the *jumma* or rent should be assessed according to the quantity of land held by each person as ascertained by subsequent measurement. They state, however, that before this measurement took place *Ram Chuckerbutty's* share was sub-divided between his two sons, *Beeshtodeb* and *Gobind Prosad*, and a further mutation of names effected in 1762, one of these sub-divisions becoming *Talook Ram-Lukhun*, the other *Beeshtodeb*. They further allege that after this, the contemplated measurement and survey took place; that the *Talook* of *Sheeb-Kant Chuckerbutty* was then assessed at a fixed *Mocurrery jumma* of Rs. 691. 9 as. 2 gs.; that the *Talook Lukhee-Kant Chuckerbutty* was assessed at a like *jumma* of Rs. 643. 15 as. 13 gs.; that *Talook Ram-Lukhun Chuckerbutty* was in like manner assessed at Rs. 335. 6 as. 9 gs.; and that of *Beeshtodeb*, existing under the name of *Ram Chuckerbutty*, at Rs. 337. 6 gs.; and that accordingly on the 14th *Joistee*, 1174 (being some time in the year 1767,) separate *bundobusts*, or settlement papers, under the seal and signature of the *Zemindar*, *Syud Imamoodeen Mahomed*, were granted to the holders of each *Talook*, and contained these words: "The above amount of *jumma* being paid in current coin year by year, no increase shall be made to it, nor shall you give any."

Thus far the title of the Defendants in each of the five suits is common to all. The subject of the first suit is the *Talook Sheeb-Kant Chuckerbutty*; that of the second, *Ram-Lukhun Chuckerbutty*; that of the third, *Lukhee-Kant Chuckerbutty*; that of the fourth, *Radha-Madub Chuckerbutty*; and that of the fifth, *Ramchunder Chuckerbutty*; the two last-named *Talooks* having, after the death of *Beeshtodeb*, been formed out of this *Talook* on a partition and division between his two sons, *Radha Khristo* and *Radha Madub*, in or some time before A. D. 1807. The Defendants in the several suits derive their title from the *Talookdars* with whom the settlements of 1767 were made, some by descent, others by purchase; but it is not necessary for the determination of the present appeal to state these devolutions of title in detail.

From what has been said it is obvious that the principal question in each suit was, whether the *Talook* that was subject of it

had been held from a period considerably anterior to the Decennial Settlement at a fixed or *Mocurrery jumma*, or was held on a rent variable, and, therefore, subject to enhancement.

The other material issues in each suit were,—

First, whether the claim of the Plaintiff was barred by the Regulation of Limitations. And, secondly, whether the notice required by law as a preliminary to a suit for enhancement of rent had been duly served.

The five suits were heard together by the Principal *Sudder Ameen* of *Zillah Backergunge* on the 20th of January, 1858. His decision was in favour of the Appellant on all points. The Defendants in each suit appealed to the *Zillah* Judge (Mr. *Kemp*), who, on the 17th of July, 1858, reversed the decision of the Principal *Sudder Ameen*, and decided in favour of the Defendants. His judgment proceeded on the ground that the Defendants had established by evidence that each *Talook* had paid a fixed and invariable rent for more than twelve years anterior to the Perpetual Settlement, and was consequently not liable to further assessment.

The Appellant then carried the five causes to the *Sudder Dewanny Adawlut* on special appeal, upon certain grounds. These seemed to have resolved themselves into the following objections:—First, that the Judge, having determined that the suits were barred by the Regulation of Limitations, was in error in afterwards going into the merits of them; and secondly, that he was in error in holding that a suit for enhancement of rent must be brought within twelve years from the date at which the Plaintiff's title accrued.

The judgment of the *Sudder* Court dismissed the special appeals on the ground that the Judge had in fact decided the suits, not on the question of limitation, but upon their merits, and that his decision, being one of questions of fact, could not be reviewed by that Court on special appeal.

Their Lordships, in dealing with the present appeal, will assume that the Appellant's claim is not barred by lapse of time, and that he has duly served the notices required by law. These points appear to have been decided below in his favour, and their Lordships see no ground to doubt the correctness of that decision. They propose, then, to confine their attention to the question whether it was sufficiently proved in the Courts below that the present *Talooks* had been held at a fixed and invariable rent for more than twelve years antecedent to the Perpetual Settlement, it being admitted that, as the law stood in 1858, the burthen of proving this lay on the Defendants.

The principal documents on which the Defendants rely in support of their title are the settlement of the 21st of *Srabun*, 1162; the *Kharijee Likhons*, or mutation papers, of the 16th and 26th of *Bysack*, 1164; the similar documents of the 13th *Joistee*, 1169; the four *Bundobusts*, or settlements of the 11th and 14th *Joistee*, 1174; the *Furud* of 1198; the petition of 1810; the *Dakhilas*, or receipts for rent. The mutation paper of *Choitro*, 1214, bears only of the partition in 1807 between the sons of *Beeshtodeb*, and the titles of the Defendants in the fourth and fifth suits.

What then is the effect of these documents if taken as genuine? The first establishes the existence of the dependent *Talook*, *Ram Chuckerbutty*, in the year 1755; the two next prove the division of that *Talook* into three in the year 1757, and the further sub-division of one of these into two in 1762. But all these fail to show that these *Talooks* were held at a fixed and invariable rent. The first is at least consistent with the hypothesis that the rent of the parent *Talook* might vary with the amount of land brought under cultivation; the others import that the rent of each of the four derivative *Talooks* was not to be settled until after survey and measurement. On the other hand, the four *Bundobusts* or settlement papers of 1174, if genuine, prove that in 1767 A. D., the rent of each of the four *Talooks* became fixed and invariable; and the *Dakhilas* support the contention of the Defendants that they and their predecessors had ever since continued to hold their lands at these rents. The *Furud* shows that in 1792, and the petition shows that in 1810, the *Zemindar* for the time being recognized the *Bundobusts* of 1174, and admit-

ted the title of the Defendants. Unless, therefore, this evidence can be successfully impeached, it seems fully to warrant the conclusion of the *Zillah* Judge that the Defendants had relieved themselves of the heavy burthen which the law cast upon them, and established the immunity of their lands from further assessment.

Before, however, considering the objections taken to the genuineness or credibility of the Defendants' evidence, their Lordships desire to notice the objection taken by the Attorney-General, to the effect that these documents, if genuine, contain no "words of inheritance" (to use the English phrase), *i. e.* no expressions importing the hereditary character of the alleged tenures. Their Lordships conceive that this objection, which does not appear to have been taken in the Courts below, is not open to the Appellant in these suits. He is not suing for the recovery of the lands, or to disturb the possession of the Defendants, in which case he might have been successfully met, and no doubt would have been met, by a plea of the Regulation of Limitations. His suits are for the enhancement of rent. The pleadings consequently admit the existence of the tenures, and the lawful occupation of the Defendants. The only question between the parties is, whether the *Talooks* are *Tashkhis* or *Mocurrery; i. e.* whether they are held at a variable or at a fixed and invariable rent. Moreover, if the objection were open to the Appellant, it could hardly prevail against the evidence which the record affords, that for upwards of a century these *Talooks* have been treated as hereditary, and as such have both descended from father to son, and been the subject of purchase. It may further be observed that in the mutation papers of 1807, the *Talook* of *Beeshtodeb* is expressly termed "hereditary."

What then are the objections to the proof offered by the Defendants? The first, and not the least formidable, is that based upon the fact, established, if not admitted, that *Syud Imamoodeen Mahomed* died in 1192 B. E. or 1785 A. D. This applies directly only to the *Furud*, and to some of the *Dakhilas*. It affects the more material documents (the *Bundobusts* of 1174) in so far only as it tends to deprive them of the important corroboration which they derive from the *Furud*, if genuine, and to throw suspicion generally on the Defendants' case.

It is clear that the *Furud* bearing the seal and "*Sri*" signature of *Syud Imamoodeen Mahomed* has not been concocted recently, or for the purposes of these suits.

That it existed in 1806, and was filed with other documents in the suit before Mr. *Winden*, is shown beyond reasonable doubt. It is very unlikely that it should have been fabricated for production in that suit, which was one between the *Talookdars* and their sub-tenants. On the other hand, it appears that the Perpetual Settlement of this *Zemindary*, the most important transaction in its history, was concluded several years after *Syud Imamoodeen Mahomed's* death, in his name, though possibly without the use of his seal. This was six years later than the date of the *Furud*. There is abundant evidence of the appearance of his seal and of his "*Sri*" signature upon other *Zemindary* documents purporting to bear a date later than that of his death. If such documents have been rejected in some cases, they have been admitted and acted upon in others. Weighing the evidence on both sides, their Lordships are not disposed to dissent from the conclusion of Mr. *Kemp*, that the date of *Syud Imamoodeen Mahomed's* death is not a fatal objection to the genuineness of the *Furud*, and the *Dakhilas* impeached on the same ground; but that all may, nevertheless, be taken to have come from the *Sharista* or office of the *Zemindar*.

It is then objected, as a suspicious circumstance, that though the *Furud* was produced in 1806, the *Bundobusts* or settlements of 1174, to which it refers, were not then produced. The answer to this is, that their production was not necessary for the purposes of that suit. Documents are not produced in the Courts of *India* without some risk; and of all men the dependent *Talookdar* has the greatest reason to be careful of his title-deeds, since, whatever may have been the recognition of his title by his existing *Zemindar*, he may at some future time have to establish that title by the strictest proof against one

coming in by purchase at a sale for arrears of revenue.

Another objection taken to the genuineness of the *Bundobusts* of 1174 is that no mention of them is made in the copy of the Quinquennial paper for 1227 B. E., corresponding with A. D. 1820. That there is some foundation for this objection their Lordships do not deny; as that document is not very well authenticated. Little, if any, weight seems to have been attached to it even by the Principal *Sudder Ameen*, whose judgment was in favour of the Appellant. The inference founded on the omission to mention certain papers is not conclusive against their existence; and, indeed, there is in the last column of this Quinquennial return a general reference to papers other than those mentioned in the preceding columns. Whatever may be the force of this inference, it seems too slight to outweigh the corroborative proof of the existence of the *Bundobusts* long before 1820, which is afforded by the *Furud*, and by the *Zemindar's* petition.

The evidence that has been given on either side, to prove or to disprove, that the enjoyment of the *Talook* has been consistent with the hypothesis that the tenures were *Mocurrery*, remains to be considered. The earlier *Dakhilas* produced (the objection to such of them as are subsequent in date to the death of *Syud Imamoodeen Mahomed* having already been disposed of) prove that for upwards of twelve years prior and up to the Perpetual Settlement the *Talooks* were held and enjoyed at the fixed rents specified in the several *Bundobusts*. So far, then, the Defendants have given the proof which the Regulations require from them. But then it is objected that *jumma wasil bakee* papers produced by the Appellant show that at a subsequent period the rent were variable. These papers are for various years between the year 1203 and 1216, and purport to show the collections in these years made either by the Receiver appointed by the Court of Wards during the minority of the *Zemindar*, or by a lessee named *Mozoomdar*. They do not mention the *Talook Sheeb-Kant Chuckerbutty*, which is the subject of the first suit; and the title of the Defendants in that suit is, therefore, unaffected by them. It is perhaps for that reason that so little notice of them is taken by Mr. *Kemp* in his judgment. On the other hand, if genuine, they do show that during these years rents higher than those which the Defendants contend to be fixed or invariable were demanded and realized in respect of the other *Talooks*, and that those rents were to some degree variable in amount. But all these accounts appear to be of a date earlier than 1810. In that year, it appears from the *Zemindar's* petition, the *Talookdars* remonstrated against certain exactions to which they had been subjected, asserted the title which their successors now assert, and obtained a recognition of it from the then *Zemindar*. There is no evidence that since that time the rent paid in respect of any of the *Talooks* has varied, and it is shown that for fourteen years after he had full notice in the proceeding before Mr. *Knott*, that the Defendants relied on the alleged settlement of 1174, the Appellant continued to receive the rents so fixed without seeking to enhance them. The conclusion, therefore, to which their Lordships would come upon the evidence is, that between 1768 and the date of the Perpetual Settlement the enjoyment of these *Talooks* was consistent with the *Bundobusts* of 1174, that it has been equally so since 1810, and that if higher and varying rents were exacted in respect of any of the *Talooks* during the period covered by the *jumma wasil bakee* papers, such exaction was wrongful, and was remedied in 1810, when the recognition of the *Zemindar* remitted the *Talookdars* to their original rights. This argument assumes the genuineness of the *jumma wasil bakee* papers, as to which there may be some doubt. They are certainly inconsistent with the *Dakhilas* for those years produced by the Defendants.

On the whole, their Lordships, though labouring under the disadvantage of having heard only the able, but at the same time candid, argument for the Appellant, have failed to find any sufficient grounds for disturbing the judgment of the Court below upon a pure issue of fact. The order, therefore, which they must humbly recommend Her Majesty to make is that this appeal be dismissed.

3rd March, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

SHAMA PURSHAD ROY CHOWDERY, & OTHERS,* } *Appellants*,

versus

HURRO PURSHAD ROY CHOWDERY AND ANOTHER, ... } *Respondents*.

Construction, sec. 16, Beng. Reg. III. of 1793—Pleading, Res Judicata.

Sec. 16, *Beng.* Regulation III. of 1793 prohibiting the *Zillah* and city Courts from entertaining any cause which, from the production of a former decree, or the records of the Court, shall appear to have been heard and determined by any former Judge, or Superintendent of a Court having competent jurisdiction,—*Held* to apply only to cases in which the question to be determined in the cause was the same question as had been already heard and determined, and not to cases in which new circumstances had intervened, and altered the nature and character of the question to be determined.

Money recovered under a decree of judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force, as the original decree or judgment must be taken to be subsisting and valid until it has been reversed and superseded by some ulterior proceeding.

29th March, 1865.

JUDGMENT was delivered by

THE RIGHT HON. THE LORD JUSTICE TURNER:

The facts of this case, so far as it is necessary to refer to them, lie in a narrow compass.

In the year 1821, *Doorga Purshad*, claiming to be entitled to the estate of his uncle, instituted a suit against *Shama Purshad Nundy*, a debtor to the uncle's estate, for recovery of the sum of Rs. 23,024, principal and interest due upon a Bond. Pending this suit and in the year 1827, *Tara Purshad Roy Chowdery*, the original Respondent, sued *Doorga Purshad* for recovery of one-half of the estate of the uncle, to which he (*Tara Purshad*) claimed to be entitled.

In the year 1829, there was a compromise of the suit instituted by *Tara Purshad* against *Doorga Purshad*, under which compromise *Tara Purshad* became entitled to a six-*anna* share of the debt due from *Shama Purshad Nundy*. Subsequently to this compromise, and on the 27th of July, 1829, *Doorga Purshad* obtained a decree in the Provincial Court against *Shama Purshad Nundy* for the amount of the principal and interest due upon the Bond. From this decree *Shama Purshad Nundy* appealed to the *Sudder* Court, and pending this appeal, and in the year 1831, there was a compromise of this suit also, which was effected by deeds, dated the 16th of May, 1831. The terms of this compromise were, that *Shama Purshad* should pay Rs. 24,217. 12. 17. at the end of three years, without interest, and that, in default of payment, *Doorga Purshad* should be at liberty to proceed and realize the amount. This compromise was, it appears, made without the privity of *Tara Purshad*, and the payment stipulated to be made by *Shama Purshad Nundy* at the end of the three years was not made by him.

In this state of circumstances, *Tara Purshad*, in the month of March, 1835, instituted another suit against *Doorga Purshad*, seeking to recover from him his (*Tara Purshad's*) six-*anna* share of *Shama Purshad Nundy's* Bond debt, and of the interest upon it up to the time of the commencement of the proceedings against *Shama Purshad Nundy* in the year 1821; and by the plaint in this suit, *Tara Purshad* reserved to himself the right to bring another suit for his share of the interest on the Bond debt from the last-mentioned date up to the date of the decree of the 27th of July, 1829, which *Doorga Purshad* had obtained as above-mentioned.

This suit was carried through the Courts in *India* up to the *Sudder Dewanny Adawlut*, and ultimately, by a decree of that Court, dated the 15th of April, 1841,

* 10, Moore's I. A., p. 203.

Doorga Purshad was decreed to pay to *Tara Purshad* the entire amount of principal and interest for which his suit was brought. From this decree of the *Sudder* Court, *Doorga Purshad* appealed to Her Majesty in Council, and upon this appeal being heard before the Judicial Committee in July, 1849 (*a*), the Committee reported to Her Majesty, that the decree of the *Sudder* Court ought to be reversed, and that it ought to be declared that *Doorga Purshad* was liable to *Tara Purshad* for a six-*anna* share of what he, *Doorga Purshad*, had received, or might thereafter receive, and of what, if anything, he might at any time after the 16th of May, 1834 (being the expiration of the time limited by the deeds of compromise of the 16th of May, 1831), without his wilful default, have recovered or received from *Shama Purshad Nundy*, or in respect of the sum of Rs. 24,217. 12. 17, and the interest thereon, payable by *Shama Purshad Nundy* under the decree of the 27th of July, 1829, and the compromise of the 16th of May, 1831, and that the case ought to be referred back to the *Sudder Dewanny Adawlut*, to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared, and that *Tara Purshad* should be at liberty to apply in the suit of *Doorga Purshad* against *Shama Purshad Nundy* for leave to enforce the decree in that suit, as he might be advised, for the recovery of his six-*anna* share of the Rs. 24,217. 12. 17, and interest, in so far as the same had not been already recovered.

By an Order of Her Majesty in Council, bearing date the 18th of July, 1849, this report was approved, and it was ordered that the decree of the *Sudder* Court of the 15th of April, 1841, should be, and the same was thereby reversed, and that it be declared and done as in the report more fully set forth and recommended, and that the same be duly and punctually obeyed, complied with, and carried into execution.

In the meantime, pending this appeal to Her Majesty in Council, and on the 3rd of December, 1842, *Tara Purshad* instituted a further suit against *Doorga Purshad* to recover the sum of Rs. 4,593. 12. 9., the interest upon his six-*anna* share of the sum secured by the Bond, from the year 1821, when the proceedings against *Shama Purshad Nundy* were commenced, up to the 27th of July, 1829, when the decree against him was made, being the interest for which by the plaint in his original suit he had reserved to himself the right to sue. This suit was heard before the Principal *Sudder Ameen* on the 11th of August, 1843, and by his decree of that date he dismissed the suit; but, upon an appeal by *Tara Purshad* to the Judge of the *Zillah* Court, the decision of the *Sudder Ameen* was reversed, and *Doorga Purshad* was ordered to pay to the Respondent the Rs. 4,593. 12. 9., with interest at 12 per cent. per annum, from the time of the commencement of the suit, with the costs in both Courts; and upon a special appeal by *Doorga Purshad* to the *Sudder Dewanny Adawlut*, that Court dismissed the appeal with costs. In consequence of these decrees *Doorga Purshad* was compelled to pay to *Tara Purshad* the sum of Rs. 11,127. 15. 3., which he accordingly paid as follows:—Rs. 8,200. 7. 3 on the 28th of April, 1848, and Rs. 2,927-8. on the 4th of August, 1857.

Several attempts appear to have been made by *Doorga Purshad* after Her Majesty's Order in Council arrived in *India* to obtain a review of the decrees made against him in the last-mentioned suit, and to have those decrees considered in connection with Her Majesty's Order in Council, but he failed in these attempts, and thereupon, on the 17th of August, 1857, he instituted against *Tara Purshad* the suit out of which the appeal before us has arisen. By his plaint in this suit he has sought to recover the sum of Rs. 23,294. 9. 16½, being the amount of the sums paid by him to *Tara Purshad*, and of the sums which he has paid for his own costs of the proceedings taken against him, with interest on such sums respectively from the respective times of the payment thereof at 12 per cent. per annum. *Tara Purshad*, by his answer to the plaint, has insisted that the decision of the Judge of the *Zillah* Court in his favour in the further suit brought by him, having been

(*a*) 1, P. C. J., p. 381.

affirmed on appeal by the *Sudder* Court, became final, and could not be set aside by a new suit, and he has relied upon section 16, Regulation III., of 1793, as a bar to the suit. On the 29th of June, 1858, the suit was heard before the Principal *Sudder Ameen*, and was by that Judge dismissed with costs. From this decision *Doorga Purshad* appealed to the *Sudder* Court, but that Court, by its decree, dated the 9th of May, 1859, affirmed the decision of the Principal *Sudder Ameen*.

The appeal now before us is from the decree of the *Sudder* Court of the 9th of May, 1859, and from the decree of the *Zillah* Court of the 29th of June, 1858. There is no appeal before us from either of the decrees made in the further suit instituted by *Tara Purshad* against *Doorga Purshad*, their Lordships having, in consequence of delay on the part of *Doorga Purshad*, refused an application made by him for leave to appeal from those decrees. *Doorga Purshad* and *Tara Purshad* have both died pending this appeal, and the appeal has been revived and is now in force between their representatives, *Sama Purshad Roy Chowdery* and others, and *Hurro Purshad Roy Chowdery* and another.

The sole question to be considered upon this appeal is, whether *Doorga Purshad* was entitled to recover, in the suit instituted by him against *Tara Purshad*, the sums which had been recovered by *Tara Purshad* from him under the decrees in the suit which *Tara Purshad* had instituted against him; and in considering this question, it must be assumed that at the times when those decrees were made, *Tara Purshad* was rightfully entitled to recover the sums which were payable under them, there not being, as has been mentioned, any appeal from those decrees. *Tara Purshad* insisted in the Courts in India, and his representatives have insisted in the argument before us, that *Doorga Purshad* was not entitled to recover these sums for two reasons: first, that his right to recover them is precluded by section 16, *Ben.* Reg. III. of 1793; and, secondly, that, independently of that provision in the Regulation, money which has been paid under a decree or judgment of a Court of competent jurisdiction cannot be recovered in a new suit or action, so long as the decree or judgment under which it has been recovered is subsisting and in force. Upon the first of these points their Lordships have felt but little doubt. Section 16, *Ben.* Reg. III. of 1793, is in these terms:—"The *Zillah* and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall appear to have been heard and determined by any former Judge, or any Superintendent of a Court having competent jurisdiction. If any doubt should arise respecting the competency of the former jurisdiction, the Judges are to report the circumstances to the *Sudder Dewanny Adawlut*, and wait the instructions of that Court." Their Lordships think that this provision applies only to cases in which the question to be determined in the cause is the same question as has been already heard and determined, and not to cases like the present in which new circumstances have intervened, and altered the nature and character of the question to be determined. The intent of the resolution, as it seems to their Lordships, is only to prevent the re-trial of the same question; and it is obvious that there is an essential difference between the question whether *Tara Purshad* was entitled to recover against *Doorga Purshad* before the Order of Her Majesty in Council was pronounced, and the question whether, after that Order was pronounced, he was entitled to hold the money which he had previously recovered.

Upon the second point their Lordships have felt more difficulty. There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in *India*—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the

money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded; and applying this test to the present case, their Lordships are of opinion, that the decrees obtained by *Tara Purshad* against *Doorga Purshad* were superseded by the Order of Her Majesty in Council pronounced in the year 1849. It was plainly intended by that Order that all the rights and liabilities of the parties should be dealt with under it, and it would be in contravention of the Order to permit the decrees obtained by *Tara Purshad* pending the appeal on which it was made to interfere with this purpose. Moreover, the decrees now under appeal rest on precisely the same cause of suit as the original decree which was reversed by the Order of Her Majesty in Council. The plaint in the case on which the original decree was recovered describes the interest recovered by the decrees under appeal as part of the same cause of suit, separated only for the convenience of *Tara Purshad*, and the decrees under appeal, therefore, were mere subordinate and dependent decrees, and their Lordships do not think that these decrees can be held to have remained in force when the decree on which they were dependent had been reversed.

That the *Sudder Dewanny Adawlut* has not, as their Lordships think it might have done, dealt with the decrees now under appeal as falling within the direction given to that Court by Her Majesty's Order in Council, to ascertain, carry out, and enforce the rights and liabilities of the parties, does not, in their Lordships' opinion, vary the case. This provision in Her Majesty's Order in Council gave power to the *Sudder Dewanny Adawlut* to deal summarily with the rights and liabilities of the parties, but it could not, in their Lordships' opinion, take away any rights which the law would give to *Doorga Purshad* independently of that power. For these reasons their Lordships are of opinion, that the decrees appealed from ought to be reversed, and that the sums of Rs. 8,200. 7. 3. and Rs. 2,927. 8. paid under them ought, so far as the assets of *Tara Purshad* will extend, to be repaid by the now Respondents to the Appellant, with interest at 12 per cent. from the respective times when such sums were respectively paid, and that the now Respondents ought also, so far as *Tara Purshad's* assets will extend, to pay the costs of this appeal; but under the circumstances of the case, and having regard to the delay on the part of *Doorga Purshad*, their Lordships do not think that his representatives are entitled to recover the costs incurred by him in the course of the proceedings taken against him by *Tara Purshad*. Their Lordships, therefore, will humbly recommend Her Majesty to make an Order upon this appeal to the effect which we have mentioned.

3rd and 4th March, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Court of the Judicial Commissioner of Oude.

MULKAH DO ALUM NOWAB TAJDAR BOHOO,* ... ... } *Appellant*,

versus

MIRZA JEHAN KUDR, NOWAB MIRZA, ZUMAN ARA BEGUM and RUFAATOONISSA BEGUM, } *Respondents*.

Lex Loci of the Province of Oude—Punjab Code of 1854, introduced into Oude in 1856—Mahomedan Law, Dower.

Considering several clauses in a letter of the *Indian* Government, dated the 4th of February, 1856, and addressed to the Chief Commissioner of *Oude*, shortly after its annexation, it appeared to their Lordships that the effect of those clauses was, that

* 10, Moore's I. A., p. 252.

the principles of law as well as the rules of procedure laid down in the *Punjab* Code were to be adopted as the basis of the administration of justice in *Oude*, and to be applied as far as they might appear to the Commissioner to be not unsuited to the circumstances of the country; but that, as far as they were founded upon local customs, varying the general law, whether Hindoo or Mahomedan they were not to be applied to *Oude*, where the local customs would probably differ from those of the *Punjab*.

The *Punjab* Code of 1854, cl. 10, sec. vi., declares that:—"By the Hindoo and Mahomedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a Defendant who has divorced his wife, without reflecting upon the liability to which he was subject. Still, although the full amount need not be decreed, yet in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband:" and the 11th sec. declares, that in the event of the husband's death "the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case, the Court would possess the modifying power of cl. (10), and award to the widow a fair sum with reference to the assets of the estate and the circumstances of the heirs."

By the settlement made on the marriage, about the year 1838, of a Mahomedan, a member of the Royal family of *Oude*, the wife's dower was fixed at a *crore* of rupees, which was not claimed till his death after the overthrow of the *Oude* Dynasty. The effect of allowing the widow's claim for dower would have been to a great extent to defeat the claims of other creditors of her husband, and to sweep away the whole property from the heirs; and, the matter coming up before the Judicial Commissioners of *Oude*, the deceased's property was directed to be equally divided between the widow and the other heirs. *Held*, on appeal, affirming such decision—

1. That the Commissioners were bound to apply the provisions of the *Punjab* Code to the case before them; and

2. That the Commissioners were at liberty to exercise the discretion between the widow and the heirs.

29th March, 1865.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. LORD KINGSDOWN:

This is an appeal by the widow of the late General *Sahib* against certain decisions which have been pronounced by the Judicial Commissioners in *Oude* on a claim perferred by her for dower against the estate of her late husband.

The marriage took place about the year 1838 of our era, and by the settlement made upon it, to which the father of the bridegroom was a party, the wife's dower was fixed at a *crore* of rupees, a sum equal to £1,000,000 sterling.

The father of the bridegroom was a son of the King of *Oude*, and at that time heir-apparent to the Throne.

General *Sahib* came over to England after the overthrow of the *Oude* dynasty, and died here.

The Royal family of *Oude* were all Mahomedans.

The General left a son, an adopted son, and two daughters surviving him. These persons claimed to be coheirs with his widow to his property.

The widow claimed a right to have the whole amount secured by the deed as her dower treated as a debt due from her husband's estate, and paid *pari passu* with the debts of other creditors, and she disputed the title of the other claimants as coheirs.

After some attempts to settle the matter by arbitration, which proved abortive, a suit was instituted, in order to determine the rights of the parties.

In the course of these proceedings an inquiry was directed with respect to the property which the General had left at his death, and in the result it appeared that it amounted in all to about five *lacs* of rupees. The claim of the Appellant alone in respect of her dower amounted to a *crore*, or 100 *lacs*, exclusive of other debts, which are represented to be of very trifling amount.

The effect, therefore, of allowing the Appellant's claim would be, to a great extent, to defeat the claims of the other creditors, and to sweep away the whole property from the heirs.

If such, however, be her legal rights, no Court of Justice can refuse to give effect to them on the ground of any inconvenience or hardship which may result from allowing them.

The case came first before two Assistant Commissioners in the *Lucknow* District Court in August, 1859; then on appeal before Colonel *Abbott*, the Commissioner Superintendent of the *Lucknow* division,

on the 2nd of December, 1859; and lastly, before Mr. *Campbell*, the Judicial Commissioner of *Oude*, on the 23rd of March, 1860. All these gentlemen were of opinion, that the claim of the Appellant could not be allowed to its full extent, but must be modified with reference to the assets of the husband and the circumstances of his family; but they differed in some degree as to the mode in which, in the exercise of their discretion, the division between the widow and the other heirs should be made. By the last order, that of Mr. *Campbell*, made on the 23rd of March, 1860, it was directed that the debts of the General should be first paid; that one-half of the remaining property should be paid to the widow, and the other half to the other heirs; but this decision was not to affect a sum of Rs. 110,000 in Company's paper in the name of the Appellant, which was to be retained by her, as her absolute property. From this and the preceding orders the present appeal has been brought.

Great trouble appears to have been taken by the Commissioners to ascertain the general Mahomedan law upon the subject, and opinions were obtained from the Courts of the several Provinces of *India*, particularly with reference to the question whether, when extravagant sums far beyond the means of the bridegroom to satisfy were provided by settlement as dower, such sums were to be treated as *bonâ fide* debts to be paid *pari passu* with other debts on the death of the husband, though they might sweep away the whole property from the heirs, or whether they were to be treated as securities for an adequate provision for the wife. The reports from the different Provinces were not uniform—some being in favour of treating the sum fixed as an absolute debt; others in favour of a modification of the demand with reference to what might be considered the proper dower of the wife.

It is not necessary, in the opinion of their Lordships, to decide the general question, because, whatever the general law may be, the mode in which contracts of this description are to be treated in *Oude* has been settled by specific Regulations issued by competent authority, in the manner which we are about to state.

We take the facts as to the origin of these Regulations from a letter dated the 4th of February, 1856, from the Secretary-General of the Indian Government, containing instructions for the Government of *Oude*, addressed to Major-General *Outram*, who was appointed Chief Commissioner of the affairs of this Province.

The facts as appearing in this letter are these: in the year 1847-48 a few rules for Civil judicature were drawn out by the India Government for the guidance of the officers employed in the Cis-and-Trans-*Sutlej* States. Then these were in 1849 extended to the *Punjab*, and it was left to the Officers charged with the local administration, laying upon these the foundation of the judicial system, to improve, amend, and elaborate them as practical experience might suggest.

These rules thus amended were in 1851 reduced into a printed form, and circulated amongst the Judges of the *Punjab*. They are entitled "Abstract Principles of Law, circulated for the guidance of Officers employed in the Administration of Civil Justice in the *Punjab*." To which is appended a proposed form of procedure.

This Code, as its title imports, contains a statement, first, of the principles of law to be adopted by the Judges; and second, of the rules of procedure to be followed. It lays down the ordinary rules of Mahomedan and Hindoo law on the principal subjects which were likely to come before the Courts, and both in the rules of law and forms of procedure, introduces some alterations into the laws prevailing in the older Provinces.

This Code thus introduced into the *Punjab* had, in the opinion of the Government, been found to work well.

In February, 1856, the King of *Oude* was deposed by the Indian Government, and the whole administration, civil and military, of the Kingdom was assumed by its officers under its authority. To provide for the administration of justice a number of Commissioners and Assistant Commissioners were appointed to act for different Districts into which the country was to be divided, and the general rules to be observed in the administration of justice, as well as in the ordering of the Pro-

vince in other respects, are laid down in the letter to which we have referred.

The intention to assimilate, as far as possible, the Government of *Oude* to that of the *Punjab* appears in several passages of the letter. In paragraph 21 it is said, —"It has been already intimated to you that the administration of *Oude* is to be conducted as nearly as possible in conformity with the system which has been introduced into the *Punjab*."

After explaining the advantages which had arisen in that Province from the introduction of the new Code, and observing that the Kingdom of *Oude* resembled very closely in its population, language, creeds, and customs the North-West Provinces, the letter proceeds, "There is, therefore, every reason to believe, and none to doubt, that the system of administration as modified for the *Punjab*, and divested of all those forms and technicalities which delay justice and are specially distasteful to a people unaccustomed to technical litigation, will be acceptable to the people of *Oude*, and more completely suited to the Province itself than it was to the *Punjab*, where, nevertheless, its success is undeniable."

After dealing with financial and some other matters, the letter, in paragraph 43, proceeds to give instructions for the administration of civil justice, with respect to which, it observes that very material assistance is derived from the results of experience acquired in the *Punjab*.

Then follow the paragraphs on which the question as to the introduction of these rules into *Oude*, mainly depends.

The 44th section, after giving the history of those rules which we have already read, proceeds thus:—"These rules now, for the most part, guide the proceedings of the Judicial Courts in the *Punjab*, and they have been found so well fitted to the requirements of a new Province and a simple people, so easy in their application, so acceptable to the population, no less than to the officers themselves, and so beneficial in their results, that the Governor-General in Council advises that they should be made the ground-work of the civil judicial system in *Oude*. Several printed copies of these 'Rules' will shortly be furnished to you for distribution.

"45. There appears to be no reason whatever for supposing that the Rules of procedure will not be as applicable to the Civil Courts in *Oude* as to those in the *Punjab*, and there can be no objection to their immediate introduction. It is believed also the 'Principles of law' will be found sufficient, in the first instance, to guide the Judicial Officers in dealing with the various questions which will come before them in this branch of their duty. But it will not escape your observation that, in the preparation of the rules under notice, much attention has been given to the *lex loci*, and that, especially in matters relating to inheritance, marriage, divorce, and adultery, adoption, Wills, legacies, and partition, as well as in all commercial transactions, a due regard to local usage has been enjoined. It cannot, of course, be supposed that the *lex loci*, or local custom, in Provinces differing so widely as the *Punjab* and *Oude* is in all, or even in many, respects identical, and it follows that those provisions of the 'Rules' which rest on the *lex loci*, in the *Punjab* cannot, with any propriety or without risk of injurious failure, be extended to the Province of *Oude*."

It appears to their Lordships that the effect of these clauses is, that the principles of law as well as the rules of procedure laid down in the *Punjab* Code are to be adopted as the basis of the administration of justice in *Oude*, and to be applied as far as they may appear to the Commissioners to be not unsuited to the circumstances of the country; but that, as far as they are founded upon local customs, varying the general law, whether Hindoo or Mahomedan, they are not to be applied to *Oude*, where the local customs would probably differ from those of the *Punjab*.

The 46th section is in these words:—"While, then, the Governor-General in Council directs your attention to this collection of principles of law, as calculated to afford material assistance in the absence of any better or more appropriate Treatise, he refrains from requiring the strict observance of them, until it can be ascertained how far they are applicable to the peculiarities of the Province and the customs of its people. With this end in view, his

Lordship in Council desires me to suggest that all the Commissioners and District Officers, and the most experienced of the Assistants, should be required to study the 'Principles of Law' in their daily application to the business brought before the Civil Courts, and, after the lapse of a twelvemonth or more, as may be hereafter determined, to report to the Judical Commissioner the opinions which they may have formed of the applicability of the 'Rules of Law' to the people of *Oude*, and to offer, at the same time, any remarks and suggestions which may have occurred to them. It may, perhaps, be advisable also to invite the opinions and observations of a few of the Native Extra Assistants, whose past career and official knowledge, and more immediate contact with the people, may have qualified them to form a judgment on those points which touch upon native customs, and to give sound advice. On receipt of all these reports, it will be the duty of the Judicial Commissioner to study the suggestions which they contain, and to recast the collection of Rules of law. It is not anticipated that the Rules of procedure will call for much, if any, alteration, but it will rest with the Judicial Commissioner to give his consideration to these also at the same time, and to introduce such modifications as may appear advisable, provided they do not tend to introduce those complications and technicalities, the removal of which is the main as it is the most acceptable feature of the system successfully followed in the *Punjab*."

This section is perfectly consistent with those which precede, and shows that the rules were to be generally acted upon, though strict obedience to them was not required, until it had been ascertained how far they were applicable to the peculiarities of the Province and the customs of its people. With this view, its application is to be carefully watched by those who administer it, who, after a certain period, are to make a report upon the subject, with any suggestions which may occur to them for amending it.

The Indian mutiny which broke out in the following year probably prevented any report being made by the Commissioner, in compliance with the directions of the 46th section, as early as was there contemplated; but, after the restoration of the British authority, we find in the official report of the administration of the Province of *Oude* for the year 1859-60, that the *Punjab* Code is stated to be the basis of the Civil Law of the country, and allusion is made to some modifications which have been introduced in it, but it does not appear that any such modification related to the subject now in controversy.

On the whole, their Lordships entertain no doubt, that the Articles of the *Punjab* Code generally were in force at the time of the date of these Orders, the first of which was made on the 25th of August, 1859, and the last on the 23rd of March, 1860.

Then on what grounds is the application of these rules to be excluded from the present case? If they are to be excluded, it must be on the ground that there is some *lex loci*, or special custom, in *Oude* by which the law of dower in that country differs from the general Mahomedan law. But no such custom is pretended. The argument for the Appellant rests entirely on the general Mahomedan law.

The next question is, do the rules of the *Punjab* Code warrant a departure from the strict law, if law it be, by which in all cases a sum fixed as dower is to be enforced as an absolute debt? Upon this question no doubt can be entertained. They provide for a modification of the dower mentioned in a marriage-contract both in the case of a divorce and of the death of the husband.

The 10th clause, section VI., is in these words:—"By the Hindoo and Mahomedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a Defendant who had divorced his wife without reflecting on the liability to which he was subject. Still, although the full amount need not be decreed, yet, in the event of a divorce without a valid cause,

heavy damages will be awarded to the wife in proportion to the means of the husband."

The 11th section provides for the event of the husband's death:—"At the husband's death, the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case, the Court would possess the modifying power of Clause 8, and award to the widow a fair sum, with reference to the assets of the estate and the circumstances of the heirs." The reference to clause 8 is either a mistake or a misprint for clause 10.

It appears by the proceedings in this case, that these rules have been and are acted upon in the *Punjab* in dealing with cases of dower, and, by the orders to which we have referred, they have been extended to *Oude*.

It was suggested that this was only to apply to future contracts, and not to contracts previously made. But their Lordships think it clear, that these sections provide for the mode in which all contracts of this description which might come before the Courts were to be treated. Upon the whole, their Lordships are of opinion, that the Commissioners were bound to apply the provisions of this Code to the case before them, and were at liberty to exercise a discretion in the division of the property in dispute between the widow and the heirs. As to the manner in which that discretion should be exercised, the Commissioner whose judgment is appealed from must be more capable of forming a correct judgment than their Lordships can be.

It may be proper to notice an objection which was taken, that in one of the Orders appealed from, a provision was made out of the estate for an adopted son, though it was admitted by the Commissioner making the Order, that such son was not properly one of the heirs. But this will be corrected by the decision of Mr. *Campbell*, which directs the division to be amongst the coheirs other than the Appellant; and at all events, it is a matter which relates to a fund in which she has no interest.

Their Lordships will humbly advise Her Majesty to affirm the Order of Mr. *Campbell* of the 23rd of March, 1860; but as the case is one of novelty and some difficulty, they will not give any costs.

6th, 7th, and 9th March, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

MUSSUMAT BHOOBUN MOYEE DEBIA, ... } *Appellant,*

versus

RAM KISHORE ACHARJ CHOWDHRY and CHUNDRABULLEE DEBIA, ... } *Respondents.*

Hindoo law—Deed of Onoomuttee puttro—Permission to adopt—Testamentary instrument creating limitation in tail male—Executory devise—Adoption by widow, after death of a natural son under an Onoomuttee puttro—Succession.

In 1811 G. K., being then childless, executed an *Onoomuttee puttro*, by which he gave power of adoption to C. B., his wife. Subsequently a son B. K., was born to G. K.; but G. K., nevertheless, two years after the birth of the child, executed another instrument, which was in these words:—"This is an *Onoomuttee puttro*, to the following purport:—Prior to the birth of a male child from your womb, I had executed in your favour an *Onoomuttee puttro* on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (*gotra*), or from a different race (*gotra*), for the purpose of performing mine and your *Sradh* and other rights, and for the *Sheba* (service) of the gods and for the succession to the *Zemindary* and other property; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering); that *dattaka* (adopted) son shall be entitled to perform your and my *Sradh*, &c., and that of our ancestors, and also to succeed to the property. To this end I execute this *Onoomuttee puttro*."

* 10, Moore's I. A., p. 279.

B. K., succeeded his father G. K., as heir at about 4 years of age, and died when 24 years old without issue, his widow inheriting his estates both ancestral and self-acquired. A son was then adopted by C. B., in execution of the power given by the deed of 1819. Two of the Judges of the *Sudder* Court (the third Judge *dissentient*) decided on the validity of the adoption on the grounds, that the document was to be regarded (i) as a will, and (ii) as containing a limitation, on failure of male issue of the testator, in the life-time of C. B., of the estate of the testator, to a son to be adopted by C. B., as a *persona designata*. Held on appeal, reversing the decree of the *Sudder* Court:—

First, that the instrument was merely a deed of permission to adopt, and not of a testamentary character; it having been registered as a deed in the life-time of the maker, containing no words of devise, nor it having been the intention of the maker that the instrument should contain any disposition of his estate except so far as such disposition might result from the adoption of a son under it;

Secondly, that, although doubtlessly by the decision of Courts of Justice, the testamentary power of disposition by Hindoos had been established within the Presidency of *Bengal*, it would be to apply a false and mischievous principle, if it should be held that the nature and extent of such power could be governed by any analogy to the law of *England*;

Thirdly, that the adopted son, as such, takes by inheritance, and not by devise, and by the Hindoo law, in the case of inheritance, the person to succeed must be the heir of the last full owner; and that, therefore, B. K., was the last full owner, and his wife succeeded, as his heir, to a widow's estate; and

Fourthly, that the adoption by C. B., under the *Onoomuttee puttro* was invalid, the power being incapable of execution at the time when it was professed to have been exercised.

Quære.—Whether under his testamentary power of disposition G. K., could have restricted the interest of B. K., in his estate to a life estate, or could have limited it over (if his son left no issue male, or such issue male failed) to adopted son of his own?

26th May, 1865.

THEIR Lordships' judgment, having been reserved, was now pronounced by

THE RIGHT HON. LORD KINGSDOWN:

The appeal in this case arises out of a suit brought by the Respondent, *Ram Kishore*, to recover certain estates in *Bengal*, which were claimed by and were in the possession of the Appellant and of *Rajendro Kishore*, whom she alleged to be her adopted son.

The facts, so far as they are necessary to make our judgment intelligible, are these:—

Gour Kishore Acharj, being the owner of considerable estates in *Bengal*, died in the year 1821. He left surviving him a widow named *Chundrabullee Debia* and an only son named *Bhowanee Kishore*.

At the time of his father's death, *Bhowanee Kishore*, who succeeded as his heir, was about four years of age. He attained, however, his majority, and married the Appellant, *Bhoobun Debia*. He died in the month of August, 1840, being then about twenty-four years old. He left no issue, and *Bhoobun Debia*, his widow, became the heir of his property, as well ancestral as of other estates which had been purchased with his own money during his life.

Immediately upon the death of *Bhowanee Kishore*, an instrument was set up, as being his Will, by *Chundrabullee Debia*, his mother, and *Bhoobun Debia*, his widow. By this instrument, power to adopt a son was given to *Bhoobun Debia*, and until such adoption was made, the income of the estates was given to *Chundrabullee Debia* and *Bhoobun Debia*.

Under this alleged Will, these two ladies took possession of the estates of *Bhowanee Kishore*, and remained in the enjoyment of them for nearly four years.

In December, 1843, *Bhoobun Debia* professed to exercise the power alleged to have been given to her by the instrument already referred to, and adopted a boy called *Rajendro Kishore*.

Upon this, a quarrel appears to have arisen between *Chundrabullee Debia* and *Bhoobun Debia*, and *Chundrabullee Debia* alleged that the supposed Will of *Bhowanee Debia*, under which she had so long been in the enjoyment of half his property, was a forgery, and had not been made till after his death, and that *Bhoobun* had no power of adoption. She further set up an instrument called an *Onoomuttee puttro*, or deed of permission, by which she alleged that a power to adopt a son had been given to her by her husband, *Gour Kishore*, in his life-time, and which power, in the events which had happened, she claimed a right to exercise.

She accordingly adopted, or professed to adopt, the Respondent, *Ram Kishore*, as the son of *Gour Kishore*, her late husband.

Bhoobun Debia, on behalf of *Rajendro Kishore*, her adopted son, having obtained

possession of all the property of *Bhowanee Kishore*, the suit in which the present appeal was brought, was instituted in 1852, in the *Zillah* Court of *Mymensing*, by a next friend of *Ram Kishore*, on his behalf, against *Bhoobun Debia* and *Rajendro Kishore*, and certain other persons, the Plaintiff claiming, as the adopted son of *Gour Kishore*, the whole property, ancestral and acquired, of *Bhowanee Kishore*. To this suit *Chundrabullee Debia* was made a Defendant, instead of suing as a Plaintiff, on behalf of her son; that course being adopted probably with a view to avoid any prejudice which might arise from the inconsistency of her previous conduct with the title now set up for her son.

When the case came before the *Sudder Ameen*, he was of opinion that the Plaintiff must recover upon the strength of his own title, and that if such title failed, it was unnecessary to decide upon the case of the Defendants.

He was of opinion that the Plaintiff had failed to prove his title, and he, therefore, dismissed the suit, expressing at the same time a strong opinion in favour of the Defendant's adoption.

He awarded the costs of the suit to the Defendants, with the exception of *Chundrabullee Debia*, whom he held to be really the promoter of the suit.

From this decision there was an appeal to the *Sudder Dewanny* of *Calcutta*. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of *Rajendro Kishore* was invalid, and that the Will of *Bhowanee Kishore*, purporting to create the power of adoption, was a forgery. They were equally unanimous in holding that the *Onoomuttee puttro* of *Gour Kishore* was a genuine and valid instrument, and that if the power to adopt continued at the time when *Chundrabullee Debia* professed to execute it, there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favour of the Plaintiff as to the ancestral property of *Bhowanee Kishore*, but not as to his self-acquired property; and the costs of the parties were ordered "to be borne by them in proportion to the amount of the property decreed or dismissed."

The case now comes before us on appeal by *Bhoobun Debia*, as representing her own rights and the rights of a son, whom she had adopted in lieu of *Rajendro Kishore*, who is dead, and on a cross-appeal by *Ram Kishore*, complaining that the decree in his favour ought to have included the self-acquired property as well as the ancestral property of *Bhowanee Kishore*.

On the hearing of these appeals, we expressed a clear opinion, without calling on the Respondent's Counsel, that the Court below was right in holding that the alleged Will of *Bhowanee* was a forgery. The evidence is irresistible that it was contrived by the different members of his family after his death, in order to give effect to an arrangement which they considered would be for the common benefit. This being so, and no power of adoption having been proved or alleged to have been given by parol, the adoption of *Rajendro Kishore* and of the son now substituted for him, must of course be held in this suit to be invalid.

The nex question is, as to the validity of the adoption of *Ram Kishore*. We see no reason to dissent from the opinion of the Court below upon the facts of the case, viz., that the *Onoomuttee puttro* of *Gour Kishore* is a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that at the time when *Chundrabullee Debia* professed to exercise it, the power was incapable of execution.

It will be necessary to go into this part of the case with some minuteness.

It appears that some years before the birth of *Bhowanee*, and in the year 1811 of our era, *Gour Kishore* being then childless, and anxious, as Hindoos generally are, to provide a son by adoption, if he should have no natural-born son, executed an *Onoomutte puttro* on the 30th of March, 1811, by which he gave power of adoption to *Chundrabullee*, his wife.

In 1819, two years after the birth of *Bhowanee*, he executed the instrument on which the present question depends, which is in these words. [His Lordship read the deed, 10, Moore's I. A., p. 281.]

The first question which arises is as to the construction of this instrument. It seems to have been considered by the two Judges of the *Sudder* Court, who decided in favour of the Respondent (certainly by one of them,) that the document was to be regarded as a Will, and as containing a limitation, on failure of male issue of the Testator in the life-time of *Chundrabullee Debia*, of the estate of the Testator, to a son to be adopted by *Chundrabullee Debia*, as a *persona designata;* and one of the Judges, in a very elaborate argument, refers to Mr. *Fearne's* celebrated treatise on Contingent Remainders, in order to show that such a devise by the English law would be valid. There is no doubt that by the decision of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of *Bengal;* but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of *England*. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing as far as possible from that which prevails amongst Hindoos in *India*.

But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be, a deed of permission to adopt; it is not of a testamentary character, it was registered as a deed in the life-time of the maker; it contains no words of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them.

The main ground of the decision in the Court below appears, therefore, to fail, and this instrument must be construed, and its effect must be determined, in just the same way as if it had been made in one of the Provinces of *India*, in which the power of testamentary disposition is not recognized.

How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that *Bhowanee* had left a son, natural born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the life-time of *Chundrabullee Debia*. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

But whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if *Bhowanee Kishore* had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to *Chundrabullee Debia* would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us.

In this case, *Bhowanee Kishore* had lived to an age which enabled him to perform—and it is to be presumed that he

had performed—all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

On the death of *Bhowanee Kishore*, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had had any. She took a vested estate, as his widow, in the whole of his property. It would be singular if a brother of *Bhowanee Kishore*, made such by adoption, could take from his widow the whole of his property, when a natural-born brother could have taken no part. If *Ram Kishore* is to take any of the ancestral property, he must take all he takes by substitution for the natural-born son, and not jointly with him.

Whether under his testamentary power of disposition *Gour Kishore* could have restricted the interest of *Bhowanee Kishore* in his estate to a life interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this. The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of *Gour Kishore* would not have taken.

This seems contrary to all reason and to all the principles of Hindoo law, as far as we can collect them.

It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindoo law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case, *Bhowanee Kishore* was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of *Bhowanee Kishore*.

If *Bhowanee Kishore* had died unmarried, his mother, *Chundrabullee Debia*, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have devested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the Text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and devested.

The only case referred to in the argument before us, or in the judgment below, as tending in that direction, is that of *Luckinarain Tagori*, reported by Sir *F. Macnaghten*, "Cons. on Hindu Law," p. 168; but it is incontestable that in that case the disposition depended wholly on the testamentary power. The authority to adopt was only subsidiary to the disposition of the property. The Will of *Luckinarain Tagori* is set forth in full in No. 5. p. 9, of the Appendix to Sir *F. Macnaghten's* work. It is termed a Will; it appoints an Executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of *Gour Kishore* to have made the disposition now insisted on by the Appellant by devise of his estates, but we find no such devise in the instrument which he has executed.

An additional difficulty in holding the estate of the widow of *Bhowanee Kishore* to be devested may, perhaps, be found in the doctrine of Hindoo law, that the husband and wife are one, and that as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection.

Upon the whole, we must humbly report

to Her Majesty our opinion on the original appeal that the Plaintiff's suit ought to be dismissed; but, inasmuch as the main expense of it has been occasioned by the Appellant setting up a state of facts which has turned out to be untrue, and disputing the facts alleged by the Respondents, which have been established, we think that no costs should be awarded to either party of the suit or of the original appeal. The cross-appeal is wholly groundless, and we must advise that it be dismissed with costs.

The several Orders and decrees complained of, so far as they are inconsistent with the above recommendations, must be reversed.

19th June, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John T. Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces.

MUSSUMAT JARIUT-OOL-BUTOOL,* ... } *Appellant*,

versus

MUSSUMAT HOSEINEE BEGUM, ... } *Respondent*.

Beng. Reg. XVI. of 1797, s. 4—Security pending appeal.

Sec. 4, *Ben.* Regulation XVI. of 1797 authorises the *Sudder* Court on the admission of an appeal to England to require security to be given by the decree-holder for protection of the litigated property pending the appeal, notwithstanding execution of the decree had issued before.

THIS was an application by the Appellant for an order that the Respondent, who was in possession as a decree-holder, under an execution order of the *Sudder* Court, to give security for the protection of the property in suit pending the appeal to *England*.

The petition alleged, that the Respondent instituted a suit against the Appellant, claiming possession of an estate called *Purhut*, and certain villages; that a decree was made in favour of the Respondent; the Petitioner appealed to the *Sudder Dewanny Adawlut* for the *North-Western* Provinces, and that Court affirmed the decree of the Civil Court, and dismissed the appeal; but allowed an appeal to the Privy Council, the transcript record of which appeal arrived in *England* on the 1st of February, 1865.

The petition set out the circumstances which gave rise to this application, from which it appeared that, prior to the admission of the appeal, the Respondent applied for execution of the decree of the Civil Court, as affirmed by the *Sudder Dewanny Adawlut*, and the same was ordered to be carried into execution, whereupon the Respondent was put in possession of the estate. This order was made and carried into effect without taking any security from the Respondent. The mode for proceeding, and the course to be pursued by the *Sudder* Court in case of an appeal, is prescribed by *Ben.* Reg. XVI. of 1797, which, by sec. 4 provides that—"In cases of appeal to His Majesty in Council, the Court of *Sudder Dewanny Adawlut* may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favour the same may be passed, for the due performance of such order or decree as His Majesty, his heirs or successors, shall think fit to make on the appeal, or to suspend the execution of their judgment during the appeal, taking the like security, in the latter case, from the party left in possession of the property adjudged against him." Notwithstanding the provisions of the above-mentioned Regulation, the *Sudder Dewanny Adawlut* did not take security from the Respondent upon the admission of the appeal of the Petitioner; and although the Petitioner caused several applications to be made to that Court, with a view to security being taken from the Respondent, such applications were rejected. The last of those applications was rejected by the Court on the 20th of November, 1863, when the

* 10, Moore's I. A., p. 196.

opinion of the Court was recorded in the following terms:—"The first point to be considered is, whether we can take this application into consideration. On this point we are of opinion that, as this application is preferred under sec. 4, *Ben.* Reg. XVI. of 1797, it is unnecessary to refer to the provisions of Act, No. VIII. of 1859, relative to reviews of judgments. The next point is, whether this application can be granted. On this point we are of opinion that, as execution of decree has been completed, the Court are not in a position to call upon the decree-holder to furnish security. Had the application been made in due time before execution of the decree had taken place, there would have been no difficulty in complying with it. The law above quoted does not contemplate the cases of decrees already executed. Sec. 92, Act No. VIII. of 1859, is, in our opinion, inapplicable. We accordingly reject the application."

The petition then alleged, that the Petitioner, finding it impossible to obtain redress in *India* in the matter of security from the Respondent, had been compelled to wait until an application could be made on her behalf to Her Majesty in Council, and that this application was made at the earliest date at which it was possible to have made the same; and it was insisted, first, that it was the duty of the *Sudder Dewanny Adawlut*, upon or after the admission of the Petitioner's appeal, to have taken security from the Respondent for the property which had been transferred to her, by reason that the *Ben.* Reg. XVI. of 1797, so far as respects the taking of security, was imperative, and gave the Court no option or discretion in the matter. Secondly, that the opinion of the *Sudder Dewanny Adawlut*, to the effect that the *Ben.* Reg. XVI. of 1797, did not contemplate the cases of decrees already executed, was erroneous, and that, on the contrary, the *Ben.* Reg. V. of 1798, referring *inter alia* to cases of appeal under *Ben.* Reg. XVI. of 1797, and providing a mode of enforcing security by attachment of the property, expressly includes cases of executed judgments, and that thus a strong presumption was afforded that *Ben.* Reg. XVI. of 1797 (in the absence of any expressed exception) was intended also to include such cases; and the Petitioner submitted that, under the provisions of the *Ben.* Reg. XVI. of 1797, she, having lodged her appeal within the time fixed by that Regulation, was plainly entitled to the benefit of the security prescribed by the same. That as no appearance had yet been entered on behalf of the Respondent to the appeal, and as considerable time must necessarily elapse before judgment can be obtained upon the appeal, the Petitioner had good reason to fear that, unless security be taken from the Respondent, the property which has been transferred to the Respondent in execution of the decree appealed from would be almost entirely wasted pending the appeal, and the Petitioner unable to reap the benefit of the decision upon appeal, if the same should be in her favour; and the petition prayed that the Respondent might be ordered within six weeks from the service of an Order upon her to that effect, to give full and sufficient security to the *Sudder Dewanny Adawlut* for the *North-Western* Provinces for the due performance of such decree as Her Majesty in Council shall think fit to make on the appeal, and that the amount of such security might be calculated and determined by the *Sudder Dewanny Adawlut*, and that in such calculations the mesne profits which have accrued from the property since the transfer thereof to the Respondent, as well as the value of the property transferred, may be taken into account; or that in default of the Respondent giving the required security within the before-mentioned period, then that so much of the property transferred to the Respondent as is now in her possession or power may be placed under attachment pending the appeal; that the requisite directions may be given for the purposes aforesaid, or for other relief.

Affidavits were filed confirming the facts contained in the petition, and of the waste committed by the party in possession.

Mr. *W. H. Melvill*, and Mr. *Almaric Rumsey*, for the Petitioner.

First: We are entitled to an Order directing the *Sudder* Court to obtain security from the Respondent pending the appeal. The affidavits show that the estate

is being wasted. *In re Rajah Vassareddy Lutchmeputty Naidoo* (*a*) is a case which illustrates our position that the estate may be entirely lost by the Court below neglecting to take security. The *Sudder Dewanny* Court should not have allowed the Order for the execution to the decree-holder without taking security, *Ben.* Reg. XVI. of 1797, sec. 2, which embodies Statute, 21st Geo. III. c. 70, sec. 21, *Ben.* Reg. XIII. of 1808, sec. 11, cl. 3; Circular Orders of the *North-West* Provinces, vol. I. p. 513. [Sir *John Coleridge:* Why was not an application made to stay execution?] We had no notice that the Order would be applied for. When the appeal was admitted six months have not expired, therefore we were not too late in applying for security. *Ben.* Reg. V. of 1798, secs. 5 & 6, provides for additional security after appeal. [Sir *James Colvile:* Does not the Act, No. VIII. of 1859, provide that there shall be no appeal from an Order directing execution?] It may be that such Order was not appealable, but, notwithstanding, this Court can admit an appeal. *The East India Company* v. *Syed Ally* (*b*.) Secondly, if there is any doubt as to the power in this Tribunal to grant the prayer of the petition, we ask for leave to apply to the *Sudder* Court for security, with an intimation of your Lordships' opinion on the question of law, as *In re Muir* (*c*.) If an Order cannot be made in either of these forms, we are in the alternative prepared with a petition for special leave to appeal from the execution Order, and to have the question argued *nunc pro tunc*, as was done in *Exp. Minchin* (*d*.)

(*a*) 5 Moore's I. A., p. 370; 1 P. C. J., p. 446.
(*b*) 7 Moore's Ind. App. Cases, 555.
(*c*) 3 Moore's P. C. Cases, 150.
(*d*) 4 Moore's Ind. App. Cases, 220.

THE LORD JUSTICE TURNER:

Their Lordships have felt some difficulty in dealing with this case, which in the circumstances is new. But, on examining the Regulations and considering the nature of the case, they are of opinion, that an Order may be made upon this application. At the same time, they think the proper Order to be made should be one which should leave it, as far as possible, in the discretion of the *Sudder Dewanny Adawlut* as to what proceedings, or what steps, should be taken; and their Lordships propose, therefore, to make the Order in this form:—Their Lordships, being of opinion that it is expedient that sufficient security should be taken from the Respondent for the due performance of such Order and decree as Her Majesty may make on this appeal, and that it is competent to the *Sudder Dewanny Adawlut* to require such security to be given, or otherwise to provide for the protection and security of the property in question pending this appeal, notwithstanding that execution had issued before this appeal was allowed; and that the Appellant be at liberty to apply to the *Sudder Dewanny Adawlut* for such security to be given, or such provision to be made, as she may admit.

By the Order in Council made on the petition it was ordered, that the Appellant be at liberty to apply to the *Sudder Dewanny Adawlut* for the *North-Western* Provinces for such security to be given or such provision made for the protection and security of the property in question pending this appeal as she may be advised. Whereof the Judges of the *Sudder Dewanny Adawlut* for the *North-Western* Provinces of *Bengal* for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

19th and 20th June, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

MUSSUMUT CHUNDRABULLEE DEBIA,* ... } *Appellant*,

versus

LUCKHEA DEBIA CHOWDRAIN, ... } *Respondent*.

Pottah—Lease in perpetuity—Non-payment of rent—Possession—Limitation of suit—Ben. Reg. II. of 1805, cl. 3, sec. 3—Action for arrears of rent—Assessment—Ben. Reg. XIX. of 1793, sec. 10.

By a *Brohmottur Pottro*, granted by an ancestor of *A.*, in the year 1796, to the ancestor of *B.* of a piece of land, *B.* and his heirs were to enjoy a house built thereon, in consideration of setting up an idol in the house, without payment of rent. Upwards of sixty years after this grant, during which period the idol remained and its worship uninterruptedly continued, no rent having been paid by the grantee or his heirs, *A.* without any demand for rent, or bringing a suit for assessment of the property, brought a suit against *B.* to recover six years' arrears of rent, at the rate fixed by *Ben.* Reg. XIX. of 1793, sec. 10. *Held*, reversing the decree of the *Sudder* Court, that *B.*, and those under whom she claimed, having been in undisturbed possession, and the cause of action having arisen sixty years ago, such suit was barred by cl. 3, sec. 3, of *Ben.* Reg. II. of 1805.

If no action could be maintained directly to recover possession of the land, none can be brought to recover the rent which is the compensation for the occupation, that occupation having been always rent-free.

Held further, that while that clause takes away the cognizance by any Court in *Bengal* of a suit, if the cause of action should have arisen sixty years before the institution of the suit, it distinguishes between the effect of the twelve years' limitation and that of sixty years, by precluding all inquiry into any original defect in the title under which the possession for the latter period obtain, and made it, in effect, unavailing to show that the possession of *A.* commenced under a grant made null and void by the Regulation of 1793.

Whether the twelve years' limitation provided by the *Ben.* Reg. II. sec. 3, cl. 1, of 1805, can be held applicable to such a suit. *Quære?*

Semble. That to maintain such an action, a demand for arrears of rent should have been preceded by a suit for assessment of rent under *Ben.* Reg. XIX. of 1793, sec. 10.

1st December, 1865.

THEIR Lordships' judgment having been reserved, was now delivered by

THE RIGHT HON. SIR JOHN T. COLERIDGE:

This was an appeal from a decree of the *Sudder Dewanny Adawlut* of *Bengal*, affirming a decree of the Principal *Sudder Ameen* of the Civil Court of *Mymensing*, which last had reversed a decree of the *Sudder Ameen* of the last-named Court in favour of the Appellant. The Respondent has not appeared, and this appeal has been heard *ex parte*.

The original suit was brought by the Respondent to recover arrears of rent for six years and nine months preceding its commencement, and the following may be taken to be the facts of the case:—The Appellant and those under whom she claims had been in peaceable and undisturbed possession of the property for more than sixty years; it is in the town of *Nusseerabad*, and within and parcel of a four-annas share of the *Zemindary* of *Pergunnah Allapsing*, of which the Respondent, as mother and guardian of her son, a minor, is the proprietor in possession. The Appellant claims under a grant from the ancestor of the Respondent, which purports to have been made for the setting up an idol, and concludes thus—"Having set up the said idol in the said house, you will enjoy the same without paying rent through sons and grandsons. For this purpose I have given you this *Bromuttur Pottro*." The date of this instrument corresponds with the 10th of February, 1796 A. D. The idol has remained, and its worship has been continued uninterruptedly from that time. The Respondent's plaint, which was not filed until the 15th of April, 1857, was preceded by no demand of rent, nor any suit for the assessment of it; but the rent sued for is stated to be "in accordance with the rate

* 10, Moore's I. A., p. 211.

of rent obtaining in lodging-houses at this place of *Nusseerabad*:" this rate being fixed by the *Ben.* Reg. XIX. of 1793, sec. 10; on which, indeed, the Respondent's case entirely depends.

These are all the facts, and it seems clear that if the original grant has not been annulled by any Regulation, or if the possession has become unimpeachable by reason of the lapse of time, either of the twelve years or of the sixty years prescribed by the *Bengal* Regulations; or if, at all events, it was under the circumstances necessary that this action should have been preceded by a suit for assessment of the rent, or a demand of rent ascertained in some way or other; the original suit could not be maintained, and the two later decrees must be reversed. They were impeached by the Appellant on all these grounds. Their Lordships, however, do not find it necessary in this case to give any opinion upon the first or third of these points, or upon the question whether, under the circumstances of this case, the twelve years' limitation prescribed by the Regulations ought to be held applicable to it. They have reason to believe that questions of some importance, and possibly of some difficulty, have been raised, and that some cases which were not cited at the Bar have been decided in the Courts in *India*, bearing more or less directly on some, at least, of these points, and they think it would neither be prudent nor safe for them, more especially in a case which has been argued on one side only, to give any opinion which might affect these questions. Moreover, it is obvious that to decide this case upon the last of the grounds on which the Appellant relied, might only lead to renewed litigation. Their Lordships, therefore, abstain from giving any opinion whatever upon any of these points.

It may be assumed, for the purpose of argument, but for that purpose only, and without the expression of any opinion by their Lordships, that all these points ought to be decided in favour of the Respondent; but they are of opinion that the Appellant was entitled to have the suit dismissed upon the ground of there having been peaceable possession by her and by those under whom she claims for sixty years before the suit was commenced, and of the suit being, therefore, barred by the early part of the 3rd clause of the *Ben.* Reg. II. of 1805.

The first and second clause, and the second branch of the third clause, of this Regulation have reference to the twelve years' limitation which was previously in force, explaining and qualifying that limitation; and as their Lordships do not, as has been already said, rest their judgment on this limitation, it is unnecessary to comment on these parts of the Regulation; but the first branch of this third clause provides that "nothing in the preceding clause, or in any part of the existing Regulations, shall be held to authorize the cognizance of any suit whatever in any Court of Justice, if the cause of action shall have arisen sixty years before the institution of the suit; nor shall any plea on the part of the Plaintiff for the non-prosecution of his claim of right during a period of sixty years after the origin of his alleged cause of action, nor any original defect of title on the part of the possessor of the property claimed, after the lapse of such period, be deemed a sufficient ground for taking judicial cognizance of any suit so preferred." This branch of the clause, therefore, in its very comprehensive language, embraces every then existing Regulation by which any Court in *Bengal* was authorized to take cognizance of any suit whatever; it, in effect, takes away that authorization if the cause of action shall have arisen sixty years before the institution of the suit; it distinguishes between the effect of the twelve years' limitation and that of sixty, by precluding all inquiry into any original defect in the title under which the possession for the latter period commenced; it makes it, in effect, in cases in which the section applies, unavailing to show that the possession of the Appellant commenced under a grant made null and void by the Regulation of 1793.

The question then is, what is the cause of action in the present case, and when did it arise? In terms the suit is brought to recover rent for the last six or seven years, and the non-payment of that rent is, no doubt, in one sense, the cause of action.

The suit, indeed, may in some sense be likened to what is of daily occurrence, the action to recover the later items only of a long account, which have become due within six years, although the Statute of limitations has barred the demand for the earlier items. The distinction, however, between such an action and the present suit, is obvious; the items of an account are independent of each other: each represents a distinct contract or a distinct debt. But the right to recover rent for the last six or seven years, depends on a possession founded on a grant avoided by the Regulation, which possession has been one and entire in character through the whole sixty years.

It is the case of the Plaintiff in the Court below, that by reason of the character of the grant and the operation of the Regulation, his ancestor might have determined the possession in the first year of its existence, or claimed rent at the end of that year. If, in spite of length of possession, an action for use and occupation could be maintained, so long as a Plaintiff could show a good title in himself and a bad one in the occupier, of what avail would any Statute of limitations be? A man might be barred in an action directly brought to recover the possession, such as ejectment, and yet not be barred when he sued from year to year, for use and occupation, for a compensation for the fruits of the land; because in this the occupation would be referable to the sufferance and permission of the real owner, and so be a good consideration for an implied promise to pay what it was worth. But this clearly could not be; and so here, if no action could be maintained directly to recover the possession of the land, none can be brought to recover the rent, which is the compensation for the occupation—that occupation having been always of one and the same character; in fact, rent free.

Their Lordships being of this opinion, will, therefore, humbly advise Her Majesty that this suit was barred by the sixty years' possession of the Appellant, and those under whom she claims, and, therefore, that the original judgment of the *Sudder Ameen* dismissing it ought to be affirmed, and the two later judgments reversed, and the costs of all the proceedings below, with those of this appeal, be paid by the Respondent.

20th and 21st June, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

SREEKANTH BHUTTACHARJEE,* ... } *Appellant*,

versus

RAMCOMUL GUNGOPADYA, GOBIND CHUNDER MOZOOMDAR and others, ... } *Respondents.*

Construction, Act No. XIX. of 1843, sec. 2—Registration of deeds of mortgage and sale.

The words "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding" in the latter part of sec. 2, Act XIX. of 1843, apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift. The enactment was plainly intended to be general and the words in question being words of reference and the terms used being general and comprehensive, there was no reason for confining their operation to only one branch of the enactment. *Held* further that in the proviso that "the authenticity of the deed be established to the satisfaction of the Court" pointed not only to the exclusion of forged but also of fraudulent deeds from the benefit of priority under the Act.

20th July, 1865.

JUDGMENT having been reserved, was now pronounced by

THE RIGHT HON. THE LORD JUSTICE TURNER:

In disposing of this appeal their Lordships do not think it necessary to enter fully into the details of the case. The view they take of it will be sufficiently explained by a mere general outline of the

* 10, Moore's I. A., p. 220.

facts. *Ramcomul Gungopadya* was originally mortgagee of the entirety of the *Zemindary*, *Pergunnah Havaleeshur*. He subsequently acquired the full proprietary right to and possession of the *Zemindary* by a foreclosure suit, and suit for possession consequent thereon, and after he had thus acquired the proprietary right in the *Zemindary* he applied for the mutation of names in the Collectorate, and was there registered as sole proprietor of the whole *Zemindary*. The Appellant, *Sreenanth Bhuttacharjee*, alleges that *Ramcomul Gungopadya* before he had acquired the proprietary right in the *Zemindary* by an *Ikrar*, or agreement for sale, dated the 20th of December, 1852, agreed with the Respondent, *Taraprosono Mookerjee*, that in the event of his acquiring the proprietary right, he would transfer a moiety of the *Zemindary* to *Taraprosono Mookerjee*, and that after he had acquired the proprietary right, he, by a *Kabala*, or deed of sale, dated the 31st of July, 1853, transferred the moiety of the *Zemindary* to *Taraprosono Mookerjee* accordingly. The moiety of the *Zemindary* thus transferred to *Taraprosono Mookerjee* was, as the Appellant alleges, afterwards conveyed to him by deed, bearing date the 27th of March, 1854; but this deed was not registered until the 2nd of May, 1854. In the meantime, and on the 5th of April, 1854, *Ramcomul Gungopadya*, by a deed of that date, in consideration of the sum of Rs. 90,000, conveyed the whole *Zemindary* to *Gobind Chunder Mozoomdar*, and by a deed of even date, *Taraprosono Mookerjee*, in consideration of the sum of Rs. 15,000, also conveyed all his interest in the *Zemindary* to *Gobind Chunder Mozoomdar*, and on the 20th of April, 1854, both these deeds were duly registered.

After the execution of these deeds, *Gobind Chunder Mozoomdar* had possession of the whole *Zemindary*, and he was in possession of it when the suit out of which this appeal has arisen, was instituted.

This suit, which is in the nature of an ejectment suit, was instituted by the Appellant against *Ramcomul Gungopadya*, *Gobind Chunder Mozoomdar*, and *Taraprosono Mookerjee*, and several other persons, for recovering the moiety of the *Zemindary* alleged to have been conveyed to the Appellant in manner above-mentioned. The plaint in the suit alleges, that *Ramcomul Gungopadya*, through fraudulent motives, had disposed of the whole *Zemindary* (including the moiety previously sold by him to *Taraprosono Mookerjee*) to *Gobind Chunder Sein* in the fictitious name of *Gobind Chunder Mozoomdar*, under a *Kabala*, dated the 4th of April, 1854, for consideration of Rs. 90,000, but the plaint contains no allegation whatever of any fraud on the part of *Gobind Chunder Mozoomdar*.

Gobind Chunder Mozoomdar by his answer wholly denies the title set up by the Appellant, and rests his case on the conveyance to him by *Ramcomul Gungopadya*. He sets up no title under *Taraprosono Mookerjee*, and, on the contrary, he says, that *Taraprosono Mookerjee* had no right or interest in the *Zemindary*, but it appears, both by the answer and throughout the proceedings in the suit, that *Taraprosono Mookerjee* had under his alleged *Ikrar* and *Kabala* set up claims to the property, and the answer in effect, treats the release from him as obtained for the purpose of putting an end to those claims. There is a great deal of evidence in the suit, with reference for the most part, to the alleged *Ikrar* and *Kabala* set up by the Appellant; but on the hearing of the cause before the Principal *Sudder Ameen*, he dismissed the suit, and upon appeal this decree was affirmed by the *Sudder* Court. The appeal before us is from these decrees.

The judgments, both of the Principal *Sudder Ameen* and of the *Sudder* Court, appear to have proceeded upon a full and careful examination of the facts of the case; but their Lordships, as they have intimated, do not find it necessary to enter upon this examination.

It appears that by the Act, No. XIX. of 1843, it is provided, "that from the first day of May last past, every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same

property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed—and that from the said day every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certficate notwithstanding."

Their Lordships are of opinion, that this case may well be decided, and ought to be decided, upon the provisions of this Act.

Two questions arise upon the Act: first, whether the words at the close of the enactment, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such unregistered deed or certificate notwithstanding," are to be construed as referring only to the mortgages and certificates mentioned in that part of the enactment which immediately precedes these words, or are to be taken to extend also to the deeds of sale or gift which are mentioned in the earlier part of the enactment; and, secondly, what meaning is to be attributed to the words "provided its authenticity be established to the satisfaction of the Court," which are contained in the enactment. As to the first question, their Lordships are of opinion, that upon the true construction of the Act, the words first above-mentioned apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift. This enactment, although divided into two branches, in consequence of the different effect which is given to it as to deeds of sale and of mortgage, was plainly intended to be a general enactment. The words we are considering are words of reference, and the terms used being general and comprehensive, their Lordships see no reason for confining their operation to one branch of the enactment rather than extending it to both. Had it been intended that they should be so confined there would have been no difficulty in expressing that intention. It would be difficult to find any reason why, in the case of a mortgage, priority should be given to a registered deed over an unregistered deed, notwithstanding knowledge or notice of the unregistered deed by the registered mortgagee, but in the case of a sale the priority of an unregistered deed over a registered deed should be retained, in cases of knowledge or notice, by the registered vendee or donee. The too common practice in *India* of setting up forged and fraudulent deeds, and the security against this practice which is afforded by registration, are quite sufficient to account for this enactment extending both to sales and mortgages, and the policy of such enactments is not unknown in other countries. The Irish Registration Acts afford an instance of it.

Then as to the second question. The proviso is, that the authenticity of the deed be established to the satisfaction of the Court. The word "anthenticity" would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act; but their Lordships think that it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bonâ fide* deed. They are not disposed so to construe the Act, but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee, and in this case no fraud is alleged, and certainly none is proved, on the part of *Gobind Chunder Mozoomdar*. It would be going much too far to impute fraud to a purchaser upon the mere ground that he had bought up a possible claim, and so far as their Lordships can find, there is nothing beyond this affecting *Gobind Chunder Mozoomdar* either in point of allegation or of proof. Of course it has not escaped their Lordships' attention that there is an allegation in the plaint which suggests collusion between *Gobind Chun-*

der Mozoomdar and *Taraprosono Mookerjee*, but their Lordships see no proof of this. Upon the whole, therefore, they are of opinion that *Gobind Chunder Mozoomdar's* deed being first registered, must prevail over the subsequently registered deed of the Appellant, and they must, therefore, without entering further into the case, humbly recommend Her Majesty to dismiss this appeal, and with costs.

23rd and 24th June, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Vaughan Williams.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

MURTUNJOY CHUCKERBUTTY,* *Appellant*,

versus

JOHN COCHRANE, Official Assignee of the estate of Messrs. HICKEY, BAILEY, and Co., Insolvents, ... } *Respondent.*

Principal and Agent—Mercantile Custom at Calcutta—Interest—Act, No. XXXII. of 1839—Costs.

H. B. and Co., as Factors, having an interest by reason of their advances in the Appellant's goods, were, by the general Mercantile law of England (which, in the absence of proof of any particular qualifying usage or custom, was applicable between Principal and Factor at Calcutta) justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their Principal, or by contract, which circumstances were not proved.

The consignments being within the scope of the Factors' general discretion and no breach of duty being established, the Principal and not they were chargeable with the losses on those shipments.

Bertram v. *Godfray* (1 Knapp's P. C. Cases, 381) distinguished.

The *Sudder* Court having in the exercise of the discretion conferred by Act XXXII. of 1839 awarded interest at 12 per cent. per annum from the date of suit, the Privy Council reduced it to 10 per cent., it appearing that in the account current between the Appellant and *H. B.* and Co. interest was allowed at that rate.

With reference to the Appellant's partial success and other circumstances of the case each party ordered to bear his own costs of the appeal.

20th July, 1865.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. THE LORD JUSTICE TURNER:

The Appellant in this case is the owner of silk filatures, and a dealer in silk of *Junghypore*, a district in *Bengal*. The Respondent is the Official assignee of an insolvent firm that formerly carried on business in *Calcutta*, under the style of *Hickey, Bailey*, & Co.

That firm from the year 1840 up to the end of 1847 acted as the Factors and Agents of the Appellant; selling some of the goods consigned to them by him in *Calcutta*, and shipping others to *London* for sale there; and the following seems to have been the course of dealing between them:—The Appellant was in the habit of drawing on *Hickey, Bailey*, & Co., against the goods consigned to them, and they accepted and paid his drafts, charging him in account with the amount of them. If they sold the goods in *Calcutta*, they rendered the account sales to him, and credited him with the proceeds. Against the goods shipped to *London* they drew Bills in sterling money upon the consignees; but credited the Appellant in account with the proceeds of those Bills in rupees at the rate of exchange at which they were sold in *Calcutta*; and on receiving the account sales from *London*, they either gave him further credit for the profit, or debited him with the loss on each shipment, according to the final result of the transaction. The account current so kept was balanced on the 30th of April, in each year, and, from time to time, rendered to the Appellant. From the year 1840 up to a period which, as found by the Courts below, we may take to have been some time in 1845, the consignments to *London* were shipped by *Hickey, Bailey*, & Co., to the consignees

* 10, Moore's I. A., p. 229.

"for sale on account and risk of *Murtunjoy Chuckerbutty*." Examples of invoices appeared in the record. About the year 1845, some change took place in the constitution of the firm of *Hickey*, *Bailey*, & Co., and either contemporaneously with, or shortly after that event, the shipments on account of the Appellant were made in a different form; most of the invoices stating the goods to be shipped by *Hickey*, *Bailey*, & Co., and consigned to the *London* house for sale "on account of the concerned;" and one or two stating them to be consigned for sale on account of *Hickey*, *Bailey*, & Co. Examples of the first of these two classes of invoices appear in the record. All the latter invoices however continued to specify the mark or brand by which the Appellant's silks were known in the market. It is upon the variation in the form of the consignments made in and subsequently to 1845 from that of the consignments made before that year, that the principal question on this appeal is raised.

The disputes between the Appellant and *Hickey*, *Bailey*, & Co. began in 1847, the year so disastrous to commerce in *India*. The letters of the 27th of November, 1845, and the 21st of February, 1846, show that from a date as early as the latter part of 1845, the silk market, both in *Calcutta* and in *London*, was in a state of great depression. On the 13th of April, 1846, Messrs. *Hickey*, *Bailey*, & Co. wrote to the Appellant: "Our market continues worse every day. After having failed in attempting to sell your silk, we have, according to your request and instructions, shipped the whole on your account to *London*, the particulars of which will be forwarded to you in due course." And accordingly their letter of the 23rd of December, 1846, contains this passage: "We also inclose invoices of 64 bales silk, and 900 pieces of your good corahs shipped on your account to *London;* the sums drawn against these shipments, as per memorandum at foot, viz.: Rs. 54,816 12as. 6p. have been carried to your credit under due dates."

It is not difficult from this memorandum, and by means of the quantities of silk, and the dates and amounts of the Bills there specified, to identify the shipments so advised with the shipments of 7 bales per "*Oriental*," and 8 bales per "*Tartar*," to *Magniac*, *Jardine*, and Co., the shipment of 13 bales per "*Kelso*," to *S. Phillips* and Co., the shipment of 18 bales per "*Essex*," to *H. J. Johnston* & Co., the shipment of 18 bales per "*Cressy*," to *Cockerell* and Co., and the shipment of 4 cases of corahs, also per "*Cressy*," to *Thurburn* and Co., which are respectively mentioned in the accounts. The losses on these shipments are amongst those his liability to which the Appellant disputes; and many, if not all, of them must have entered into the accounts which were the subject of the correspondence that will be next mentioned.

In August, 1847, Messrs. *Hickey*, *Bailey*, & Co. wrote to the Appellant their letter of the 5th of that month. The most important passage in it is the first paragraph, which is in these words: "We beg to wait upon you with the following:—A statement of your account current exhibiting on the 30th of April last a balance in our favour of Co.'s Rs. 13,171-3-7, and a continuation of the same in open account to date showing a balance against you of about Rs. 31,882-6-5. Four account sales from Messrs. *Magniac*, *Jardine*, & Co., *Samuel Phillips* & Co., and *Cockerell* & Co., of *London*, comprising 69 bales of your silk, and three account sales comprising 51 bales of theirs." This letter also expresses an unwillingness in the then state of the markets to receive any further consignments "drawn against;" and presses the Appellant to place the house in funds either by remittances or goods.

The Appellant's answer to this communication was dated the 12th of August, 1847. After professing himself confounded by the letter of the 5th, he says: "The cost of the goods I consigned to you was Rs. 5,000 or 8,000 more than I drew on you, and I believed you owed me that sum at least, but in your letter you make me your debtor more than Rs. 31,000. I am ashamed to hear this. Your old house several years has sent silk and corahs to *England* on my account, and the *London* houses have ever sent account sales, &c., for every transaction in my name, and I have these accounts in my hand. Your new house, I don't know how, has taken

a new manner of business, and all the account sales sent to me now are copies signed in *Calcutta;* this does not satisfy me at all, and, therefore, I want the *London* account sales as formerly. There are many particulars I want to know in these sales, because I see in your copies several sales on account of the concerned. Until I have the particulars I will not examine the account current, and I request you will send them to me as quick as possible."

In reply, *Hickey, Bailey,* and Co., on the 28th of August, 1847, sent a letter, in which they forwarded, though under a kind of protest, the original accounts demanded; complained of the tone of the Appellant's letter to them; and again pressed for payment of the balance due to them.

There is no evidence of any further correspondence between the parties until October, 1847. On the 11th of that month, *Hickey, Bailey,* and Co. wrote a letter to the Appellant, which is not in evidence. From the references to it in the subsequent correspondence, we may infer that it contained an account corresponding more or less closely with that mentioned in the record as No. 1.

In answer to it the Appellant wrote the letter of the 25th of October, and in which he for the first time put forward distinctly the case on which he now relies. He says, "I am very anxious to settle my two years' accounts with you. I hereby send you the copy of the abstract of your letter dated the 11th of October, 1846, for your inspection. In your opinion my goods created a good name in the *London* markets, so relying on your statement I desired you to ship a quantity of my silk, but you in contravention to your practice shipped them in your own name instead of mine, and, therefore, owing to my name being suppressed, I hold you responsible for the loss. It is very easy to settle accounts. I will only debit you with the invoice cost of the goods shipped by you to *London;* likewise, I will debit you with amount of the account sales sent by you with interest. You may also, according to former practice, debit in my name the amount I received from you with interest, and also costs."

The reply of *Hickey, Bailey,* & Co. to this is dated the 30th of October. After explaining the letter of the 11th of October, 1847, they say, "Regarding the shipments, we must beg to observe that the invoices of your property have been uniformly worded according to the practice followed in *Calcutta,* 'on account of the concerned,' under your well-known filature mark, and not in our name as you pretend, which, however, would make no difference in the result of the operations. You were fully made aware of those shipments by our letter of the 23rd of December, 1846, &c., and, therefore, cannot at this late hour, because the result has been a loss, pretend to have no personal interest, and decline all responsibility in shipments made on your account, and to which you have till now made no objections, you having on the contrary, in many of your letters, directed us to ship your goods on your own account, and not to sell them in *Calcutta,* evidently because you expected a more profitable realization of them by so doing. We, therefore, beg to hand you again a statement of your account closed 30th of April last, showing a balance in our favour of Company's Rs. 22,312-9-6, and a continuation of the same in open account, showing a balance against you up to date of Company's Rs. 48,547-1-0. This account, you will see, has been corrected, owing to a mistake in crediting you with a draft for Rs. 10,000, against a shipment which had nothing to do with your account." The right to make this correction is also a material question on this appeal.

The Appellant replied to this letter by that of the 18th of November. The following are the material passages in it: "I am informed of the particulars from the contents of your letter dated the 30th of October, which reached me at a time when I was busily engaged in preparing your accounts, and consequently could not reply to it. I am now sending you the account for your inspection, bearing a balance of Rs. 1,390-12-1 in my favour, which please let me have. The points treated by you in your letter may be true in your opinion, but in my opinion they are improper, for my goods were unjustly shipped

to *England*. Notwithstanding this I have forwarded Bills to you, and debited you with the cost price of them. I have credited you with the amount you paid to me, and entries have been made regarding your commission and discount according to the former practice."

Messrs. *Hickey*, *Bailey*, & Co. stopped payment early in January, and were formally adjudged insolvents on the 17th of February, 1848. In their schedule the claim against the Appellant was entered as "disputed." The Respondent afterwards became the Official assignee of this insolvent estate, and some correspondence appears to have passed between him and the Appellant touching the disputed claim on the latter in June and July, 1849. He continued to insist on his view of his rights, and, instead of admitting anything to be due from him to the estate of *Hickey*, *Bailey*, & Co., to contend that the sum of Rs. 1,390-12-1 was due to him on the balance of the account as made out by him.

In July, 1857, after a delay not very satisfactorily accounted for, on the ground of the poverty of the estate and the complexity of the accounts, the Respondent, under the authority of the Insolvent Court, commenced an action in the *Zillah* Court of *Moorshedabad* against the Appellant for the recovery of Rs. 1,00,000, the balance alleged to be due on this disputed account. The plaint showed that the balance claimed to be due at the date of the insolvency, with the subsequent interest, amounted to Rs. 1,10,938 and a fraction; but relinquished all in excess of the Rs. 1,00,000, in pursuance of a rule which obtained in the Courts of the East India Company, and forbade a Plaintiff to recover more than double the amount of his principal debt.

The judgment of the *Zillah* Court, which is dated the 2nd of February, 1859, decreed the whole amount claimed to the Respondent, with interest at the rate of 12 per centum per annum from date of suit to date of payment.

On appeal, the *Sudder Dewanny* Court by its judgment, dated the 24th of February, 1862, confirmed this judgment on all points except the calculation of interest. It held that the sum claimed as principal money and the balance due to the insolvent firm in February, 1848, being Rs. 54,784-9, should be corrected by the deduction of the difference between 12 and 10 per cent. interest on the account between the 30th of April, 1846, and the 30th of April, 1847; it refused to allow the Respondent any interest on the sum so ascertained during the period in which he had delayed to bring his suit, but gave him interest on it from the date of the commencement of the suit to the date of payment, at the rate of 12 per centum per annum.

From these decrees the present appeal is brought; and the substantial questions to be determined upon it (some minor points that were raised on the pleadings have been given up in the Courts below or here), seem to be reduced to the following, viz.:—

First, whether the Appellant is properly chargeable with the balance of the account between him and the late firm of *Hickey*, *Bailey*, & Co., taken on the principle on which this account has been taken, or whether he is now entitled to have that account taken on the principle asserted in his letters of the 25th of October and 18th of November, 1847, viz., that of treating all the later shipments to *England* as made by *Hickey*, *Bailey*, & Co. at their own risk, and of debiting them with the prime cost, or other assumed value of the goods in *Calcutta* at the dates of the shipments?

Second, whether, assuming the shipments to have been made at the risk of the Appellant, it is proper, under the circumstances, to charge him with the amounts of the re-drafts from *London*?

Third, whether he is entitled to any, and what relief in respect of the item of Rs. 10,000, withdrawn by *Hickey*, *Bailey*, and Co., from the amount as mentioned in their letter of the 30th of October, 1847?

Fourth, whether the interest on the balance due by him has been correctly calculated?

The first question involves the inquiry, whether *Hickey*, *Bailey*, and Co., when they made the consignments of the Appellant's goods in the form in which they

are shown to have made them subsequently to the year 1845, were guilty of any breach of the duty which either the general law, particular custom, or special contract between them and their Principal, imposed upon them as Factors. In the Court below evidence was given to show what are the general powers of Factors in *Calcutta* who are employed to ship goods for sale in *England* on account of their Principal. Their Lordships apprehend that this evidence was adduced not so much for the purpose of establishing that any peculiar custom of trade obtained in the port of *Calcutta*, as for that of showing what was the general law; the country Courts of *India* not being very conversant with questions of Mercantile law, and not recognizing the law of *England* as the *lex fori*. But, however that may be, their Lordships are of opinion, that the evidence altogether fails to show that any particular usage or custom qualifying the Mercantile law of England, as between Principal and Factor, prevails at *Calcutta*. It is, therefore, by the general Mercantile law that the powers and duties of *Hickey*, *Bailey*, and Co., in making their consignments of the Appellant's goods, must be determined.

Again, their Lordships see no ground for dissenting from the exposition of the law which is contained in the careful judgment of the *Sudder* Court. They are of opinion, that *Hickey*, *Bailey*, and Co., as Factors, having an interest by reason of their advances in the Appellant's goods, were justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their Principal, or by contract. Of positive instructions or of express contract there is no proof. The existence of either, if to be inferred at all, is only to be inferred from the evidence of the course of dealing before 1845.

Again, their Lordships are of opinion, that even if there were nothing to set against the course of dealing so proved, the inference from it that the general discretion of the Factors in respect of all future consignments had been controlled, would hardly be safe or legitimate. But, in truth, the prior course of dealing is not the only fact from which their Lordships have to draw their conclusion on the point now under consideration. The letter of the 23rd of December, 1846, proves that invoices of the consignments of that year were then sent to the Appellant. All those invoices are not produced; but it is impossible to escape the conclusion that they must have shown in what form the consignments were made; since the losses on the shipments to which they relate are unquestionably some of those which the Appellant, on the ground of the improper form of the consignments, is now seeking to throw on the estate of *Hickey*, *Bailey*, and Co., and he does not pretend that the invoices sent to him were not counterparts of the invoices sent to *England*. Nevertheless, on the receipt of that letter he made no complaint respecting the form of the consignments.

Again, when these transactions were known to have resulted in heavy losses, and he wrote this letter of the 12th of August, 1847, his chief complaint was that in the absence of the original account sales, he had not the proper evidence of what had been done with his goods in *England*; and it was not until October, 1847, that his present case was distinctly made. The correspondence thus tends strongly to negative the existence of instructions, contract, or understanding inconsistent with the acts of *Hickey*, *Bailey*, & Co. Their Lordships, therefore, think that the alleged breach of duty on the part of the Factors has not been established, and that as between them and the Appellant he was chargeable with the losses on all the shipments to *England*. The foundation of his case having thus failed, it is unnecessary to inquire whether, if it had been established, he would have been entitled to the particular relief which he claims. Their Lordships, however, observe, that in many important particulars, this case, if the Agent's breach of instructions had been proved, would have been distinguishable from that of *Bertram* v. *Godfray* (1 Knapp's P. C. Cases, 381.) There it was proved that the Agents who in breach of their instructions had neglected to sell when the funds were at 85 per cent., and

might have sold at that price; and consequently, the facts both gave the measure of the damages sustained, and afforded the means of compelling the Agents to put their Principal in the position in which he would have stood had they observed his instructions. Here it is quite uncertain what (if any) proportion of the loss is attributable to the form of the consignment. Nor is it easy to see upon what principle *Hickey, Bailey*, & Co. could be charged with the cost of invoice price of the goods; since it follows from the letter of the 13th of April, 1846, both that the Appellant had authorized the shipment of them for sale in *England;* and they must have been sold at a heavy loss, if sold at that time in *Calcutta*.

The next question is, whether the Appellant has been properly charged in account with the re-drafts. It is stated in the judgment of the *Sudder* Court, that no question had been raised regarding the good faith of these entries. They must, therefore, be taken to represent correctly the difference between the net proceeds of the Appellant's goods and the amounts of the Bills drawn against them by *Hickey, Bailey*, and Co. Had *Hickey, Bailey*, & Co. remained solvent and paid the re-drafts, the propriety of these charges against the Appellant could not have been questioned. For he had already received credit in account for the sums for which *Hickey, Bailey*, & Co.'s Bills on *London* had been sold; and, therefore, to charge him with the re-drafts was only tantamount to writing back the excess of credit which he had received in anticipation of the realization of the proceeds of his goods. The question raised, however, is, whether *Hickey, Bailey*, and Co., having failed, and having presumably paid, at most, a dividend on these re-drafts, they are entitled to charge the whole amount of them against the Appellant. The answer to this question depends on the further question, whether upon or after the insolvency of *Hickey, Bailey*, & Co., the consignees in *England* had any right of resort to the Appellant for the recovery of the difference between the sums realized by the sale of the goods, and the amount of their acceptances against them; or the unpaid portion of such deficiency. If they had no such remedy, the Appellant, as the account stands, has received credit for all to which he is entitled, viz., the net proceeds of his goods; whereas, if he were to retain credit for the amounts for which the Bills on *London* were sold, without submitting to be debited with the re-drafts, he would charge the estate of *Hickey, Bailey*, & Co. with more than the net proceeds of the goods. On the other hand, if he remained liable to the consignees for the losses on the goods or for any part of such losses, his objection to a mode of stating the amount, which would have the effect of making him pay, or leaving him answerable for such losses, twice over, would be well founded.

It appears to their Lordships that in these transactions there was not that privity of contract between the Appellant and the consignees in *England*, which would render him liable for the sums represented by the re-drafts in question.

This is not the ordinary case of a contract made by an Agent for an undisclosed Principal, on which the contractee, on discovering the Principal may at his election sue either Principal or Agent.

The contract on which the liability, in respect of which the re-drafts were drawn, arose, was not a simple consignment of goods for sale by an agent on account of an undisclosed Principal; it was a contract of pledge by Factors having an interest in the goods pledged. *Hickey, Bailey*, & Co., being entrusted with the possession of the goods, and having advanced upon them, drew the Bills on *London* in their own names; they and not the Principal were liable as drawers on those Bills; and they probably sold the Bills with the shipping documents in the market. Had the Bills not been accepted by the consignees, the holders, though pledgees, by means of the Bills of lading, of the goods, could have had no remedy for any deficiency against the Appellant. The acceptance of the Bills by the consignees, and the delivery of the shipping documents to them, made them the pledgees, but did not alter the character of the transaction, which was one whereby *Hickey, Bailey*, & Co. had pledged the goods for the payment of Bills on which

they, and not the Appellant, were liable as drawers for an amount exceeding the value of the goods. The re-drafts are for that excess. There seems on such a transaction to be no privity of contract between the consignees and the undisclosed Principal. How can such a privity be imported into it by the fact that, according to the course of dealing between *Hickey, Bailey,* & Co. and the Appellant, the latter received credit on account for the sums for which the Bills on *London* were sold, subject to the final adjustment of the accounts of the different consignments?

Their Lordships are, therefore, of opinion that the Appellant has been properly charged with the re-drafts.

We have next to consider the disputed item of Rs. 10,000. In the account, No. 1, the Appellant is credited with this sum under date the 13th of April, 1846, as the proceeds of a draft of *Hickey, Bailey,* & Co., on *Gouger* & *Stewart*, of *London*, against sixteen bales of raw silk, shipped on Appellant's account per "*Orient*"; and under date, March 18th, he is on the other side of the same account charged with Rs. 541-12-6, as commission and shipping charges on the same consignment. It has already been stated that by their letter of 30th of October, 1847, *Hickey, Bailey,* & Co. advised the Appellant that this shipment had been erroneously treated as made on his account; that he had in fact nothing to do with it; and that they had, accordingly, corrected the account by striking out the credit of Rs. 10,000.

It seems that, in the first instance, they omitted to strike out as they ought, on this view of the case, to have done, the charge of Rs. 541-12-6; but this omission was afterwards set right by the Respondent. In the plaint and subsequent proceedings this shipment and the credit attached to it are stated generally and loosely to have been those "of another Merchant;" and the only case thus made by the Appellant on this point, was to the effect that no sufficient reasons had been assigned for withdrawing from the account a sum with which he had been once credited; and that the Respondent's looseness of statement concerning the transactions was an argument for holding that the deduction of the sum in question had been made fraudulently. On the trial in the *Zillah* Court, Mr. *Morinet*, the former book-keeper of *Hickey, Bailey,* & Co., was examined as to this item. His evidence was to this effect, "The silk did belong to the Defendant originally, but was shipped by *Hickey, Bailey,* & Co., on their own account, they having purchased it, and rendered the account sales to the Defendant." No question was put to him by way of cross-examination on this statement, although he was cross-examined by the Appellant's Agents as to another part of his evidence. The contest in both the Courts below apparently continued to be confined, as before, to the propriety and *bonâ fides* of the alteration in the accounts. Their Lordships see no grounds for disturbing the conclusion of both the Courts below upon this point. They accept *Morinet's* statements as the true account of the transaction. He was not cross-examined upon it; there seems to have been no suggestion in the Courts below that the Appellant had not received credit for the proceeds of these bales of silk as sold in *Calcutta*. There is an item in the accounts which are in the record which seems to represent those proceeds; and the fact would probably appear even more clearly if we had the Bengalee account made out by the Appellant on the principle asserted by him which was before the Courts below. It is difficult to conceive that he would allow the account to be finally taken against him without seeing that in one way or other every bale of silk which was consigned by him to *Hickey, Bailey,* & Co. was accounted for.

The evidence of *Morinet*, however, suggests another question, which, although it has not been dealt with in the Courts below, their Lordships have been unwilling to exclude from their consideration. That question is, whether the transaction as described by Mr. *Morinet* is not one which the Appellant may impeach as a fraudulent purchase by an Agent on his own account of his Principal's goods? In an ordinary case it might fairly be objected that this point was not taken upon the pleadings. The answer to that in the present case is, of course, that the Respondent, by speak-

ing of the transaction as one of "another Merchant," has misled the Defendant, and thrown considerable suspicion on the *bonâ fides* of his own case. On the other hand, it is to be observed that *Morinet*, if cross-examined, might have cleared up the transaction, and have shown that the purchase by *Hickey, Bailey*, and Co. was known to and sanctioned by the Appellant. Again: it was open to the Appellant, if he were interested in so doing, to raise the point now under consideration in the Indian Courts, where he was represented by an eminent English barrister, to whom the equity on which it is based must be familiar. That he failed to insist on this equity, is a strong argument that it was not for his interest to do so. He could only have set aside this purchase by *Hickey, Bailey*, & Co., on the terms of writing back the sum for which he had received credit as the proceeds of the sale to them, and by taking to the shipment to *England*, with its loss or profit as the case might be. And there seems to be no reason why this particular shipment of sixteen bales should have escaped the common fate which on the evidence we must take to have befallen the other consignments of silk which were shipped from *Calcutta* about that time, and have realized a profit, instead of resulting in heavy loss. It may be added, that the point is not distinctly taken in the Appellant's case. On the whole, their Lordships see no sufficient ground for reopening this account in respect of the item of Rs. 10,000.

The only remaining question is that of the interest to be allowed. The *Sudder* Court, in the exercise of the discretion given to it by Act, No. XXXII. of 1839, has given interest from the date of the commencement of the suit, at the rate of 12 per centum per annum. There was evidence that the account current between *Hickey, Bailey*, & Co. and the Appellant bore interest at the rate of 10 per centum per annum only; and on that ground the *Sudder* Court reduced the interest allowed by the *Zillah* Judge before the commencement of the suit. Their Lordships are of opinion, that the same consideration should have determined the rate of interest to be allowed from the date of suit, and that the amount of this should also be calculated at 10 per centum per annum.

The order, therefore, which their Lordships propose humbly to recommend to Her Majesty as proper to be made on this appeal is, that the interest allowed from the date of suit to the date of payment be reduced by the difference between 12 per centum and 10 per centum per annum, and that in other respects the decree of the *Sudder* Court be affirmed. But having regard to this alteration in the amount decreed, and to the other circumstances of the case, they will also recommend that each party do bear his own costs of this appeal.

27th November, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Madras.

MUTUSAWMY JAGAVERA YETTAPA NAIKER,* ... } *Appellant*,

versus

VENCATASWARA YETTIA,... *Respondent*.

Practice—Appealable value—Special leave to appeal.

An application for special leave to appeal ought always to be made to the Court below before being made to the Privy Council. Such application dispensed with in the particular case as the parties by their course of conduct were precluded from urging before the Court below that the real value exceeded 10,000 Rs. Special leave to appeal, granted in a case actually brought for arrears of maintenance less than 10,000 Rs. in amount, on the ground that the real value of the subject matter at issue between the parties exceeded the appealable amount.

* 10, Moore's I. A., p. 313.

THE RIGHT HON. LORD CHELMSFORD:

THEIR Lordships have had considerable difficulty in coming to a conclusion in this case. They consider, under the peculiar circumstances, that leave to appeal ought to be given. They have no doubt that substantial questions of law are involved in the case, and therefore, upon that ground, if there were no other, their Lordships might be disposed to come immediately to a conclusion in favour of the application now made to them. But the great difficulty of the case arises from the rule with regard to the necessity of applying to the High Court in *India* before coming here for leave to appeal. Some years ago various petitions came before their Lordships asking for leave to appeal where that preliminary form of applying to the Court below had not been pursued, upon the ground that the *Sudder* Court had expressed an opinion with regard to the mode of estimating the value of the subject of dispute, confining the parties to the actual sum claimed, and intimating that they would certainly adhere to such estimate; applications were, therefore, made direct to Her Majesty in Council, the Petitioners alleging that they were precluded from applying to the Court below, because in such circumstances that Court would certainly consider the subject-matter under the appealable value of Rs. 10,000.

In the case of *Maharajah Sutteeschunder Roy* v. *Guneschunder*, that was cited from 8 Moore's Ind. App. Cases, 164, which was a judgment given by Lord Justice *Turner*, upon several applications similar to that now before us, their Lordships gave leave to appeal, but they stated that it must be understood in similar circumstances that application ought always to be made to the Court below, and that that Court was bound to give leave to appeal in cases in which the specified amount of Rs. 10,000 could be reached, though only as it there appeared by the addition of interest subsequent to the decree; and it was essential that such an application should be made to the Court below before coming here. Since those decisions, and very recently, an application was made to this Court for leave to appeal, where there had been no previous application to the *Sudder* Court below, and their Lordships expressed very strongly their determination to adhere to the rule so laid down by them, and not to grant leave to appeal in future, unless there had been such previous application made to the Court in *India*, and they refused that application. That decision would of course be binding upon their Lordships now, and would compel them to say on the present application that, as there had been no application for leave to appeal to the High Court, therefore the Petitioner's application to this Court ought not to be entertained, and no leave given to appeal. But there are very peculiar circumstances in this case. The suit was instituted in the *Sudder Ameen's* Court, which has no jurisdiction in any demand above Rs. 2,500. Supposing that, upon the face of the plaint, it appeared the demand was really beyond the value of Rs. 2,500, it was competent to the Defendant to have pleaded to the jurisdiction of the Court; but no such course was taken, and a decision having been given, and an appeal made to the High Court, both parties proceed on the footing and upon the admission that the sum in dispute is under Rs. 10,000, the appealable amount to Her Majesty in Council.

Supposing, therefore, that an application had been made to the High Court for leave to appeal, it would not have been competent to the parties, in this state of circumstances, to turn round and say that the value was above Rs. 10,000; and if not so, the High Court would have had no power to give leave to appeal.

Therefore, under these very peculiar circumstances, which distinguish this case from those which have been previously determined, their Lordships grant leave to appeal here, reserving of course to the Respondent liberty to apply upon the subject of costs, in case the appeal should not be prosecuted.

28th November, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Bengal.

NAWAB SIDHEE NUZUR ALLY KHAN,* ... } *Appellant*,

versus

RAJAH OOJOODHYARAM KHAN, ... } *Respondent*.

Practice—Staying proceedings in Court below—Costs.

Applicant having appealed to *England* against a remand decree of the High Court dated January 12th, 1864, applied unsuccessfully in June 1865 to that Court for stay of the proceedings on remand. Without appealing against the latter order of the High Court, the applicant applied direct to the Privy Council for expediting the hearing of his original appeal and for stay of proceedings in *India*.

Their Lordships declined to pronounce any opinion on their right or authority to interfere in such cases, being of opinion that even if they had such power no case had been made for interference.

An application for stay of proceedings must essentially be founded upon two grounds—(1) that serious injury will result to the applicant unless the proceedings are stayed; (2) that his application is promptly made.

Mere apprehension as to costs is no ground for stay of proceedings, as ultimately those costs fall on the losing party, nor can such application be considered prompt if made after a delay of sixteen or eighteen months, and must be dismissed with costs.

THE RIGHT HON. LORD CHELMSFORD:

THEIR Lordships have not entered into the consideration of the merits of this case, nor will they decide any question with regard to the right or authority which they may have to interfere by ordering a stay of proceedings in the circumstances of these cases; but they decide upon this petition entirely upon these grounds: that any application for a stay of proceedings must be founded upon two points, which are essential to sustain the application: first, that a serious injury will be the result to the party applying unless the stay of proceedings is granted, and secondly, that the party has come promptly to make the application for delay.

Now, with regard to any suggested injury which may arise to the Petitioner in case the delay asked for is not granted, there is no ground whatever for supposing that any such injury will be sustained. All that he can allege is, that he may be put to costs upon the trial of these issues of fact remitted to the *Zillah* Court, supposing ultimately the decision of their Lordships on the appeal now pending in this Court should be in his favour, upon the questions of law which it is said are raised therein. But the answer to that objection, if it be one, is, that if the Petitioner is put to costs improperly, those costs will ultimately fall on the Respondent; while, on the other hand, the situation in which the Respondent would be placed, if their Lordships were to grant this application, must be considered, because there might be very great danger of his losing evidence, parol and documentary, if the delay asked for were granted. Therefore, with respect to any supposed injury which would arise from the cause being allowed to take its course, and the issues of fact allowed to be tried in due form in the *Zillah* Court of *Midnapore*, there is no pretence for saying that any such injury will arise.

Then, has the Petitioner come promptly with his application? which is another essential requisite of an application for delay or, for a stay of proceedings in any case.

The appeal to the High Court of Judicature was decided finally on the 12th of January, 1864; and on the 10th of February, 1864, there was a petition for leave to appeal, and no application to stay proceedings made till the month of June, 1865. The delay was endeavoured to be accounted for, from the Respondent having objected to the leave to appeal, on the ground that the six months ought to be dated from the date of the original decree, and

* 10, Moore's I. A., p. 322.

not from the order on review; but there really appears to their Lordships to be no explanation at all, at least no satisfactory explanation of the delay which has taken place, of sixteen or eighteen months before this application to stay proceedings is made.

Under these circumstances, there being no proof of any serious injury which would be sustained by the Petitioner, by their Lordships, supposing they have the power to interfere, not interfering to stay proceedings, and on the other hand, the Petitioner not having come, as rightly and properly he ought to have done, promptly with this application to stay the proceedings below, their Lordships think this petition ought to be dismissed, and with costs (*a*.)

28th November, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of Oude.

SHEONATH, *alias* BURRAY KAKA,* ... ... } *Appellant*,

versus

RAMNATH, *alias* CHOTAY KAKA, ... } *Respondent*.

Compulsory Arbitration—Appeal—Waiver.

Under the Civil Procedure Code, (Act VIII. of 1859) secs. 312, 3.4 and the law priorly in force in *Oudh*, the *Punjab* Code, Part II., sec. 2, cl. 15, no Civil Court can refer a case to Arbitrators nominated by itself against the protest of one of the parties.

The parties must either name the Arbitrators or consent to the nomination of them by the Court.

The irregularity of the appointment was neither cured by the fact that the parties had prior to the suit united to make an abortive agreement to refer the matters then in dispute between them to the same Arbitrators; nor by the fact that the Appellant failing in repeated protests and appeals against such appointment, defended his case before the Arbitrators.

It is open to a party on an appeal from a final decree to question a prior interlocutory order, without separately appealing against the latter.

Maharajah Moheshur Singh v. *The Bengal Government* (7 Moore's Ind. App., p. 302) followed.

22nd December, 1865.

JUDGMENT was reserved and now delivered by

THE RIGHT HON. SIR JAMES W. COLVILE:

The Appellant and Respondent are first cousins, and natives of *Lucknow*, and were formerly jointly interested in certain ancestral property, and in the business of three *Kothees*, or Firms, the styles of which were *Hurjus Roy & Gungaram, Gungaram & Juggurnath, Sheonath & Ramnath*. Each appears to have been also possessed of separate property.

In 1859 they made a partition, as far as they then could, of their joint property; and on the 16th of September of that year they interchanged *Furighkhuttees*, or instruments of mutual release, of which that executed by the Respondent, after stating that the two parties were jointly interested in the before-mentioned firms, and had settled the accounts of them amicably, and had made an equal division of the entire ancestral property, moveable and immoveable, cash, promissory notes, &c.; and after formally abandoning all claims on account of the said firms against the Appellant and his heirs,—contained this passage, "But I have a claim to an equal share of such moneys as may be realized on account of debts due to these Firms on this date, and I also hold myself liable for a moiety of such sums as may be due by these Firms up to this date."

In 1861 there was a dispute, the precise nature of which is not disclosed, between the cousins respecting the division of the paternal estate, and the debts due to or by the Firm of *Sheonath & Ramnath*; and they agreed to refer the matters in dispute to the arbitration of five persons, named

(*a*) See upon this point, Rajah Perladh Sein *v.* Baboo Bhoodoo Singh, 10 Moore's Ind. App. Cases, 78, 2 P. C. J., 73.

* 10, Moore's I. A., p. 413.

Hyder Hosein Khan, *Meer Wajid Ali*, Mr. *Jacob Johannes*, *Sah Mukhun Lall*, and *Gridharee Lall*. A written agreement to this effect was executed by each on the 8th of May, 1861; but the Appellant afterwards drew back from his agreement, and refused to have it registered; and nothing came of this attempt to settle the dispute by arbitration.

In September, 1861, the Respondent, *Ramnath*, instituted this suit against the Appellant. The plaint sought a general account and partition; it alleged that no account had ever been settled between the parties; it mentioned the execution of the *Farighkhuttess*, but alleged that there had been no partition, as stated in them; that the partition was intended to take effect after a settlement of accounts, when the *Farighkhuttees* were to have been registered; and that, in the meantime, they had remained with the Appellant as incomplete instruments. It referred, also, to the agreement for a reference to arbitration, but only as evidence that the whole property still remained undivided.

The cause was tried by the Civil Judge of *Lucknow* (Mr. *E. G. Fraser*,) with the assistance of a jury, and his decree, founded on the findings of the jury, established that there had been an actual partition and division of the joint property; that the *Farighkhuttees* had been executed on the footing of it, without taint of fraud, and that the Respondent had failed to prove that he had any interest in a fourth Firm which the Appellant carried on under the style of *Ramnath Rughonath*. It also decided against the Respondent a question in the suit touching the profits made by the Appellant by means of sale and purchase of Government notes during the rebellion.

The Respondent appealed against this decision to Mr. *Campbell*, then the Judicial Commissioner, who by his Order of the 15th of May, 1862, affirmed it on all the points raised by the appeal. His judgment, however, contained these passages: "But it seems clear that there is one account between the parties still quite unadjusted, *viz.*, the division of the outstandings, which was left open at the time of the division of assets. I think it would be proper that a sum in satisfaction of all claims on this account should be awarded to Plaintiff, so as to settle the matter, and I remit the case to the Judge to decide that point. If possible, a decision should be obtained from the arbitrators previously appointed by the parties." And again, "There was something very considerable to be settled that still remains to be settled, and I trust that, in accordance with my Order, the Judge will manage, by a successful arbitration, to give the Plaintiff a fair equivalent for his share in the outstandings of the three firms."

The effect, therefore, of this Order was conclusively to limit the claim of the Respondent to his share in the outstandings of the three Firms; and to direct, or at all events to suggest, that that claim should be enforced not by taking the accounts upon the footing of the *Farighkhuttees* in the regular way; but by giving him a lump sum as the value of his interest therein, and that such value should be fixed by the Award of the Arbitrators to whom the parties had formerly proposed to refer their disputes.

The cause being thus remitted to the Civil Judge, that Officer, on the 7th of June, 1862, made an Order, whereby he referred to four out of the five Arbitrators formerly named (the fifth, *Girdharee Lall*, having left *Lucknow*) the decision of the following questions: first, what accounts remained unadjusted between the parties; second, what amount of outstandings remained then unrealized and undivided; third, what amount should be given to the Plaintiff (the Respondent) as an equitable acquittance of his share therein. He directed the Arbitrators to file their award within two days, and empowered them, should they be equally divided in opinion, to elect an umpire.

The Appellant did not acquiesce in this Order. On the 10th of June, 1862, he petitioned the Judicial Commissioner against it. In his petition he stated, that he had no objection to the Order of the appellate Court referring the question of joint but divisible debt to arbitration, but that he objected, on the grounds therein stated, to the Arbitrators to whom the Civil Judge had referred the case, and requested that

other Arbitrators might be selected by the parties, and that his case be referred to them. The Order of the Judicial Commissioner on this petition was in these words: "It is in the Judge's discretion to employ the Arbitrators formerly named by the parties, or to arrange new ones if he can. I do not think it possible that a complicated account can be settled by a jury."

The Appellant being thus referred back to the Civil Judge, presented on the 13th of June a petition to that Officer, in which he reiterated his objections to the Arbitrators named, and begged the Judge, as authorized by the Judicial Commissioner, to dismiss them, and to order "other Arbitrators to be named, composed of such parties as I and the Plantiff may select." This application was on the 23rd of June, 1862, rejected by the Judge, who gave the following reasons for his decision: "I see no reason to change. I acted on the Judicial Commissioner's Order, and transferred the case to the old *Punches*. If their work, when it comes in, prove open to suspicion, or is anywise unsatisfactory, I shall not decide upon it, but I think it desirable to have the fullest light they can throw on the matter. If they are partisans, and go in favour of Plaintiff unduly, they will still have to show grounds. If they go against the Plaintiff, whose friends they are said to be, it will be all the more satisfactory to the Defendant." Against this last Order the Appellant appealed by petition dated the 25th of June, 1862, to the Judicial Commissioner, whose order thereon was in these words, "I will not interfere in this stage."

The Appellant afterwards, and before any Award was made, presented two further petitions to the Civil Judge. The first of them is dated the 22nd of July, the other the 19th of August, 1862. In these, after referring to his ineffectual protests against the nomination of the particular Arbitrators, and to the determination of the Judge not to change them unless they proved themselves partial and unfair, he objected to their mode of proceeding. And in the last petition, he expressly asked that their Award might be set aside, and that new Arbitrators might be appointed in their stead, by which means justice might be done him.

The Arbitrators filed an Award about the 20th of August, 1862, on which day it was returned to them by the Judge for amendment as to its form. It was filed in its amended form on the 25th of that month. Its effect was, that the amount which the Respondent could fairly claim from the Appellant in respect of the outstandings was Rs. 66,090, besides one moiety of a judgment debt which had been recovered in the Civil Court of *Cawnpore*, and was described as the "*Rusdhan* decree."

On the 4th of September, the Award was discussed before the Civil Judge. He overruled the Appellant's objections to it; observed that it did not include the sums due to the firms on mortgage, and that the question to what the Plaintiff was entitled in respect of these must be referred back to the Arbitrators. His decree was to this effect: "I accept the decision of the Arbitrators, awarding Rs. 66,090 to the Plaintiff as equivalent for all outstandings except the mortgages, and half of the *Rusdhan* decree."

Against this decree the Appellant, on the 16th of October, 1862, appealed to the Judicial Commissioner. The Order passed by him on the following day was in these words: "Case is not completed; appeal will be heard when the whole is complete."

On the 20th of December, 1862, the Arbitrators, to whom a fifth (*Ihtimamood Dowlah*) seems to have been added, made their Award in respect of the mortgages. The effect of it was that a further sum of Rs. 15,000, should be paid on this account to the Respondent by the Appellant.

On the 22nd of December, 1862, the Civil Judge adopted this finding in spite of the Appellant's objections, and ordered that he should within three months make good this sum, as well as those which by the decree of the 4th of September, he had been ordered to pay.

The Appellant appealed also against this decree to the Judicial Commissioner. His petition of appeal, which is dated the 16th of March, 1863, states, amongst other things, that the Arbitrators had been challenged by him both in the Lower Court

and in the Judicial Commissioner's Court. This appeal, and that against the decree of the 4th of September, 1862, of which the consideration had been postponed, was brought before Mr. *Couper*, who had then become Judicial Commissioner, in the place of Mr. *Campbell*, and he, on the 3rd of July, 1863, upheld the Awards of the Arbitrators, and affirmed both the decrees of the Civil Judge.

Against this decision the present appeal is brought.

Their Lordships will assume, and such is, in fact, their opinion upon the facts before them, that if the questions which the Arbitrators have determined were properly referred to them, no sufficient grounds for impeaching their Award have been established. It has, however, been strongly urged at the Bar that it was not competent to the Judicial Commissioner, except with the consent of both parties, to vary, as he did vary by his Order of the 15th of May, 1862, the rights of the parties under the *Farighkhuttees*, and to impose on the Appellant the obligation of purchasing the Respondent's interest in the outstandings on a rough estimate of its value. Another objection to the proceedings—and it is that on which the petition of appeal chiefly insists—is that the nomination of the particular Arbitrators by the Judge, without the consent and against the repeated protests of the Appellant, was altogether irregular, and that their Award is, therefore, not binding upon him.

Their Lordships do not deny the force of the arguments addressed to them on the first point, but they are nevertheless of opinion, that the determination of this appeal must depend upon the validity of the second objection; because if the nomination of the Arbitrators were regular, there is evidence in the petition of the 10th of June, and in other parts of the proceedings, that the Appellant accepted the issue proposed by the Judicial Commissioner, and was willing that the accounts between him and the Respondent should be settled on that principle and by arbitration.

That both points are open to the Appellant, although he has in terms appealed only against the final decision of the Civil Judge and the confirmation of it by the Judicial Commissioner, is, we think, established by the case of *Maharajah Moheshur Sing* v. *The Bengal Government* (7 Moore's I. A., p. 302; 1 P. C. J., p. 647) (*a*). The appeal is, in effect, to set aside an Award which the Appellant contends is not binding upon him. And in order to do this he was not bound to appeal against every Interlocutory order which was a step in the procedure that led up to the Award.

Was it, then, competent to the Judge to refer the decision of this question to Arbitrators selected by him against the will and in spite of the repeated remonstrances of the Appellant? When the suit was commenced, the powers and procedure of the Courts in *Oude* were still regulated by the Rules and Ordinances which had been passed by the Governor-General in Council in order to provide for the administration of justice in that Province on its first annexation? These were substantially the same as those which had previously been in force in the *Punjab*, and were known as the *Punjab* Code. But on the 6th of August, 1861, the Governor-General in Council, by a notification issued under the 385th section of Act, No. VIII. of 1859, extended to the Province of *Oude* the provisions of that Act (which is generally known as the Code of Civil Procedure,) subject to certain exceptions and provisions, as from the 1st of January, 1862. The exceptions are only five in number; they are modifications of the 3rd, 17th, 111th, 172nd, and 205th sections of the Act, and none of them have any bearing on the questions raised by this appeal. At the date, therefore, of the Judicial Commissioner's Order of the 15th of May, 1862, the Code of Civil Procedure had thus been extended to and was in force in *Oude*.

The 388th section of that Code provides that from and after the time when this Act shall come into operation "in any part of the British territories in *India*, the procedure of the Civil Courts in such part of the said territories shall be regulated by this Act, and except as otherwise provided by this Act, by no other law or Regulation." The only exception as to suits

(*a*) See also Forbes v. Ameeroonissa Begum, 10 Moore's I. A., pp. 340, 346.

pending at the time when the Act shall come into operation is contained in the preceding section, and is in these words: "If in any suit pending at the time when this Act shall come into operation, it shall appear to the Court that the application of any provision of this Act would deprive any party to the suit of any right in reference to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect." There is no expression upon the face of the proceedings of an intention on the part of the Judges below to suspend or modify the operation of Act, No. VIII. of 1859, by virtue of the provisions last quoted, or otherwise. Nor is it easy to see how the compulsory reference to arbitration which is here complained of could have been brought within the definition of a right belonging to the opposite party. Moreover, that party himself, in the proceeding, appealed to certain sections of the Act as establishing the finality of the Award, thereby admitting that the reference was to be taken as made under the new procedure. Any larger powers, therefore, which the Judicial Commissioner and his subordinate may have possessed under the *Punjab* Code must be held to have been suspended on the 15th of May, 1862; and the only question is whether the subsequent proceedings were authorized by the Code of Civil Procedure.

The 312th section of the Act provides, that if the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the joint decision of one or more Arbitrator or Arbitrators, they may apply to the Court at any time before final judgment for an order of reference. The 314th section provides, that the Arbitrator or Arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the Arbitrator or Arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the Arbitrator or Arbitrators.

These sections clearly import that the parties must either name the Arbitrators or consent to the nomination of them by the Court. They are the only provisions which bear upon the subject; and it follows that the Code gives no authority to the Court to force upon a reluctant party the decision of any question in the cause by Arbitrators selected at its discretion. It may be observed that the *Punjab* Code, Part II., sec. 2, cl. 15, seems to require, as might be expected, equally with the Code of Civil Procedure, the consent of the parties to a reference to, and the appointment of, Arbitrators.

Their Lordships need hardly observe, that if the appointment of the Arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that they were four out of five persons to whom the Appellant had on a former occasion agreed to refer the matters then in dispute between him and the Respondent. That agreement to refer had proved abortive; the Respondent's suit was not brought to enforce it, but for the determination of the rights of the parties by the Court; and the question referred to the Arbitrators was an entirely new question, suggested by the Judicial Commissioner.

Again, the appeal having been heard *ex parte*, their Lordships have felt bound to consider, whether this case could be brought within the principle of those authorities, which establish that a defect in the nomination of Arbitrators, may be cured by the waiver implied from the act of the party in going in before them, and taking his chance of a favourable decision. Their Lordships are, however, of opinion that the Appellant cannot be held to have forfeited in this manner his right to question the validity of these awards. From what has been already stated, it appears that his protests and appeals were frequent, and were repeatedly rejected as inadmissible by the Judges. Whatever part he took in the proceedings before the Arbitrators, he must be deemed to have taken under a continuing protest, and in self-defence.

Their Lordships, therefore, however much they regret the necessity of re-open-

ing this litigation, feel bound to allow the present appeal.

It is not improbable that the decrees impeached give no more to the Respondent than upon a proper adjustment of the accounts will be found to be his due. But this result has been reached by referring a question which involves a compromise of the strict legal rights of the parties, to Arbitrators who were not duly authorized to determine it. The consent of the Appellant was essential both to the form of the issue, and to the constitution of the Tribunal that was to decide it. It was wholly wanting to the one; if given at all to the other, it was, at most, a qualified consent.

The only remaining question is, with what directions this cause should be remitted to the Courts below? It will, of course, be open to the Judge, if both parties consent, to refer the question suggested by the Order of the 15th of May, 1862, or any other question directed to the ascertainment of their respective rights in the outstandings, to Arbitrators duly appointed under the Act, No. VIII. of 1859. But if the parties do not consent to any such mode of settling their disputes, it will be the duty of the Judge to adjust the accounts still unsettled between them in the regular way, by taking an account of the debts which were due to and from the three Firms at the date of the *Farighkhuttees*, and of what has been received and paid in respect thereof, and by whom; and by inquiring whether any and which of the debts due to or from the said firms, remain outstanding and unpaid respectively, and by ascertaining what, upon the result of these accounts, is due from either and which of the parties to the other of them. Act, No. VIII. of 1859, sec. 92, seems to give to the Court the power of appointing a Receiver if one should be necessary.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Judicial Commissioner of the 3rd of July, 1863, and that of the Civil Court of *Lucknow* of the 4th of September, 1862, and to remit the cause to the Judge, with directions to wind up the outstanding concerns of the three Firms pursuant to the *Farighkhuttees*, unless the parties shall consent to any other mode of determining their rights in these outstandings. Their Lordships think that the Appellant is entitled to the costs of this appeal, and also to the costs of the Order of the 15th of May, 1862, and of the proceedings following upon it.

28th, 29th and 30th November, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Madras.

TAYAMMAUL,* ... *Appellant*,

versus

SASHACHALLA NAIKER & VIRASAMI NAIKER, } *Respondents*.

Hindu Law—Adoption—Will—Evidence.

In a suit which involved a disputed question of fact as to an unpremeditated adoption and Will, which were apparently parts of the same family arrangement the Court of first instance in *India* upheld the adoption and the Will solely relying upon the testimony of an independent witness called by itself and on the conduct of the Appellant after her husband's death. The *Sudder* Court upheld the judgment on appeal.

The Privy Council reversed the concurrent judgments of the *Indian* Courts as the witness called by the Court only proved that the adopter testator was a dying man, almost continually insensible though occasionally roused to consciousness by violent means but immediately relapsing into insensibility; and when momentarily conscious, with his mind inert and fatigued upon the slightest exertion. Such evidence was entirely insufficient to establish the testamentary or adoptive capacity.

The acquiescence of a Hindu female in an alleged adoption or Will ought not to prejudice her so long as she is acting without independent advice. The participation in and acknowledgment of adoption by the Widow and the performance of funeral rites by the adopted son cannot sustain the validity of an adoption unless it clearly appears that the act itself was performed under such circumstances as would render it perfectly legal.

* 10, Moore's I. A., p. 429.

The concurrent opinions of two *Indian* Courts even upon a mere question of fact will not prevent the Privy Council from acting upon their own independent judgment.

Runyama v. *Atchama* (4 M. I. A., 1; 1 P. C. J., 313); *Huradhun Mookurjia* v. *Muthura Nath Mookurjia* (4 M. I. A., 414; 1 P. C. J., 375); and *Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar* (4. M. I. A., 431; 1 P. C. J., 378) cited and followed.

22nd December, 1865.

THE consideration of their Lordships' judgment was adjourned, and now pronounced by

THE RIGHT HON. LORD CHELMSFORD:

After stating the nature of the appeal, his Lordship proceeded as follows:—

The claim to the property is founded on an alleged adoption of the infant, *Virasami Naiker*, by *Balakristnama Naiker* on the day of his death, on which day it is alleged, that he also executed a Will, by which he appointed the Respondent, *Sashachalla Naiker*, the uncle of the infant, and *Devanayaga Naiker*, the father of his wife (the Appellant,) the guardians of his adopted son, and "to manage all the affairs," till his adopted son came of age.

The alleged adoption took place at 7 o'clock, and the Will was made about 9 o'clock, in the evening of the 30th of July, 1849. Although there was no necessary connection between these two acts, as the adoption might be good and the Will invalid, yet it is difficult to separate the different transactions of the day from each other, or to view them in any other light than as different parts of one arrangement.

On the part of the Appellant both the adoption and the Will are disputed, the first by denying that it ever took place, and both upon the ground that *Balakristnama Naiker* was on the day in question utterly incompetent to perform either of the acts imputed to him.

The acts which are said to have constituted the adoption are described by all the witnesses in almost the same words (no unusual circumstance with Indian witnesses,) but there is no reason to suspect that these acts were not performed; and the mere *factum* of the Will appears to be sufficiently established by the evidence.

There was no proof that application had been previously made to the natural parents of *Virasami* to give their child in adoption, nor was it shown that *Balakristnama Naiker* had ever contemplated the adoption of this boy before the day in question.

The acts were performed without much preparation, and without many of the accustomed ceremonies, but it was admitted in argument that they were not essential, and that enough was done (if there were no other objection but the absence of these ceremonies) to constitute a legal adoption.

The case was heard *ex parte* before their Lordships, but in the Civil Court in *India* it was strongly pressed against the Appellant in support of the validity of the adoption, that she was a consenting party to it, performing her part in the ceremony, and afterwards showing by unequivocal acts her entire acquiescence in what had been done. These acts were—allowing the boy to perform the funeral rites as an adopted son, and the day after the adoption putting her mark to an *arzee* addressed to the Collector of *Southern Arcot*, stating the adoption and the performance of the funeral rites by the adopted son, and praying for the transfer into his name of her late husband's property.

With respect to the *arzee*, the Appellant, who was examined as a witness in the suit, positively denied that she ever put her mark to it, and asserted that it was a fraudulent imposition upon her; and, as to the performance of the funeral rites, it was alleged on her behalf that they were not performed by *Virasamy* as an adopted son, but as her agent, she being unable by the custom of her caste to go out and perform them herself.

The evidence in support of the *arzee* is not of the most satisfactory description. *Devanayaga*, the Appellant's father, by whom it is said to have been prepared, and who wrote her name before she put her mark to it, was not produced, although he was in the list of witnesses delivered in by the Plaintiff. The reason for not examining him is stated in a memorandum presented to the Court by the Plaintiff, "that he suspected *Devanayaga Ayangar* was associating with the adverse parties."

With respect to the performance of the

funeral rites considerable doubt at least arises upon the testimony of the *Purohit*, or family Priest, whether they were really performed by the boy as an adopted son.

But assuming both these acts to be satisfactorily established, and also the participation of the Appellant in the proceedings of the 30th of July, 1849, all this will not sustain the validity of the adoption, unless it clearly appears that the act itself was performed under such circumstances as would render it perfectly legal.

The concurrence of the widow, and the various acts of acquiescence attributed to her, would be important if they were brought to bear upon a question which depended upon the preponderance of evidence; but if the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove. The Appellant is a Hindoo female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or Will ought not to prejudice her. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact, and a legal adoption, or between a Will in fact, and a valid Will. The acts attributed to her are really no confirmation of the Respondent's case, as every one of them upon which reliance is placed might equally have been done with respect to a legal or an avoidable adoption.

The question, therefore, will be, not whether certain acts were done which if unobjectionable in other respects would have constituted adoption, but whether the alleged adopting father was of sufficient capacity at the time to understand the nature and object of those acts, and voluntarily gave an intelligent consent to their performance.

On this question, upon which the validity of the adoption and of the Will depends, many witnesses were called on both sides. It is unnecessary to examine the evidence, or to weigh one set of witnesses against the other, because the Judge who tried the cause in the Court below declined to decide the case upon their conflicting testimony, but himself directed an additional witness to be examined, and taking the facts deposed to by him as to the bodily and mental state of *Balakristnama Naiker* at the time of performing the acts in question, made them the foundation of his judgment. Can it be said that he rightly exercised his judicial function in the appreciation of those facts, and in the correct application of the law to them? What is the description given by *Kandoji Rao*, the Court witness, as he is called, of the state of *Balakristnama Naiker* on the day in question? That of a dying man, almost continually insensible, though occasionally roused to consciousness by loud tones, or by pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility, and when momentarily conscious, with his mind quite inert and instantly fatigued upon the slightest exertion.

How is it possible that a person in such a condition could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion. Viewing the adoption and the Will together, they present every appearance of a concerted family arrangement. As an adopted child passes into a new family, his natural relations become, as it were, strangers, and the association of the boy's natural uncle with the father of the adopting mother for which the Will provides, must be regarded as a contemporaneous and concurrent act with the adoption. If the law were to countenance acts of this description, performed at such a time and under such circumstances, without the clearest and most cogent evidence to establish their validity, relations and managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and to ascribe acts to a dying man in which he would have been the merely passive instrument to prolong their own gain and authority.

If this question had come originally be-

fore their Lordships, and not by way of appeal, they would have had no difficulty in deciding that *Balakristnama Naiker* was on the day in question quite incompetent to perform the adoption, or any other act requiring the exercise of the powers of judgment and reflection.

They have, however, to deal with the case under the influence of two previous decisions at variance with their own views. But the concurrence of opinion of two Courts in *India*, even upon a mere question of fact, has not upon previous occasions prevented their Lordships acting upon their own independent judgment. In the case of *Rungama* v. *Atchama* (4 Moore's I. A., p. 1, 1 P. C. J., p. 313) upon a disputed question of adoption, the Provincial Court and the *Sudder* Court on appeal, held that the evidence was not sufficient to establish the fact of adoption: but their decision was reversed by this Committee. Precisely the same state of things occurred in *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (4 Moore's I. A., 414, 1 P. C. J., p. 375) and with the same result. And in *Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdry* (4 Moore's I. A. 431, 1 P. C. J., p. 378) Dr. *Lushington* in delivering the judgment of their Lordships, says in p. 433, "Both the Courts below have decided against the validity of the instrument; a fact which, considering the advantages the Judges in *India* generally possess, of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not, and ought not to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case."

This case is something different from a mere question of fact. The matters questioned, an adoption and a Will, involve both the *factum* of each and the capacity of the alleged adopting father and Testator. Each of these acts interferes with and displaces previously existing rights, inchoate or presumptive. A Judge who decides in favour of a disputed adoption or Will in a case of questioned capacity of a dying man, must apply his mind not simply to the act of adoption in fact, or to the execution in fact of a Will, but he must be careful to see that the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully complied with. Now, in this case the Judge, not satisfied with the evidence brought before him, selected a witness to assist him with his judgment. There was no careful weighing of the evidence on both sides, but his decision was founded upon the single testimony of this witness. The *Sudder* Court say, "Little need be added to the arguments on which the Civil Judge has founded his decision," and they add nothing. They, therefore, adopt the conclusions at which the Civil Judge arrived, based not upon a review of the whole of the evidence, but upon a witness chosen by himself, whose testimony in the opinion of their Lordships does not warrant the judgment which he has pronounced. They will, therefore, recommend to Her Majesty that the decrees appealed from be reversed, with costs.

30th November, and 1st December, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

MAHARANEE INDERJEET KOOAR,* ... } *Appellant,*

versus

MUSSUMATH ISMUDH KOONWUR & SOONNETT KOONWUR, ... } *Respondents.*

Razinamah—Division of shares—Government compensation for abolition of Pilgrims' tax—Assets—Liability to pay Government jumma.

Two brothers executed a *Razinamah* in 1824 defining their respective rights in fixed shares in

* 10, Moore's I. A., p. 329.

paternal property, which included a tax levied on the pilgrims at *Gya*. The tax was subsequently abolished and a perpetual money payment awarded instead as compensation.

An actual partition was then made between the brothers, of the *Zemindary* properties in the shares specified in the *Razinamah*, but not of the aforesaid money payment.

Government finally set off the money payment by reducing the revenue assessment of certain *Mehals* which led to disputes between the brothers as to whether the money should be divided in the proportions stated in the *Razinamah* or in the proportions of the Government revenue paid by each after partition for the *Mehals* the subject of revenue remission. *Held*, that the money payment in lieu of the abolished tax was a distinct asset and separately divisible in the proportions fixed by the *Razinamah*;

That in whatever new form the Government might subsequently choose to keep their fiscal accounts, the rights of the parties under the *Razinamah* and the partition could not be affected without their consent, but would continue to be adjusted according to the proportions originally established.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. LORD CHELMSFORD:

This is an appeal from four decrees of the *Sudder* Court of *Calcutta*, reversing four decrees of the Principal *Sudder Ameen* of *Zillah Behar* in favour of *Maharajah Hetnarain Singh*, whose widow and heiress is the Appellant. The Respondents are the widows and heiresses of the late *Modnarain Singh*, who was the brother of *Hetnarain Singh*, and the Plaintiff in one and Defendant in three of the suits in which the decrees now under appeal were made.

The four suits involved the same question, which is shortly and accurately stated in the Appellant's case as follows:—

"Whether *Hetnarain Singh* and *Modnarain Singh* were entitled to the annual sum of Rs. 17,212 9 as. 5 p., in the proportions of $\frac{9}{16}$ths and $\frac{7}{16}$ths respectively, in accordance with the contention of *Hetnarain Singh*, or in the proportions of the amounts of *sudder jumma* payable by them respectively on account of the nineteen *Mehals* in the pleadings mentioned in accordance with the contention of *Modnarain Singh*."

The two brothers were sons of the *Maharajah Mitterjeet Singh*, who died on the 3rd of October, 1840. During the life-time of the *Maharajah* an agreement was entered into for a division of the property between his two sons after his death. The particulars of this agreement are stated in a former suit between the brothers, which was brought by appeal before their Lordships and is reported in Moore's Ind. App. Cases, Vol. 7, p. 312, to this effect:—"Family dissensions having arisen during the life-time of *Mitterjeet Singh*, certain proceedings were instituted, and on an appeal to the *Sudder Dewanny Adawlut* in a suit in which *Mitterjeet Singh* and the Appellant and Respondent were parties, a compromise was entered into and a *Razinamah* and *Ikrarnamah*, dated the 7th of February, 1824, was filed by *Mitterjeet Singh*, which instrument was to the effect, that the real and personal estates held by him after his death were to be divided between the Appellant and the Respondent. The former was to take a 9 *annas* share and the latter a 7 *annas* share. Partition deeds of the same tenor were also filed, and on the 4th of March, 1824, the *Sudder* Court decreed that the parties should act up to the terms entered into by them in the above-mentioned instruments."

The *Maharajah* was entitled to a tax levied upon Pilgrims resorting to the Temple at *Gya*. This tax was abolished by the Government in the month of January, 1840, and a compensation was awarded to the *Maharajah* in lieu of it in the shape of a perpetual annual payment of Rs. 17,212 9 as. 5 p. The grant of this compensation was the subject of a Government letter of the 16th January, 1840, which, unfortunately, is not printed in the proceedings.

On the death of the *Maharajah*, his property, whether moveable or immoveable, had to be divided between the sons according to the proportions of nine-sixteenths and seven-sixteenths, settled by the agreement and decree of 1824. And the compensation tax, as part of that property, was divisible in these proportions. His immoveable property, which was very extensive, consisted partly of nineteen *Mehals* which were held by him in severalty, and partly of *Mehals* which he held conjointly with other persons.

Disputes arose between his sons imme-

diately after his death. The Commissioner of the District intervened and induced them to make a partition of the immoveable property. Under his advice, and with his approbation, deeds of partition were executed on the 30th of December, 1840, and that which was executed by *Modnarain* specifies the different villages which fell to the lot of *Hetnarain* and *Modnarain* respectively; and also the sums which each, as between him and his brother, was bound to pay in respect of the *Sudder jumma*, or Government revenue. The partition, however, was not made upon the principle of dividing each *Mehal*, with the burthen of the public revenue assessed thereon, in the proper proportions, but of assigning certain villages and parcels according to their real or supposed value to each share, so as to give to *Hetnarain* nine-sixteenths in value, and to *Modnarain* seven-sixteenths in value of the whole immoveable property. In consequence of this mode of division, in six out of the nineteen *Mehals* which had been held by *Mitterjeet Singh* in severalty, *Modnarain* took more than a nine *annas* share (his share in some of them being absolutely much larger than that of his brother,) with the liability of having to pay a corresponding share of the public revenue assessed on those *Mehals*. This deed of partition, which was confined to immoveable property, made no mention of the compensation for the Pilgrims' tax; and the *jumma*, or revenue, stated therein to be chargeable on the different *Mehals*, and to be apportioned between the brothers as therein mentioned, was the full amount of *jumma* assessed upon them under the perpetual Settlement. It follows, then, that as far as this partition went, the compensation for the Pilgrims' tax was not included therein, and presumably continued to be part of the assets of *Mitterjeet Singh* divisible between his sons in the proportion of nine to seven *annas*.

In *Mitterjeet Singh's* life-time the payment of this annuity would have been very simple; he had annually to pay a very large sum (upwards of three lacs of Rupees) for Government revenue, and would naturally have retained the Rs. 17,212 by way of deduction or set-off. It would seem, however, that in his life-time, or very shortly after his death, the Revenue authorities of the District entertained the notion of putting, in some way or other, this payment against the *Sudder jumma*, in respect of the nineteen *Mehals* held by him in severalty, distributing the whole sum of Rs. 17,212 amongst the different *Mehals* according to the *jumma* assessed upon them respectively. This appears from the letter of the Accountant of the Revenue department, which purports to be in answer to a letter from the Collector of the 22nd October, 1840, which is not in evidence. The Accountant's letter is dated the 26th December, 1840, and is in these terms: "I have the honour to acknowledge the receipt of your letter, No. 344 of the 22nd October last, and with reference to the seventh paragraph thereof, I beg to acquaint you that on examining the items rateably distributed by you among the several *Mehals* in your statement, trifling errors have been discovered to exist in almost every item. I accordingly transmit herewith a copy of your statement with an additional column added to it, showing the calculations made in this office, agreeably to which you will have the goodness to allow the remissions in favour of the several *Mehals*. I have used the term remissions, though, as far as the course of entry is concerned, which the settlement with the *Rajah* will render necessary, no remissions in account will appear; for the compensation in question to the *Rajah's* heirs you will be pleased to recollect will have to be charged under the head of *sayer* compensation, subordinate to pensions, the charge being balanced by a distinct credit *per contra* 'to land revenue' (the estates being in your District, *Towjee*). This course of entry you will observe will prevent you from exhibiting the transaction in account as a 'remission.'"

By a proceeding, dated the 23rd of March, 1841, the Collector directed that effect should be given to the letter of the Accountant, and that the Rs. 17,212 9 as. 5 p., should be credited on the 1st of April of the current, and of every future year, to the *Mouzahs* of each lot, as was specified in the letter of the Accountant, that is, on the list of *Mehals* annexed to

it; but it appears that in April, 1841, and again on the 31st of March, 1842, a warrant was written for the whole sum of Rs. 17,212 9 as. 5 p., and this settlement of accounts was, therefore, in the nature of a set-off of one independent demand against another, and did not imply the permanent remission or deduction of part of the *jumma* originally assessed on the several *Mehals*.

On the 6th of June, 1842, the Secretary of the Government wrote to the Accountant that the remission of the Rs. 17,212 9 as. 5 p. was to be adjusted by reduction of the *jumma*. The letter is in the following terms:—"With reference to the communication made to your office from this Department under date the 16th of January, 1840, I am directed to inform you that the Honourable the Deputy-Governor of *Bengal* has this day been pleased to determine that the remission granted to *Rajah Mitterjeet Singh* shall be adjusted by a reduction of the *Sudder jummas* of the estates, recorded in his name on the *Behar* Collector's *Towjee*." And a letter to this effect, of the date of 14th of June, 1842, was sent to the Collector of *Behar*. Whether that Court was right in this statement, their Lordships, not having the letter of the 16th of January before them, are unable to determine.

This order of June, 1842, for adjusting the remission by a reduction of the *jumma*, apparently rendered a change in the mode of stating the accounts necessary; but, in fact, no alteration was made in them down to the year 1850. This appears from a letter to the Collector of *Behar* of the 17th of September, 1850. Part of that letter is in these terms: "As regards the mode of adjusting the remission still observed by you, I beg to remark that instructions from this office based upon the orders of Government of the 6th of June, 1842, were, under date the 14th *idem*, issued to you, wherein you were requested to account for the remission by a reduction of the *Sudder jumma* of the estates recorded in the name of *Rajah Mitterjeet Singh* on the *Towjee* of your District, which instructions apparently set aside those contained in letter, No. 426 of the 26th December, 1840. It would seem that after this communication the Government accounts were kept in accordance with the Government letter of the 6th of June, 1842, which is obviously treated as having introduced a mode of accounting for the compensation for the Pilgrims' tax differing from that established by the Accountant's letter of the 26th of December, 1840, in that it proceeded less upon the principle of set-off, and more directly upon that of remission of revenue. Assuming, however, that the order so to deal with the compensation was within the competence of Government, as a direction to their Officers for the more convenient mode of keeping their accounts, or otherwise, how could that affect the rights of *Hetnarain Singh* and *Modnarain Singh, inter se?*

The Government might keep their accounts in any manner they pleased, but the Rs. 17,212, would still continue to be the property of the brothers in the settled proportions, unless they acquiesced in the course adopted by the Government, and acted upon it in such a way as to indicate a fresh agreement between them. Now, there is no evidence that *Hetnarain Singh* ever assented to this arrangement, or that he ever agreed to alter the proportions in which the property was originally divided. On the contrary, on the 15th of April, 1843 (and no action can have been taken on the letter of June, 1842, until the 1st of April, 1843), he presented a petition to the Collector, in which he complained of his being called upon to pay a larger sum than was due from him for the *jumma*, and praying relief. That petition was rejected. He then appealed to the Commissioner, and the Commissioner, in refusing to interfere, said: "It appears that the *Malikanah* allowance has been rateably credited to the revenue of the *Mehals* of both the parties. If there is a diminution in their respective shares as opposed to the fixed allotment of share, let them adjust the differences among themselves; Government has nothing to do with this. The Collector is to communicate this to both the parties."

Accordingly, from the date of this order until the commencement of these suits in 1853, *Hetnarain Singh* continued to assert his right to nine-sixteenths of the Rs. 17,212 9 as. 5 p., by retaining so far as he

could, out of the sums which under the partition he was bound to pay as his share of the *jumma* assessed in the different *Mehals*, his proportion of the remission allowed in respect of each particular *Mehal*. The suit of *Modnarain Singh* is brought to recover the sums which, according to his contention, were in this manner improperly retained by *Hetnarain Singh* in satisfaction of his full proportion of the remissions allowed in respect of three of the *Mehals*, whilst the three suits of *Hetnarain Singh* are for the recovery from *Modnarain Singh* of the differences between the sum actually returned by him, and his full nine-sixteenths of the remissions allowed in respect of three other *Mehals*. The deed of partition, as has already been shown, made no alteration in the original rights of the parties, and the observations of the Principal *Sudder Ameen* in this respect are perfectly correct. It is to be observed also that *Modnarain Singh*, in his plaint filed on the 8th of April, 1853, as to the three *Mehals* of which *Hetnarain Singh* had received his nine-sixteenths, does not found himself upon any new agreement between them, but upon the authority of the Government order of June, 1842. The ground upon which the *Sudder* Court proceeded in overruling the decree of the Principal *Sudder Ameen* in the Appellant's favour was, that the parties were aware that the remission of the *jumma* had been made, and that there was a deduction from certain specified *Mehals*, and that the amount of remission from each of these *Mehals* had been ascertained and determined, and that it was, therefore, a reasonable inference from the silence of the deed of partition on the subject, that the parties believed and were willing, that the amount of remission on each estate, should be apportioned to the amount of *jumma*, for which each of the contracting parties was responsible. There is, however, not the slightest proof that when the deed of partition was in preparation (the consent to an amicable adjustment in which it resulted having been given on the 24th of December, 1840), or even at the time of the execution of the instrument on the 30th of December, 1840, the parties were aware of the mode in which the Government accounts had at that time been made out. The letter of Revenue Accountant of the 26th of December, 1840, can hardly have reached the Collectorate of *Behar* before the 30th of December, and the proceeding of the Deputy-Collector shows that that letter was not taken into consideration by him until the 4th of January, 1841, and that no final orders were passed thereon until the 23rd of March, 1841. But even if the parties at the time when the deeds of partition were executed, had known of the letter of the 26th of December, 1840, they would have had no notice of the determination on the part of the Government to settle the account by way of reduction or remission of *jumma*. The arrangement was effected by the letter of Government of the 6th of June, 1842, and it is treated throughout the proceedings as differing materially from that contemplated in the letter of December, 1840. It is in the letter of 1842 that *Modnarain Singh* in his plaint founds his claim, and the sums which he sought to recover were those retained by *Hetnarain Singh* after the date of it.

The *Sudder* Court puts the case of the sale for arrears of revenue of one of the lots on which a reduction of *jumma* had been allowed, and the danger of the Government revenue suffering from a doubt, whether the parties would consider themselves obliged to give up so much of a remission which they now enjoy, or would expect the Government to submit to the loss of revenue, consequent on treating the *jumma* on the *Mehal* as permanently reduced by the amount of the remission now allowed. But it is difficult to understand how, because in a supposable case the Government may be thrown into a state of uncertainty with respect to the mode of dealing with the reduction, this can have any influence on the rights of the parties between themselves.

Their Lordships are of opinion, that the view of the case taken by the *Sudder* Court cannot be adopted, but that the Rs. 17,212, was divisible between the brothers in the proportion of nine-sixteenths and seven-sixteenths, and that, in whatever mode the Government may think proper to deal with this sum with reference to the

jumma, the rights of the parties cannot be affected without their consent, but will continue to be adjusted according to the proportions originally established.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the decrees of the *Sudder* Court in all the four suits, and to affirm the decrees of the *Sudder Ameen* in all those suits, with costs of the Court below and here.

1st, 2nd and 4th December, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Madras.

KAMALA NAICKEN,* ... *Appellant*,

versus

PITCHACOOTTY CHETTY, ... *Respondent*.

Lease for term of ten years—Consideration advances to Lessor—Specific performance—Redemption.

K. in consideration of 3,000 Rs. advanced for the purposes of litigation by P. executed in P's. favor a lease of K.'s *Zemindary* for ten years and set off the said advance against future rents under the lease. On the same day, K gave to P. Bonds for the 3,000 Rs. and an order to K.'s tenants to pay rents under the lease to P., which order was subsequently countermanded, and in consequence P. failed to realise rents.

P. sued for a decree adjudging K. not to interfere with and prevent P.'s enjoyment of all the incomes of the *Zemindary*.

K. answered that P. obtained the lease by undue influence; that P. only paid Rs. 1,052, out of the 3,000 Rs. for which Bonds had been given; that on the 25th November 1851, P. agreed to advance the remainder of the loan within 5 days, on failure whereof P. would return the lease and bonds and receive back the amount already advanced by him; that P. failed to pay as above agreed, and in consequence K. failed in the litigation and suffered serious loss.

The first Court dismissed P.'s suit holding the lease to be an executory contract not enforcible without consideration and also the transaction to be void for maintenance and champerty.

On remand by the High Court, the first Court found the agreement of 25th November 1851 to be a genuine document and considering the prior lease to be cancelled thereby, dismissed the suit.

The High Court on appeal decreed to P. specific performance of the lease and possession of the *Zemindary* under it.

Held, by the Privy Council that there was no proof that the lease had been fraudulently obtained;

That the agreement of 25th November 1851 was not proved to be genuine;

That as their Lordships were anxious to preserve to K. all the rights which arose to him out of his dealings with P., and as it appeared extremely doubtful whether K. received the 3,000 Rs. in full; the decree for possession under the lease to P. should stand affirmed with costs, but with a declaration that it was to be without prejudice to the claim of K. for redemption (if any), and to any question which might be raised as to the amount actually advanced by P.

21st December, 1865.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. LORD CHELMSFORD:

The original suit out of which this Appeal arises was instituted in the Civil Court by the Respondent, for the purpose of obtaining undisturbed possession of a lease of the *Zemindary* granted to him by the Appellant, the *Zemindar*.

The lease, which is dated the 17th of September, 1851, recites that the Appellant had leased out to the Respondent the whole of the *Zemindary* for a period of ten years from *Fusli*, 1267 (answering to the year 1857, A. D.), and had fixed the amount of lease at Rs. 19,000 per annum. It then directs that out of the Rs. 19,000 the lease should pay the *pesh kist* of the *Zemindary*, at Rs. 13,961 8 as. 6 p., and certain other expenses, amounting in the whole to Rs. 16,469 8 as. 6 p., and that out of the amount to be realized during the ten years at Rs. 2,530 7 as. 6 p., after deducting the Rs. 16,469 8 as. 6 p., Rs. 3,000, which the lessor states "I have up to this day borrowed from you under the Bonds executed to you by me and its interest," should be paid (for this is clearly what was intended, although the sentence is not complete); and it then proceeds thus: "that if I can afford to pay the same before the lease of the *Zemindary* shall take

* 10, Moore's I. A., p. 386

effect in *Fusli*, 1267, you should receive the principal and interest; that I should also pay the said amount if demanded by you; that even if the said debt may be thus discharged, still you would, without any objection whatever, enjoy the lease of the said *Zemindary* for the said ten years, in consideration of the assistance you have done to me; that as you have at my request agreed to lend me Rs. 18,000, in order to discharge my debts, and you should, after getting possession of the said *Zemindary*, lend me Rs. 5,000, in *Fusli*, 1267, Rs. 5,000 in the following *Fusli*, and Rs. 5,000 in the next following *Fusli;* and should credit for these sums, and the said sum of Rs. 3,000 (in the event of it not being paid before the lease takes effect), the aforesaid annual residue Rs. 2,5307 as. 6 p.; that in the event of my not requiring the said loan, you should deduct the said sum of Rs. 3,000 and its interest from the amount to be realized by you for the debt at Rs. 2,530 per annum, and pay me the remainder annually." The Appellant, on the same day, executed two Bonds to the Respondent, one for Rs. 2,000 and the other for Rs. 1,000. The Bond for Rs. 2,000 is in these terms, "To meet the cost of suit now instituted by me, and the demand of *Ramkrishna Setti* by means of precept, &c., I have up to this date borrowed of you the sum of Rs. 2,000. For this sum of Rs. 2,000 and the interest thereon, at 1 per cent. per mensem, I have rented out to you my *Zemindary* for a term of ten years from *Fusli*, 1267, and executed a lease specifying the amount of the rent to be Rs. 2,530 7 as. 6 p. per year: therefore you should credit this rent amount towards the principal and interest in question. If you require the said principal and interest before the said *Zemindary* is put in your possession in *Fusli*, 1267, I shall pay them, and I shall also discharge the said debt if I could get coin. Although the debt may be discharged as aforesaid, yet there is no objection whatever in your enjoying the lease, of the said *Zemindary*, under the terms of the lease, for a term of ten years from *Fusli*, 1267." The Bond for Rs. 1,000 recites the execution of the bond for Rs. 2,000, and in all other respects is exactly similar. In addition to these securities the Appellant on the same day (the 17th of September, 1851,) issued an order to the inhabitants of the villages in his *Zemindary*, reciting the lease to the Respondent from *Fusli*, 1267, to *Fusli*, 1276, directing them "to continue to pay during the said *Fusli* to the said *Settiar* (the Respondent,) or his agents, all sorts of revenue, and place themselves under his orders."

Upon the arrival of the term at which the Respondent became entitled under the lease to the possession of the revenue of the *Zemindary*, he sent the above order of the Appellant to the inhabitants of the villages, but found that the Appellant had issued a counter order, directing them to send to himself the collections and accounts.

The Respondent thereupon instituted his suit in the Civil Court of *Madura*, praying for a decree adjudging the Defendant not to interfere with and prevent his enjoyment of all the incomes of the *Zemindary*.

The Plaintiff in his plaint recites that having obliged the Defendant by lending him Rs. 3,000 on the 17th of September, 1851, in relief of the distress which he had been subject to, he has leased out to him the whole of his *Zemindary*, and then sets out the stipulations in the lease, and after stating the *takid* or order to the inhabitants of the villages of the same date, he alleges that he had sent a copy of the Defendant's *takid* with his own *takid* to the villagers who had admitted them, but that Defendant had sent a counter order, and had thus prevented him from holding according to the terms of the lease, and he prays for a decree in the terms above-mentioned.

The Defendant by his answer alleges that the Plaintiff, a Merchant, has, with a view of defrauding the Defendant and getting the agreement in question from him by holding out to him hopes of pecuniary and other assistance, executed separate documents to the Defendant's men, and having thus gained them over and caused them to persuade the Defendant, has thus fraudulently obtained the agreement in question.

That the sum of Rs. 3,000, which is

said to have been advanced to the Defendant by the Plaintiff for the agreement in question was never paid. That the Plaintiff has entirely omitted to mention in his plaint the stipulations of the documents passed respecting the same, and the documents passed in pursuance thereof in regard to certain other transactions, as also the stipulation of these documents by which the Plaintiff is bound to do certain acts.

The Plaintiff in his replication denies that the lease was obtained by holding out any hopes to the Defendant, or by executing any documents to the Defendant's men as alleged in the answer. And as to the Rs. 3,000 not having been paid, he states that the Defendant has not only executed a Bond for the sum of Rs. 3,000 which is said in the plaint to have been lent to him by the Plaintiff, but has also acknowledged his (Defendant's) receipt of the same in the said lease.

And lastly, the Defendant by his rejoinder states "that about seven years ago the Plaintiff, with a view of obtaining a lease of the Defendant's *Zemindary*, and breaking his friendship with Mr. *Fondclair*, who had obtained an *Izaradar* and had held dealings with him at the time, caused the Defendant to institute a suit against that gentleman, and held out to him hopes of pecuniary assistance for that suit, for the precept to which the Defendant was then liable, and other necessary expenses. That the Plaintiff has also caused the Defendant's men and friends (whom he gained over) to persuade the Defendant, and having thus obtained the lease has executed separate agreements to them, giving them certain shares in the said lease as follows, viz., one-eighth share for the Defendant's manager, *Muttaya Pillai*, in the name of his younger brother *Mayandiya Pillai;* one thirty-second share for his *Rayasam* (Clerk), *Subbramaniya Pillai*, in the name of his brother-in-law, *Sankaralingam Pillai;* five thirty-second shares for his friend *Varadaya Naikar;* and five thirty-second shares for *Kalaryar Kovil Chellama Ayar*, a friend of both the parties, in the name of his son, *Aiyairayar*. These particulars came to the Defendant's notice lately. That the Plaintiff obtained two Bonds from the Defendant (on the date of the said document) for the sum of Rs. 3,000, which he required at the time, but paid him only Rs. 500 at the time. With the aid of this money, the Defendant instituted a suit against the said gentleman in No. 4 of 1851, on the file of this Court for Rs. 23,000. The Plaintiff has subsequently paid to the Defendant only Rs. 52 on one occasion, and Rs. 500 on another occasion, and has executed to him an agreement of the 25th of November, 1851, to the effect that if he should fail to pay the rest of the amount within five days, he would return the lease and bond, and receive back the amount advanced by him. The Plaintiff, who failed to pay the money within the said time, having been demanded about the same, has stated in the presence of certain mediators that he would, according to his younger brother's advice, return the said lease, &c., and that the said sum of Rs. 1,000 and odd should be paid back. Accordingly, the said amount was ready, and the Plaintiff was searched for, but he could not be found. The Plaintiff having failed to give any pecuniary assistance according to his positive promise and concealed himself, the Defendant was obliged to pay Rs. 1,000 and odd for *Madara Ramakristna Chetti's* precept through Mr. *Fondclair*, and to withdraw the said suit No. 4; and the Defendant's grove of tamarind trees and *karamal* (tanks), which can yield Rs. 5,000 per annum, were sold at auction."

From the singularly loose and inexact character of the pleadings, it is scarcely possible to discover what were the precise questions intended to be raised between the parties, and no copy of the issues is to be found amongst the printed proceedings.

It is clear, however, that two of the main questions of fact to be tried were:

First, whether the lease of 17th of September, 1851, was obtained by undue influence; and, Secondly, whether the document of the 25th of November, 1851, was a genuine document.

Another question arose as to the payment of the Rs. 3,000 by the Plaintiff to the Defendant, which although not decisive of the suit, has yet and important

bearing upon the genuineness of the document upon which the case principally, if not altogether, depended. The Plaintiff rested the proof of his case entirely upon the lease of the 17th of September, 1851, and the two Bonds of the same date executed by the Defendant, in which the advance of the Rs. 3,000 before their execution is distinctly admitted, and also upon the order to the inhabitants to pay to the lessee or his agents, after the commencement of the lease, the whole revenue of the *Zemindary*.

The Defendant, in support of the allegation in his rejoinder, produced a document, dated the 25th of November, 1851, and purporting to be attested by three witnesses, and to have been engrossed by one *Appavaiyar* of *Madura*. And he called five witnesses to prove its execution. Of these, two were the persons whose names appeared as attesting witnesses, the third name being that of a person who was proved to have been dead several years, and another was *Appavaiyar*, the alleged writer of the document. All these five witnesses swore to the execution of it by the Plaintiff in their presence. In addition to this evidence, four of the witnesses stated in almost the same words, that "the Plaintiff did not act up to the conditions of the agreement. That as soon as the term of the agreement had expired, the Defendant sent for the Plaintiff and asked him to receive back the money and return the lease and the Bonds. That the Plaintiff said in a week he would send for and return the documents and receive back the money."

Upon the case thus presented the Civil Judge of *Madura* dismissed the suit on the ground that the alleged lease was an executory contract, and being without consideration could not be enforced, and also that the transaction was void for maintenance.

Upon appeal to the High Court of Judicature the objections taken by the Civil Judge were overruled, and the case remanded to him to be disposed of upon its merits generally. It is perhaps unnecessary to consider the objections upon which the Civil Judge originally disposed of the case. They were very slightly alluded to in the argument before their Lordships, and are not entitled to any weight. On the return of the case to the Civil Judge, he decided upon the merits in favour of the Appellant. He thought there was no cause to question the truth of the evidence and genuineness of the document of the 25th of November, 1851, that the lease of the *Zemindary* was cancelled by it, and he, therefore, decreed that the Plaintiff's suit be dismissed. Upon appeal the High Court of Judicature reversed this decree, and gave judgment that the Plaintiff was entitled to specific performance of the lease, and to the possession and enjoyment of the *Zemindary* under the terms of such lease.

Before proceeding to examine the grounds of this decree, their Lordships cannot refrain from animadverting upon the inaccurate and inartificial character of the pleadings in this case.

The Plaintiff's right of action depended entirely upon the lease, which entitled him to possession of the *Zemindary;* and if that possession had been usurped by the *Zemindar*, the Plaintiff ought to have brought ejectment. The prayer of his plaint seems rather to be for an injunction to restrain the *Zemindar* from collecting the revenue of his *Zemindary*, against the terms of his own authority to the Plaintiff. But the High Court of Judicature appear to treat the suit as one for specific performance, which it could not be if, according to their opinion, the lease was not an executory contract. It is most desirable that such laxity of pleading should be discountenanced, as it imposes additional difficulties in the decision of a case like the present, where the utmost precision and accuracy were necessary in order to bring the parties to distinct issues.

It is evident that the whole case ultimately resolved itself into the proof of the genuineness of the document of the 25th of November, 1851.

This question is involved in considerable difficulty. On the one side there is the positive testimony of five witnesses, who swear to the execution of the document; and on the other, there is negative evidence of the strongest character arising from the great improbability of it ever

having been executed. It must, however, be borne in mind that the *onus* of displacing the Plaintiff's case rested upon the Defendant, and in support of his appeal he ought to be able to show that the evidence he produced was so unsuspicious and satisfactory that the High Court of Judicature were not justified in making a decree against him.

The Plaintiff's evidence merely consisted of the lease of the 17th of September, 1851, and of the contemporaneous Bonds, and the authority from the *Zemindar* for the collection of the revenue. The Defendant rested his defence on three grounds:—first, that the lease was fraudulently obtained by the Plaintiff by means of bribing the Defendant's servants and friends to exert their influence to persuade him to grant it; secondly, that the whole of the Rs. 3,000, the consideration for the lease, was not paid, but only Rs. 1,052, by three payments; and, thirdly, the agreement of the 25th of November, 1851, by which the Plaintiff agreed to return the lease if he did not make payment of the residue of the Rs. 3,000, within five days, which he failed to do.

With respect to the allegation of the improper and fraudulent mode in which the Plaintiff obtained the lease, it is unnecessary to say more than that the Civil Judge thought it was not supported by the evidence.

The question as to whether the whole of the Rs. 3,000, was advanced requires a little more consideration. The Plaintiff relied entirely upon the estoppel arising from the statement of the advance of that sum in the lease and the Bonds.

The Defendant proved that the Plaintiff paid only Rs. 500 on the date of the execution of the Bonds, and that when the agreement of the 25th of November, 1851, was executed, a further sum of Rs. 500, was paid. If the genuineness of the agreement of the 25th of November, 1851, was established, it expressly states that Rs. 1,052 only had been paid. It is difficult to reconcile the mode in which the Plaintiff conducted his suit with the idea that he had really paid the Rs. 3,000 to the Defendant. He is a Merchant at *Madura*, keeping Books, as a matter of course, in which all his transactions would be entered. He might have presented himself as a witness, have proved the advance of the Rs. 3,000, and have vouched the entries in his Books in support of his evidence. This course of proceeding would not only have established the honesty of his case, but have gone very far to show that the agreement of the 25th of November, 1851, with its statement of the advance of only Rs. 1,052, could not have been signed by him.

But notwithstanding the prejudice which arises to the Plaintiff's case from his not appearing as a witness to facts peculiarly within his knowledge, and especially to disprove his signature to the document of the 25th of November, 1851, that document is still exposed to all the improbabilities which surround it on every side. The Defendant's case represents the Plaintiff as so anxious to procure the lease in question that he bribed the Defendant's servants and friends to assist him in his endeavour to obtain it; and yet, succeeding in his object, as having agreed a little more than two months afterwards to surrender the right which he had acquired by such improper means, upon non-payment of a sum of Rs. 1,948, within five days, and as having been unable to raise such a comparatively small sum to save this valuable interest from forfeiture.

It is a circumstance worthy of remark that the lease was registered immediately after its execution, but the alleged document of the 25th of November, 1851, was never registered at all. Now, although it might not have been one which it was absolutely necessary to register, yet when a lease was recorded which so seriously affected the interests of the *Zemindar*, it might have been expected that an instrument which five days after its execution had actually put an end to the lessee's right to the lease, would have been placed upon the register as a matter of ordinary prudence and precaution.

One circumstance of improbability suggested by the High Court of Judicature must be dismissed as having arisen from a misapprehension of the facts. They say, "The lease in issue was on a stamp, the instrument to cancel it is on unstamped paper; and it is highly improbable that the

precautions taken in this respect to fortify the lease should not have been adopted to strengthen and place as far as possible beyond question an instrument obtained to make void the lease, if such instrument were genuine." The fact, however, is, that both the lease and the instrument were originally without stamps, and upon both the penalty was paid for stamping them to render them admissible in evidence.

But a further improbability arises from the circumstance that after the Defendant had obtained this instrument, and the terms of it had not been complied with, he allowed the lease and the Bonds to remain in the Plaintiff's possession for upwards of six years without any attempt to obtain them from him, except what he states in his rejoinder, "That the money he was to pay back was ready, and the Plaintiff was searched for and could not be found." There is no evidence of this alleged fact, and it is highly improbable that the Plaintiff, who was carrying on business at *Madura*, should have eluded the Defendant's search during so many years. But if he was thus continually endeavouring to escape the fulfilment of his undertaking, it is the more extraordinary that the Defendant should not have instituted a suit against him to compel him to deliver up the lease and the Bonds upon payment back of the money he had received, and which he alleges that he was ready to pay.

But all these improbabilities are as nothing, in comparison with that which arises from the conduct of the Defendant in the present suit. The object of this suit is to obtain a decree to enable the Plaintiff to collect all the revenue of the *Zemindary*, to which he claimed to be entitled under the lease granted to him by the Defendant.

If the Defendant's case founded upon the document in question was a true one, he had a short and conclusive answer to the Plaintiff, and it is not unfair to presume that it would at once have been brought forward. It is not pretended that there is any distinct allusion to such a document in the Defendant's answer, but certain vague and doubtful expressions are relied upon, as showing that it must have been in existence at this time, although not specifically mentioned. But if this were the case it is most unaccountable, that the Defendant should have left this complete answer to the Plaintiff's case to the last stage of his pleadings, and even then have introduced it almost incidently as part of a narrative of the transactions between them.

One other circumstance may be mentioned as prejudical to the notion of this being a genuine document. The Defendant himself put in evidence a Bond, dated the 1st of September, 1856, executed by *Mutta Pillai* to the Plaintiff for the payment of a sum of Rs. 250, within ten months, from the profits derived from one-eighth share of the *Zemindary*, and from the income of his own lands. The lease of the *Zemindary* was to commence in 1857, and *Mutta Pillai* would then be put in possession of his share. *Mutta Pillai* was the manager of the Defendant, and it is hardly possible to believe that if the document in question had ever been executed it should have been unknown to him, and that he should have been dealing with an interest in 1856 which had ceased to exist in 1851.

All these strong improbabilities the Defendant had to overcome before he could fairly expect that reliance would be placed upon witnesses, however numerous, to the execution of a document upon which his own conduct had thrown so much suspicion. All the facts were within his own knowledge, and yet he did not tender himself as a witness to strengthen the evidence which both from the station of the witnesses produced by him, and from the general character of their testimony, is extremely untrustworthy. No satisfactory explanation was even attempted of any of the extraordinary circumstances accompanying and following the supposed agreement, and the effect of them is not to be weakened, much less avoided, by the observation of the Civil Judge, that "there is no accounting for a native's acts." Their Lordships think that the High Court of Judicature were warranted in their conclusion, that "upon consideration of all the circumstances affecting the credibility of the witnesses and the whole of the evidence, together with the probabilities and

improbabilities of the case, the document had not been proved to be a genuine and binding instrument."

In adopting this view their Lordships are anxious to preserve to the Appellant all the rights which arose to the *Zemindar* out of his dealings with the Respondent. Although the Respondent may be entitled to possession under the lease, yet it may be least questionable whether the transaction did not operate merely as a security for the money advanced, and agreed to be advanced, and whether the *Zemindar* would not have been entitled to redeem. Again, the unwillingness of the Respondent to appear as a witness, knowing that it was not only asserted that he had not advanced the full sum agreed upon, but also that he was charged with imposition and fraud, makes it extremely doubtful whether the *Zemindar* ever received the whole amount of Rs. 3,000. Their Lordships will, therefore, humbly recommend to Her Majesty that the decree of the High Court of Judicature in favour of the Respondent for possession of the *Zemindary* under the terms of the lease be affirmed with costs, but with a declaration that it is to be without prejudice to the claim for redemption (if any) to which the Appellant may be entitled, and to any question which may be raised as to the amount actually advanced to the *Zemindar* by the Respondent.

7th, 8th, and 9th December, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir John Taylor Coleridge, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Calcutta.

ALEXANDER JOHN FORBES,*... *Appellant,*

versus

AMEERUNNISSA BEGUM, ... *Respondent.*

Conditional Sale—Foreclosure proceedings—Beng. Reg. XVII. of 1806—Mortgagee in possession—Payment by Mortgagor—Benami Lease—Remand—Interlocutory order—Appeal.

The law of foreclosure as established by the Regulations and the practice of the Courts in Bengal stated.

Till 1806, the rights of the holder of a *Bye-bil-wuffa* (Mortgage by Conditional Sale) were enforceable according to the strict terms of the contract. The Mortgagor was bound to tender the amount due or to pay it into Court within the stipulated period for the repayment of the loan.

Changes made by Regulation XVII. of 1806; after which enactment the general effect of the Regulations was this:—If anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The Mortgagee however must, in order to complete his title, bring a regular suit to recover possession if he is out of possession or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest on sufficient grounds the validity of the conditional sale or the regularity of the foreclosure proceedings taken under the Regulation to make it absolute. He may also allege and prove that nothing is due, or that he has made a sufficient deposit. But the issue in so far as the right to redeem is concerned, will be whether any thing at the end of the year of grace remained due to the Mortgagee, and if so whether the necessary deposit had been then made. If that be found against the mortgagor the right of redemption is gone.

Held, that although the Mortgagee's suit was for possession and mesne profits, the finding that he was already in possession under a *Benami* lease was not sufficient ground for its dismissal. The objection as to the form of the suit had not been clearly raised in the pleadings and if raised, the Sudder

* 10, Moore's I. A., p. 340.

Court had not considered it to be valid. The real object of the mortgagee's suit being to perfect his title as absolute owner of the property, there was no reason to withhold that relief, if he be otherwise entitled to it; because, under an erroneous view of the legal effect of the lease, the prayer in the plaint was in a somewhat different form and for something in addition (mesne profits) to which Plaintiff was not entitled.

Under sec. 8, Regulation XVII. of 1806 or Circular Order No. 37 of the 22nd July, 1813, it is not necessary that the private demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a mortgagee in possession should be produced in the foreclosure proceedings.

Held, upon the construction of sec. 11, *Beng.* Regulation XV. of 1793 that the production of accounts by a Mortgagee in possession seeking to foreclose cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the admitted balance.

A Mortgagee in possession is bound to produce accounts;

1st, When the Mortgagor has deposited the principal sum. leaving the question of interest to be settled by an adjustment of accounts.

2ndly, When the Mortgagor has deposited all that he admits, or alleges, to be due; and

3rdly, When he pleads and undertakes to prove that the entire debt, principal and interest has been liquidated by the usufruct of the mortgaged property.

Beng. S. D. A. D. for 1852, pp. 678, 1063, distinguished S. D. A. for 1859, p. 492 approved.

It is not necessary to appeal from an Interlocutory Order which does not dispose of the suit. Such order can be impeached on appeal from the final decree.

Maharajah Moheshur Singh v. *The Bengal Government* (7 M. I. A., p. 283, 1 P. C. J., p. 643) and *Sheonath* v. *Ramnath* (10 M. I. A., p. 413, 2 P. C. J., p. 134) followed.

1st February, 1866.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES W. COLVILE:

On the 13th of March, 1850, *Shah Ally Reza*, the late husband of the present Respondent, executed an instrument which, upon the face of it, purported to be an absolute Bill of sale of the *Talook* and lands therein described to the Appellant, in consideration of the sum of Rs. 39,500. On the same day the Appellant executed to *Shah Ally Reza* an *Ikrah*, or agreement, importing that on payment of the sum of Rs. 39,500 with interest at 12 *per centum per annum* on the 13th of March, 1851, the sale should be void; but that in the event of the seller's not paying the principal and interest according to his engagement, the *Ikrah* was to be null and void, and the purchaser (the Appellant) was to become the absolute proprietor of the property.

The effect of these two instruments was simply to secure the repayment of the sums lent by the Appellant to *Shah Ally Reza* with interest on the day named, by means of that kind of mortgage which is known in *India* as *Bye-bil-wuffa*, or Conditional sale.

The transaction between the parties, however, included something more. On the 12th of March, the day before the date of the Bill of sale, *Shah Ally Reza* had granted a lease of the mortgaged premises for three years ostensibly to Mr. *Alexander Demetrius Forbes*, the son of the Appellant, and had taken the corresponding *Kabooleat* from him.

The latter shows that the lessee had bound himself, after paying the Government revenue and other charges on the lands, to pay to the lessor by way of rent for the *Bengali* year 1258, the sum of Rs. 2,000; for the year 1259, Rs. 2,382 9 as. 6 p.; and for the year 1260, Rs. 2,399 2 as. 6 p.

And, it appears on the face of the *Ikrah*, that *Shah Ally Reza* had given an order to the lessee to pay by instalments out of this rent to the Appellant the sum of Rs. 2,101, in part satisfaction of Rs. 4,740, which would become due on the 13th of March, 1851, for one year's interest on the Rs. 39,500.

It has been proved as a fact, and is not now disputed, that the grant of this beneficial lease was, what is called in *India*, a *Benamee* transaction; that though taken in the name of his son, it was really a lease to the Appellant, who under colour of it obtained possession of the mortgaged premises.

In April, 1851, the time fixed for the repayment of the mortgage money having expired, the Appellant commenced the proceedings which must be taken in order to foreclose a mortgage of this kind, and make the Conditional sale absolute.

And the question on this appeal is, whether these proceedings have been effectual,

or whether his suit has been properly dismissed by the decree of the *Zillah* Judge, confirmed by that of the *Sudder Dewanny Adawlut.*

So many points touching the regularity of these proceedings have been raised at the Bar that it is desirable before going further to state what, in their Lordships' apprehension, the law of foreclosure as established by the Regulations and the practice of the Courts in *Bengal*, is.

Up to the year 1806, the rights of the holder of a *Bye-bil-wuffa* were enforceable according to the strict terms of the contract. It was necessary for the Mortgagee,* if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I. of 1798, within the stipulated period for the repayment of the loan.

Regulation XVII. of 1806, first introduced a modification of the strict rights given by the contract analogous to, though by no means identical with, that which Courts of Equity have long imposed on mortgages in this country. The 7th section of that Regulation extended the period within which the Mortgagor might redeem, to any time within one year from and after the application of the Mortgagee to the *Zillah* Court under the following section; the 8th, which provides that a Mortgagee desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower, or his representatives, apply for that purpose by a written petition to the *Zillah* Judge, who should cause the Mortgagor to be furnished with a copy of the application, and notify to him that if he did not redeem the property in the manner provided by the preceding section, within one year from the date of the notification, the mortgage would be finally foreclosed, and the Conditional sale made absolute.

Hence, when these proceedings have been had, it becomes incumbent on the Mortgagor to take within the year the steps towards redemption which are prescribed by the 7th section.

Within that period he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the Mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to section 2 of Regulation I. of 1798.

That enactment, of which the object was to relieve Mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be. "When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent, with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession." In either of these cases the deposit preserves to the borrower his full right of redemption and entitles him to immediate possession of the land, if it is in the possession of the lender, subject to the adjustment of the accounts. A third case is then provided for as follows:—"If the borrower in any case shall deposit a less sum than above required, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed; and if the amount so deposited be admitted by the lender, or be established on investigation, to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands, until it be admitted or established that he has paid the full amount due from him." The 3rd section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary.

The general effect of these Regula-

* Mortgagor. (P)

tions is, that if anything be due on the mortgage and the Mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the Mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July, 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII. of 1806, sec. 8, are purely ministerial, and that a Mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession.

In that suit the Mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the Mortgagee, and if so, whether the necessary deposit had been then made. If that be found aganist the Mortgagor the right of redemption is gone.

It has been stated that the Appellant commenced his proceedings to foreclose under Regulation XVII. of 1806, the 5th of April, 1851.

On the 31st of August, 1852, the Principal *Sudder Ameen* of the *Zillah*, in whose Court these proceedings had been had, made an Order which, after stating all that had taken place, including the claims of certain third parties, concluded thus:—"Forasmuch as the term of one year has expired from the date of the issue of notice, and the Mortgagor has not deposited the amount of the mortgage, and that the plea of the before-mentioned third parties is not cognizable in this miscellaneous case, therefore, considering that Regulation XVII. of 1806, has been complied with, it is ordered that this suit be decided, and that the papers of the case be forwarded to the Judge's Court."

Upon this, on the 28th of January, 1853, the Appellant commenced this suit in order to complete his title under the foreclosure. Treating, however, the lease to his son as a subsisting lease to that person, and himself as out of possession, he asked to have possession decreed to him, together with mesne profits from the 13th of March, 1851, calculated upon the rent reserved by the lease.

The answer of *Shah Ally Reza*, after raising a question touching the sufficiency of the stamp, which it is not necessary to consider here, alleged by way of defence, that the Appellant before filing his petition for foreclosure in the *Zillah* Court had not made the demand required by law; and after stating the circumstances under which the lease was granted, insisted that by virtue thereof the Appellant had fraudulently held possession of the mortgaged property in his son's name. And in order to show what was the value of this possession, the answer contains a passage which after stating the gross revenue of the various portions of the mortgaged property, amounting in all to Rs. 9,601 7 as. 2 p., and the charges thereon amounting in all to Rs. 3,931 9 as. 4 p., proceeds thus, "There remains Rs. 5,666 13 as. 10 p., as annual profit. Out of this amount, deducting Rs. 4,740 as interest due on the principal, the remaining sum of Rs. 926 13 as. 10 p. must have been annually received by the Plaintiff on account of the said amount of principal." The answer also insisted, that the Appellant was bound to render an account in conformity with sections 10 and 11 of Regulation XV. of 1793, and that the *Bye-bil-wuffa* had been vitiated by the fact of his having realized the whole of the interest as well as a portion of the principal from the profits of the mortgaged property; and that the Appellant was bound to render an account in order that the Court might be satisfied how much was due, and from whom.

The material issues settled by the Judge were:—First, whether the Plaintiff had performed the conditions prescribed by section 8 of Regulation XVII. of 1806, and was entitled to possession. Secondly,

whether Plaintiff was or was not in possession. Thirdly, whether the claim for mesne profits was correct. Fourthly, whether the receipt by Plaintiff of interest on the purchase money invalidated the *Bye-bil-wuffa*.

The cause was tried by Mr. *Loch*, the Civil Judge of *Purneah*, on the 18th of December, 1854.

The principal point contested on the first issue was, whether there had been a sufficient demand, and this issue was found in the Plaintiff's favour. On the third and the last issues the Judge found that the lease was, in fact, taken by the Plaintiff, who must be taken to have been, under colour of it, in possession of the mortgaged property: but that, inasmuch as it was not attempted to show that the collections realized by the Plaintiff covered the principal and interest of the debt, and it was, in fact, admitted that when the notice under section 8 of Regulation XVII. of 1806 was filed, a balance was due, and that there was nothing to show that the Defendant had paid any part of it, the *Bye-bil-wuffa* was not invalidated, and that the Plaintiff was then absolutely entitled to the property. On the fourth issue he found, erroneously and inconsistently with his finding on the question of possession, that the claim for mesne profits was correct. The decree was for possession with the mesne profits claimed.

The Defendant, *Shah Ally Reza*, appealed to the *Sudder Dewanny Adawlut*. That Court by its Order, dated the 22nd of January, 1857, held that the Civil Judge of *Purneah* had been wrong in decreeing *wassilat*, or mesne profits; and further, that as the Appellant had been found to have been in possession, he was bound, before he was entitled to have his Conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property, and it remanded the case, in order that the Judge might call upon the Plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case went back, the Plaintiff produced accounts, in which he charged himself, not with the gross collections, but with the rents reserved by the lease. The then Acting Judge (Mr. *Brodhurst*) held, that the accounts were insufficient, and that the proper accounts not having been produced he was precluded from deciding as to the balance due to the Plaintiff, and accordingly by his decree, dated the 29th of March, 1859, dismissed the suit.

Against this decree the Appellant appealed to the *Sudder Dewanny Adawlut*, but that Court by its Order of the 21st April, 1862, dismissed the appeal with costs; refusing to remand the cause again, in order to give the Appellant an opportunity of producing the proper accounts.

He afterwards applied for a review of judgment on affidavits directed to show that he had tendered the proper accounts in the Court below, but this application was also rejected with costs, on the 21st of January, 1863.

The present appeal is from the decrees dismissing the suit.

The learned Counsel for the Respondent in the course of their able argument maintain the propriety of this dismissal upon various grounds, of which some do and some do not directly arise upon the decrees now under appeal. And it seems convenient to consider the latter in the first instance.

Mr. *Rolt* insisted, that inasmuch as it had been conclusively found that the Appellant was in possession of the mortgaged premises, and the plaint was, nevertheless, for possession and mesne profits; the form of the suit was of itself a sufficient ground for its dismissal. Such, however, was not the view taken in the Courts below. If it be granted that this point is raised, and it is not very clearly raised by the answer, it does not appear to have been among the grounds of the Respondent's appeal from Mr. *Loch's* decree, which, though not set out *in extenso* in the record, are noticed by the *Sudder* Court in its judgment of the 22nd of January, 1857. The objection, if made, was certainly not treated as a valid one by the *Sudder* Court; which did not dismiss the suit, but remanded it for re-trial on the production of the account. That remand implied that the Appellant might succeed. The real

object of the suit is to perfect his title as absolute owner of the property; and their Lordships do not see why he should not have that relief, if he be otherwise entitled to it; because, under an erroneous view of the effect of the lease, he has asked for it by his plaint in a somewhat different form, and with something to which he is not entitled.

It was also urged that the *Bye-bil-wuffa*, the *Ikrar*, the lease, and the *Kabooleat* must be taken together as one transaction; that the effect of the two latter so qualified that of the two former, that the mortgage must be taken to have been in its inception, one for the term of three years, and that until the expiration of the term the Appellant was not at liberty to take any step towards foreclosure. Their Lordships have to observe that this was not one of the issues in the cause, and that the point is not even raised on the pleadings, nor do they think that this defence could have been successfully raised. The Respondent cannot both repudiate the obligations of the lease and claim the benefit of it. That transaction has been held, and properly held, not to effect that for which it was probably designed, *viz.*, to save the Appellant from the liabilities, whilst it gave him the advantages of a Mortgagee in possession. Still less can it be taken to do what it was never meant to do, *viz.*, modify the terms of the Conditional sale.

It was further urged, that the proceedings in the *Sudder Ameen's* Court under section 8 of Regulation XVII. of 1806 were irregular, both by reason of the insufficiency of the demand, and the non-production of the accounts in the course of those proceedings. One of the issues in the cause when it was before Mr. *Loch*, was, whether the Plaintiff had performed the conditions prescribed by the Regulations, and that issue was found in his favour. As far as appears from the printed record, the Respondent did not appeal from that finding. He had undoubtedly raised in the *Zillah* Court the question whether there had been a sufficient demand, and the fact had been found against him. He had not taken the point that the accounts ought to have been produced in the preliminary proceedings. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not necessary either that the demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a Mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated.

The questions which really arise upon the decrees under appeal, and on which the determination of this appeal depends, are these:—

First, whether the *Sudder* Court was right in requiring the Appellant to produce his accounts, and in remanding the cause for re-trial on the production of those accounts by the Order of the 22nd of January, 1857.

Secondly, whether if it were wrong in so remanding the cause, the Appellant is not now bound by that decree, against which he did not appeal.

Thirdly, whether the *Zillah* Judge and the *Sudder* Court were right in dismissing the suit, because the Appellant had not produced the proper accounts, or whether they ought to have given him further time for so doing.

Their Lordships, considering the first question independently of the authority of decided cases, are of opinion that, upon the true construction of these Regulations, there was no necessity for calling for the production of the accounts, and, consequently, that the order for the remand was wrong. The issue upon which the determination of the cause depended, and upon which even by the Order of remand it was made to depend, was whether the loan had been liquidated, with interest, from the usufruct of the property. Now, not only was there no allegation on the pleadings, or issue raised in the cause, to the effect that the loan had been thus liquidated, but there was an express admission on the face of the Defendant's answer that even on his mode of stating the account, the principal sum of Rs. 39,000 had, when the foreclosure proceedings were commenced, and when he ought to have made the requisite deposit, been reduced by no more than Rs. 927. It was therefore clear, upon the face of the proceedings, that the

question to be tried could be answered only in one way, and that in favour of the Appellant. And the Order of remand can be supported only on the principle that, in all cases, it is imperative upon a Mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd section of Regulation I. of 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are, "In all instances wherein the lender on the *Bye-bil-wuffa* may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account," &c. Two conditions are expressed, the possession of the Mortgagee, and the necessity of an account. And a comparison of this with the preceding section, and with Regulation XVII. of 1806, shows that that necessity arises, and need only arise, first, when the Mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; secondly, when he has deposited all that he admits or alleges to be due; thirdly, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.

It remains to be seen whether the proposition that the Mortgagee, who has been in possession, must in all cases produce his accounts, has been conclusively established by the authority of decided cases.

The cases cited by the *Sudder* Court in its judgment, and now relied on by the Respondent, are reported in the decisions of the *Sudder Dewanny Adawlut* of *Bengal* for 1852, pp. 678 and 1063. The transactions out of which these cases arose were not mortgages by way of Conditional sale, but mortgages of a different character, and governed by different rules. Neither authority, therefore, seems to touch the point now under consideration. On the other hand, in a more recent case, which is reported amongst the decisions of the same Court for 1859, at p. 492, the Court held that there being no averment in the answers that the Plaintiff had paid himself by the usufruct of the property, the objection that the Mortgagee had not produced his accounts could not be entertained on the appeal.

The question, therefore, cannot be said to have been concluded against the Appellant by authority; and their Lordships have already intimated their opinion, that upon principle the obligation to produce the accounts should depend on the circumstances of the case and the nature of the issues raised.

Upon the question whether the Appellant is so bound by the Order of the 22nd of January, 1857, against which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the Order was an interlocutory one; that it did not purport to dispose of the cause; and consequently, that upon the principle laid down by this Committee in the case of *Maharajah Moheshur Sing* v. *The Bengal Government* (7 Moore's In. App., p. 283, 1 P. C. J., p. 643,) upon which their Lordships have very recently acted in a case from *Oude* (*a*,) the Appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts. In truth, the learned Judges of the *Sudder* Court, by their judgment of the 21st of April, 1862, treated the latter point as still open to the Appellant, although, upon grounds which appear to their Lordships to be unsatisfactory, they determined it against him.

The view which their Lordships had taken of the questions already considered renders it unnecessary to determine whether the Appellant ought to have been allowed further time, or a second opportunity for the production of the accounts required from him. Their Lordships will only say upon this point that the affidavit filed by him on the application for a review are, when contrasted with his grounds of appeal, extremely unsatisfactory, and that he appears to have done little to entitle him to the indulgence of the Court.

They are, therefore, not prepared to say

(*a*) Sheonath v. Ramnath, *ante* p. 134; 10 Moore I. A., p. 413.

that if the production of the accounts required had been necessary, those delivered were sufficient; or that in that case there would have been any such improper exercise of the discretion of the Court below as their Lordships would have interfered with. But they think that the error of the Court below was in the dismissal of the suit, on the assumption that the production of any accounts was necessary in a case in which there was neither plea nor proof that the usufruct had liquidated principal and interest, and no deposit had been made to cover the balance admitted to be due.

Their Lordships, on the whole case, are of opinion, that this appeal should be allowed, and they will humbly recommend Her Majesty to reverse the decrees appealed against, and also the order of remand of the 22nd of January, 1857, and to vary the decree of the 18th of December, 1854, by declaring that the Appellant was entitled to the possession of the mortgaged premises as absolute owner, by virtue of the Conditional sale which had been duly made absolute, but was not entitled to a decree for any mesne profits. Their Lordships think that the Appellant is entitled to the costs of this appeal, and also to all costs of the suit below, up to and including the costs of the Order of the 22nd of January, 1857.

Considering that he might have appealed against that order, and that his conduct in the subsequent proceedings in the Court below has not been satisfactory, their Lordships are not disposed to recommend that he should have the costs of those proceedings against the opposite party. He will of course be entitled to a refund of the costs (if any) which have been paid by him under any of the decrees reversed.

14th and 16th December, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner at Oude.

SHAH MUKHUN LALL, GUNGADEEN AND BOODHOO JEE,* ... } *Appellants*,

versus

NAWAB IMTIAZOOD DOWLAH AND HAJEE ALI, } *Respondents*.

Oude—Limitation, Act XIV. of 1859 (*Punjab Code*)—*Acknowledgment of debt.*

Act XIV. of 1859 was introduced in the non-Regulation Province of *Oude* in July 1860.

Under sec. 24 of that Act a suit begun there within two years from the introduction would be governed by the prior law of limitation, namely the *Punjab* Code as modified by Circular Orders No. 51 of March 1859, and No. 104 of July 4, 1860.

Saligram v. *Mirza Azim Ali Beg* (*ante* p. 87, X. M. I. A., 114) cited and followed.

Before the passing of Lord *Tenterden's* Act in *England* and Act XIV. of 1859 in *India*, an *admission* of the debt was sufficient to remove limitation; and it was not necessary to shew an *acknowledgment* in writing *signed* by the debtor. In such case, a letter (though not signed or sealed) offering to pay the principal by instalments, and praying to be excused from payment of interest, would be an ample acknowledgment to take the case out of the Statute of Limitations.

Case remanded for trial of the issues between the parties.

JUDGMENT was delivered by

THE RIGHT HON. LORD CHELMSFORD:

The printed cases both of the Appellant and Respondent assume that the question upon the appeal is to be governed by the new law of limitation in the Act, No. XIV. of 1859. But the last section of that Act provides that the Act "shall not take effect in any non-Regulation Province (to which class *Oude* belongs) until it shall be extended thereto by public notification by the Governor-General in Coun-

* 10, Moore's I. A., p. 362.

cil, and that whenever it shall be so extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed." In the recent case from *Oudh, Saligram* v. *Mirza Azim Ali Beg*, (*Ante*, p. 87, 10 Moore's I. A., p. 114,) it appeared that the Act, No. XIV. of 1859, was not extended to *Oude* till July, 1860. As this suit was commenced on the 13th January, 1862, it falls within the exception, and must be determined as if the Act had not been passed.

In the case just referred to, in which the question arose what law of limitation was to be applied, it appeared that since the annexation of the Province of *Oude* various rules of limitation had prevailed. That in 1857, suits of the nature of the present one were subject to a limitation of six years, and to the general provisions of the *Punjab* Code. That in March, 1859, these rules had been modified by a Circular Order, No. 51, which had afterwards been repealed by another Circular Order, No. 104, dated the 4th July, 1860. And their Lordships held that the case before them was to be governed by the last-mentioned Order. Upon the authority of that decision it appears that this case must fall within the 10th of the rules then promulgated under that Order. This declares the period of limitation to be three years "in all suits for money lent for no definite period or for interest thereon, unless there is a written engagement, and where Registry offices existed at the time such engagement was registered and signed by the party to be bound thereby, or by his duly authorized agent."

The rules which were promulgated under this Circular Order were modifications of the *Punjab* Code which previously existed, and, therefore, it may be necessary in this case to resort to that Code for the purpose of determining the time from which the period of limitation is to be calculated, or the circumstances which will take a particular case out of the operation of the limitation. Having ascertained the law to be applied to this case, we proceed to consider the question to be decided.

The suit was instituted by the Appellant, carrying on business as a Merchant at *Lucknow*, to recover a balance of Rs. 11,278 3 as. 0 p., principal moneys and interest alleged to be due from the first named Respondent, on account of advances made to him for the maintenance of his family, through his agent, the other Respondent, *Hajee Ali*.

The plaint was filed on the 13th of January, 1862, and the last advance was in 1858, consequently more than three years before the commencement of the suit.

Issues were settled by the Judge, the first of them being limitation, and the case was ultimately decided upon the question, whether the Plaintiff had given sufficient evidence of an admission of the debt by the Respondent to prevent the application of the period of limitation to his claim.

In order to prove such an admission, the Plaintiff produced three letters marked respectively *B. D.* and *F.* Letter *B.* appearing by its own date, and the other two letters by the post-marks upon their envelopes, to have been written in the year 1860. The letter *F.* purports to be signed by the *Nawab*, but has no seal. The other two letters have neither signature nor seal, but the envelope of *D.* appears to have been "dispatched by *Imatiazood Dowlah Bahadoor* from *Khizirpoor* in *Calcutta*." Letter *F.* is stated to have been filed with the plaint, but no attempt was made to prove that it was signed by the *Nawab*. No other evidence was given of the letters *B.* and *D.*, except by *Hajee Ali*, who was called by the Plaintiff, and said "*B.* came to the Plaintiff, not through me, *D.* ditto." This was perhaps scarcely sufficient to admit them to proof, but the Judge received them, and then the question arose whether being admitted they did not carry with them internal evidence of their genuineness. There can be no doubt, that when the *Nawab* left *Lucknow* his family remained behind, and would require to be maintained during his absence. *Hajee Ali* was appointed his Agent by a *Mokhtarnamah* sealed with his seal, in which it is contemplated that money would be borrowed from the Appellant's firm, and *Hajee Ali* besides this authority was armed with blank pieces of paper impressed with the

Nawab's seal, to be used when required. It is not pretended that the family were maintained out of the funds of the *Nawab*, and no other source of supply was ever suggested, except that which was derived from the Appellant. Under these circumstances the debt to the Appellant was incurred. His claim is for nothing else than advances made to meet the wants of the *Nawab's* family, with interest upon these advances. The *Nawab* was examined upon interrogatories. He denied all knowledge of the Appellant. Asserted that he never had himself, nor permitted any one to have, any money transactions with him. That he was not aware that money had been advanced by the Appellant, and that nothing was due to him for principal or interest. It is impossible not to agree with the observations of the Civil Judge (*a*) upon these answers of the *Nawab*. "That Defendant was largely indebted to Plaintiff through his old *Karindah*, *Hajee Ali*, there can be no doubt, and there is much perjury on that score in the Defendant's deposition."

But if the Respondent was indebted to the Appellant through his agent, is it at all credible that he should have been ignorant of the fact, and that knowing that his own funds had not been applied to the maintenance of his family, he should never have had the curiosity to inquire from what source the supplies were drawn? It is clear that he must have known that he was indebted to the Appellant for the means of support of his family, and it is most improbable that when the debt had grown to a large amount, and his own affairs had suffered considerably from the annexation of the province of *Oude*, no communication should have taken place between him and his creditor. Assuming the probability, in this state of things, that something would have passed between them, it will be found that the letters in question are precisely those which might have been expected to be written under the circumstances. They are in the following terms:*

Assuming, then, the genuineness of these letters to be thus established, the question arises whether they contain a sufficient admission of the debt to prevent the ap-

(*a*) 10, Moore's Ind. App., p. 372.

* Translation of a letter (B.) to the address of *Sahjee* in these terms:—"Dear Sir,—After compliments, I beg to inform you that I have received the account through your *Gomashta*, *Lalla Shah Soonder*, and become acquainted with its contents. But, dear *Sahjee!* it is known to the world how we have been ruined; and you also are well aware of my circumstances, that no private property has been left to me, and I am obliged to manage my expenses (out of my salary which is allowed to me) the best way I can.

"A friendly intercourse and money transactions have been carried on between you and me for a long time, and there never took place any disagreement of any kind, and even now, please God, no difference will arise. I am every way willing to pay off your money, and have no objection on that head. But I wish you will, under present circumstances, receive from me the principal due to you by instalments; my means do not enable me to pay you the interest, and I will not be able to pay it. I have no hesitation or objection to pay you the principal sum. I shall suffer inconvenience, but, please God, I will pay you your debt by instalments; but I certainly demur to pay the interest, because I do not know how to pay it. Under such circumstances, it becomes you also to give up your claim to interest, because you and I having been on friendly terms for a long time, it is nothing but proper that you should show me such consideration. After the revolution that has taken place in our affairs, may God enable me to pay off your principal debt! I will consider myself very fortunate, and thank God if I succeed in liquidating it.

"D. 20th *Suffur*, 1277 *Hijree*.

"Postscript.—Having stated above that I am ready to pay you by instalments, I take this opportunity to let you know that I can arrange to liquidate your debt by monthly instalments of Rs. 200 each, to be paid to you, please God, monthly, through your agent, when I receive my allowance from the British Government."

Translation of a letter (D.) to the address of *Shah Mukhun Lall:*—"Dear Sir,—After compliments, I beg to inform you that before this I wrote to you that I could pay the principal by instalments, but that you would excuse me for the interest, but you have not yet sent me any satisfactory answer. I therefore write to you again that a friendly communication and money dealings have existed between you and me for a long time, and that no disagreement ever arose, nor did I make any objection in my dealings with you. I did whatever you told me. But my objection to pay you the interest now arises from my being involved in ruined circumstances, which is known to the world, and even you yourself are well aware that I have been robbed of all the private property I had, and that nothing is left to me. My salary was stopped for a long time; but as it is now allowed, I am ready to pay off your principal without any hesitation, although I shall suffer much inconvenience even by paying your princi-

plication of the period of limitation to the Appellant's suit. As the Judges below seemed to regard the letter *F.* as probably not genuine, and some suspicion may rest upon it, it will be better to confine the consideration of this question to the letters *B.* and *D.* Their Lordships entertain no doubt that if the question were to be tried by the rules of English law before Lord *Tenterden's* Act, these letters offering to pay the principal money by instalments, and praying to be excused from the payment of the interest, would be an ample acknowledgment to take the case out of the Statute of limitations, and they are not aware of anything in the *Punjab* Code which would lead to a different construction. The Judges in the Courts below dealt with the questions rather summarily, and disposed of the case without affording the Appellant an opportunity of supplying any deficiency which they found in his proof. But if they proceeded upon the Act for the limitation of suits, No. XIV. of 1859, and both the Civil Judge and the Judicial Commissioner thought that letter *F.* was out of the question, their conclusion was right, because letters *B.* and *D.* being without signature, there was no acknowledgment in writing signed by the party to be charged. But that Act not being applicable, and an admission of the debt being all that was requisite to save the limitation, even if letter *F.* were put aside, the letters *B.* and *D.* being before the Judges, they ought to have considered them and determined whether they were sufficient to prevent the Plaintiff's remedy being barred. To this consideration their minds were never applied, and in dealing with another point which arose in the case, there seems to have been a miscarriage. It was proved by *Hajee Ali* that the *Nawab's* brother, *Hadee Ali Khan*, paid the Appellant Rs. 1,700, in two sums, after he become agent. The Civil Judge appears to have entirely overlooked this fact. But the Judicial Commissioner, dealing with the argument that the period of limitation should be calculated from the last of these payments, which was made on the 14th of July, 1859, observed (*a*) that "a period of limitation cannot now be renewed by a payment unless it be made at a time specifically conditioned." It is difficult to understand to what Code the Judicial Commissioner was referring when he made this observation. In the Act, No. XIV. of 1859, there seems to be no provision giving effect to a payment on account, or partial satisfaction. The *Punjab* Code, Part II., section 1, clause 6, limits suits to a certain time after the cause of action shall have arisen, unless (amongst other things) the complainant has "obtained an admission or partial satisfaction of his demand from the opposite party."

But from clause 7 it appears, that it is not every part payment which will amount to "a partial satisfaction of demand" within the meaning of the rule. It must

pal, because God knows how I manage my expenses in so small a sum. Hence, under the present state of affairs, when times have been so much changed, it is nothing but proper that you should have a regard to the friendly intercourse which has subsisted for a long time between you and me, and not demand the interest. You should show me some consideration, and receive the principal due to you by instalments. Pray do not withhold your kindness in this respect, and under present circumstances consider it a booty if you have your principal debt liquidated. I am unable to pay the interest, and can by no means pay it. Otherwise I would have made no objection to discharge the interest, and would have paid it. You should send me an early answer."

Translation of a letter (F.) to the address of *Shahjee*:—"Dear Sir,—I wrote to you frequently asking you to return me the whole of my bonds, and to have one drawn in lieu of them; that I can pay you interest at the rate of 8 *annas* per cent.; that you should make up your account and have one bond executed for the aggregate sum, and that you should receive payment from me by monthly instalments of Rs. 200, each, and I told the same to your agent; but I am surprised to find that neither you have written to me anything on the subject up to this time, nor has your agent given me any answer.

"I am, therefore, under the necessity of writing to you again, and request you will send all my papers, consisting of bonds, etc., which you have in your possession, to your agent here, who may return them to me and have one bond executed in lieu of all of them. I also wish that your agent may be allowed to receive from me the instalments of Rs. 200 a month promised by me, which I am ready to pay. Please send me, without any hesitation, an immediate and complete reply as soon as you receive this letter."

(*a*) *Ante*, p. 110.

be a payment according to a regular and continuous course of dealing, "something tantamount to a running account." It was this qualification which the Judicial Commissioner probably had in his mind when he made the observation; but if he meant to apply this Code, and had turned to the words of it, he probably would have thought that the payments made by the Defendant's agent upon an account, continued monthly for several months, ought to be regarded as tantamount (at least) to a running account, if not itself correctly described as a running account.

The case has not been properly dealt with, nor fully and sufficiently considered in the Courts below, and, in their Lordships' opinion, it ought to be submitted to further and more careful investigation. They will, therefore, recommend to Her Majesty that the decrees be reversed, and the cases remitted to the Court below for trial of the issues between the parties.

15th December, 1865.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

PRANKISHEN PAUL CHOWDRY,* ... } *Appellant*,

versus

MOTHOORAMOHUN PAUL CHOWDRY, ... } *Respondent*.

Hindu law—Undivided family—Separation—Re-union—Purchase by a member of a Joint Family—Presumption—Joint estate—Onus probandi.

P. and M. united Hindu brothers separated without any regular partition of the lands, each brother taking his share of the rents. P. and M. then agreed to a re-union under the terms of a deed (*Ungshobodhareet Puttur*) which recited that P. had during separation acquired for valuable consideration a *Putnee* from his own funds which he made part of the joint family property; M. agreed by that deed to renounce all claims on P. for the accounts of management and to pay out of joint funds all *debts* incurred by P. for purchasing the *Putnee*.

The brothers having again separated, P. sued M. for one-half of the purchase money of the *Putnee*, on the allegation that it had been advanced from private funds and M. as subsequent sub-purchaser was bound to repay P.

Held, that the re-union of the brothers relegated them to their former *status* as members of a joint Hindu family;

That the deed (*Ungshobodhareet Puttur*) executed between them provided the terms upon which the acquisitions of the elder brother should go into the joint fund, and did not warrant P.'s claim, even if it were proved that he had purchased from his private funds.

Property not shewn to be separate is presumed by Hindu Law to be joint; as P. had not alleged much less proved that he had any separate property the funds in his hands immediately on separation would be presumed to be joint funds for which he was accountable as manager to the younger brother M., and if the *Putnee* was purchased from such funds, M. upon the general principles of Hindu Law was entitled, on re-union, to share in the *Putnee* as acquired by the use of joint funds; independently of the deed executed between the parties.

JUDGMENT was delivered by

THE RIGHT HON. SIR JAMES W. COLVILE:

Their Lordships are of opinion that no ground has been shown for disturbing either of the decisions below, and, therefore, they do not think it necessary to call upon the Respondent's Counsel.

The case turns almost entirely upon the construction to be given to the deed of *Ungshobodhareet Puttur*. That deed not only defines the rights and obligations of the parties, but it contains a narrative of the facts of the case upon which we can rely, as it is a statement in which both parties joined, at a time when there was apparently no difference between them.

It appears, then, from that deed, that this was a joint Hindoo family, consisting of the Appellant, and the Respondent, and a younger brother of the half blood, who was a minor, and is since deceased. They were, in all respects, a joint and undivided family. In the year 1254 *B. E.*, there were disputes between the adult brothers, and they separated, but there was no regular partition of the estate. The effect of the separation was that the lands remained undivided, but each brother, being no

* 10, Moore's I. A., p. 103.

longer a member of a joint Hindoo family, took his share of the rents.

It appears from other parts of the Record, and although it is not very distinctly stated in the deed, it would almost follow from the nature of the case, that the younger brother had then a large claim against the elder brother, who had been the manager of the estate, in respect of the rents and profits received previous to the partition. That is stated distinctly in the judgment of the *Sudder* Court, where the Judges say, "We find that the Plaintiff's Pleader admits that up to 1253 his client, as elder brother, made all the collections, and held all the joint funds of the family. That although a separation took place in 1253, and the Plaintiff was bound to give a full and honest account of his management, no such accounts were ever rendered for the satisfaction of the brother Defendant."

The separation of the two brothers continued for little more than eleven months; they then agreed to come together again, and this deed was executed. The deed states that, during that period, the elder brother had entered into a treaty for the purchase of the *Putnee Talook*, the price of which is the subject of the present contention; and further, that the youngest brother having died, and his mother having taken his share by inheritance, *Prankishen Paul Chowdry* had purchased that share from her, subject to an annual payment of Rs. 1,200.

On the reunion of the two brothers, which of itself remitted them to their former *status* and members of a joint Hindoo family, it was expressly agreed that those acquisitions which the elder brother had made whilst the separation continued, should all go into the joint fund, and the deed provides the terms upon which that should be done.

Now, the material parts of the deed with respect to these transactions are these: first, there is a recital "that I, *Prankishen Paul Chowdry*, by contracting loans, negotiated to take in *Putnee Turruff Munsebpore* and *Dhee Rajapore*, *benamee* in the name of my relative, *Sumboodchunder Singh*, inhabitant of *Dowlutgunge*, and advanced the *byana*, or earnest money." Then it states, "Afterwards a settlement was effected between us brothers, and again the entire property came into our *ijmallee* possession, as it had been before, and the *Putnee*, &c., that had been recently purchased also came under the *ijmallee* settlement, and of the balance of the consideration or purchase money of the aforesaid *Munsebpore*, &c., taking no *putnee*, some was paid by us two from our private funds and some portion by loans raised in bonds given by us respectively, and by granting *durputnee pottahs*, and we obtained a *Pottah* of the said *Putnee*, and both brothers remained in *ijmallee* possession, having taken from the aforesaid *Singh* an *ikrar* or acknowledgment of the *benamee;* at present we two brothers have brought under *ijmallee* the entire hereditary and acquired property, and that which has been recently acquired as *Putnee*, and all real and personal property, have made this condition and settlement that from hence the whole is to remain *ijmallee*, and that such property of the share of *Ramkishen Paul* as I, *Prankishen Paul*, had purchased and held under a perpetual *Pottah* was likewise to become *ijmallee* and held by us in possession in equal shares, and that we two brothers will pay the profits of the said property to our step-mother, and that whenever we, or our heirs, share and take the aforesaid and other property, we, or our heirs in such case, shall equallly share and take our said deceased half brother's property, and not more, and the shares of the same shall never be more or less."

In short, it is expressly provided that the entire property, whether ancestral, or then acquired, or thereafter to be acquired, is to be joint, and enjoyed in equal moieties. Then follow certain directions for the management of this joint estate, including provisions for giving the elder brother a larger share in such management, all of which are immaterial to the present case.

Then follows that which appears to their Lordships to be one of the most important provisions in the deed. It is to this effect, "All the money that has been borrowed on our joint Bonds, and that which I, *Prankishen Paul*, had borrowed during

the time of our separation, on bonds given in my own name, and which said money has been paid as the consideration or purchase money for the *putnee* of *Turruf Munsebpore* and *Dehee Rajapore*, shall all be accounted as our *ijmallee* debt, and the said *ijmallee* debt shall be liquidated by us out of the profits of the *ijmallee* property." As their Lordships understand that stipulation, it provided that whatever *Prankishen Paul* had borrowed on Bonds given in his name, or whatever the two had borrowed on their joint security, in order to provide the consideration money paid for the purchase of these two *Putnees*, should be a charge on the joint estate, and should be liquidated out of the joint property; but they can find in that no provision whatever for the repayment, out of the joint property, to the elder brother, of any funds which he might have advanced, or might have alleged that he had advanced, on the same account, out of his private money. The deed is, upon that point, entirely silent, and, as one of their Lordships observed in the course of the argument, it would be a strange thing to infer from this silence an implied promise to pay the sum sought to be recovered in this suit.

Then follow provisions to which we shall afterwards refer, providing for the event of a subsequent disagreement between the parties, and a second partition, and then comes this stipulation:—"No party shall make any claim hereafter upon the other on account of any cash having reference to the former *ijmallee* period, that is, for the time anterior to the year 1254 B. S. *I, Prankishen Paul*, have no claim upon you, *Nobokishen Paul*, on account of the price of the real and personal property of *Ramkishen Paul's* share, for which I had obtained a perpetual *Pottah*, and which I had obtained in the way of a purchase, and whatever writings have been executed and given by me to our step-mother, we both shall be bound to comply with the conditions thereof." Now, those last words show that although *Prankishen Paul* may have paid out of the money which he had collected formerly, or out of private resources, or in any way, for the share of his half brother, yet he throws all that into the joint concern, and there is no claim to be made upon the younger brother in respect of that acquisition. That is express. Again, there is, no doubt, a general covenant or agreement that no claim shall be made upon him in respect of any moneys for which he may have been accountable in respect of those earlier collections. And Mr. *Leith* relies upon that as an answer to that portion of the Respondent's case which rests upon the assumption that the moneys which are in dispute came out of these former collections, and were applied by *Prankishen Paul* to the purchase of the *Putnee Talooks*. But it seems to their Lordships that the whole deed must be taken together, and as one general compromise; and if they are right in their construction of the former clause, that there was no provision made for the payment, or the adjustment of the price of the *Putnees*, except in so far as it consisted of borrowed money, which was to be paid out of the assests of the joint estate; then, when they find afterwards an agreement that there shall be no account in respect of the former collections, the two must be taken together, and must be construed to import that whilst, on the other hand, the elder brother makes no claim in respect of any moneys which he may have applied in that way, so, on the other hand, the younger brother says, I will make no claim for any moneys *ultra* that, and I will treat the whole account as settled and closed by this arrangement.

Therefore, upon this deed if it stood alone, it would be very difficult to say how the present claim could be supported.

We find, however, that the case which the parties contemplated really happened, and that after a short period of reunion they again separated, and the deed of partition, which, though not printed in the record, has been produced to-day and is now before us, was executed. We find in that deed no provision at all for such a claim as this, while we do find a provision for the payment of those debts which, upon the construction which we have put upon the clause, really would fall upon the joint estate. That provision imports, "that the money borrowed under simple and mortgage Bonds is to be liquidated by both in equal portions." Therefore, the subse-

quent deed of partition seems to be entirely consistent with what was contemplated by the former deed, and does not in any way re-open any of the accounts settled by that deed.

It would, then, as it seems to us, be extremely difficult to support the case made by the Appellant, even supposing that the funds in question were really his private funds. If, indeed, the sums mentioned in the *jummah khurruch*, which seems to have been used originally to meet the fraudulent claim of the trustee, to hold the *Putnee Talooks* as his own, if those sums, though described as coming from the private funds of the Appellant, had been alleged and proved by him in this suit to have been money actually borrowed on Bond or otherwise, and had been so brought within the stipulation of the deed, the case would have been very different. But no such issue was raised by the Appellant.

The issue of fact upon which the parties went to trial was raised by the other side, and, as ultimately settled, was this, "whether it was true that the Plaintiff had, out of his own funds, paid the sum of Rs. 20,120, or that the said amount had formed a part of the *ijmallee* funds of the two parties." The Appellant gave no evidence on this issue; the Respondent examined four witnesses upon it, and it was found in his favour. Their Lordships have no doubt of the propriety of that finding. It is not even alleged upon these proceedings, that the parties originally had any separate property; the presumption of Hindoo law in such cases is, that property not shown to be separate is joint; and it is an admitted fact that the Appellant was long in the management of the joint estate, had received the collections from it, and was accountable for them to his younger brothers. And if the moneys employed in the purchase of the *Talooks* formed part of those so drawn from the joint estate, it follows that the Respondent on the reunion was entitled, upon the general principles of Hindoo law, and independently of the express provisions of the deed, to share in them, as acquisitions made by the use of the joint funds.

Their Lordships are, therefore, of opinion that the decree of the Courts below were right; and they have no difficulty in determining humbly to recommend to Her Majesty that this appeal be dismissed with costs.

5th and 7th February, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of the North-West Provinces at Agra.

LALLA BUNSEEDHUR,* ... *Appellant*,

versus

KOONWUR BINDESEREE DUTT SINGH, and after his death, MUSSUMAT GUNAISH KOER, ... *Respondent*

Guardian—Minor's estate—Sale—Purchasers.

He who sets up a charge upon a minor's estate, created in his favor by the guardian, is bound to shew, at least, that when the charge was so created, there were reasonable grounds for believing that the transaction was for the minor's benefit.

Hunoomanpershad Panday v. *Mussamat Babooee Munraj Koonweree* (6 M. I. A., 423, 1 P. C. J., 552) cited and followed.

Held on review of the facts of the case that the provisions of the *Ikrarnama* of February 17, 1850, whereby Plaintiff's guardian besides abandoning large claims (adjudicated and unadjudicated) upon the Defendant acknowledged the minor's liability to pay Defendant 27,000 Rs., could not be for the benefit of the minor and could not have been reasonably supposed to be so, when the only consideration for such concessions by the guardian was the abandonment by the Defendant of an appeal to *England* preferred by him in connection with a claim for Rs. 50,000 on the minor's estate, which claim after being only partially decreed in the first Court had been wholly dismissed, on appeal, by the *Sudder* Court.

That the provision in the *Ikrar* was similarly objectionable whereby the guardian was encouraged to embark in expensive litigation with pecuniary assistance from Defendant on condition that the fruits of the litigation were to be divided with the

* 10, Moore's I. A., p. 454.

Defendant. If the litigation failed, the minor's estate would not be bound by such a speculative advance.

That under the circumstances it was sufficient for the failure of the suit that the Defendant had wholly failed to relieve himself of the burden which the law cast upon him of showing that he had good grounds for supposing that the transaction was for the benefit of the minor's estate.

Held further that the transaction was a fraud on the minor, whether the guardian was herself defrauded or was a colluding party thereto.

An innocent purchaser in an execution sale and the purchaser in such a sale fraudulently brought about by himself cannot have the same rights. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

Ali Hossein v. *Badil Khan* (19th May, 1863, S. D. A. N. W. P.) overruled.

Decree of the *Sudder* Court awarding to Plaintiff possession with mesne profits subject to a refund (with 5 per cent. interest) of the sum actually advanced by Defendant to save the estate from an execution sale, confirmed, except as to interest, which was allowed at the rate (six per cent.) agreed to in the *Ikrar*.

A mere variation in the rate of interest from 5 to 6 per cent. ought not to deprive the Respondents of their costs of the appeal.

26th February, 1866.

THEIR Lordships reserved judgment, which was now pronounced by

THE RIGHT HON. SIR JAMES W. COLVILE:

After stating the above facts his Lordship proceeded:—

"The first and principal question that arises upon it is whether the *Ikrar* of the 17th February, 1850, which was executed by his guardian during his minority, is binding upon the Respondent.

In dealing with this question we have no difficulty about the *ratio decidendi*, since it is admitted that the principles which govern it have been authoritatively laid down in the case of *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree* (1 P. C. J., p. 559). It is there said, "The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." And again, p. 559, "The lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate." It follows, from the passages above cited, and from the rest of this judgment, that he who sets up a charge upon a Minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

The learned Counsel for the Appellant have not ventured to contend that the stipulations of the instrument, to which these principles have now to be applied, were, upon the face of them, beneficial to the Respondent's estate. Their arguments have been directed to show that the whole transaction might be justified by a consideration of the circumstances in which the parties stood, and of the nature of the litigation in which *Sheodutt Singh* had in his life-time been engaged. It becomes necessary, therefore, to review, as briefly as may be, the very tedious and intricate history of that litigation.

In 1828, *Seetaram Singh*, the father of the Appellant, had lent, or agreed to lend, Rs. 29,500 to *Sheodutt Singh*, on a mortgage of the ancestral *Talook* now in dispute. The *Talook* consisted of twenty-nine villages, and the mortgage was to be a usufructuary mortgage by way of a lease for ten years of the whole *Talook*. Before this arrangement was completed, it appeared that the two other persons, named *Baijnauth* and *Bishun Dayal*, claimed to be prior mortgagees of part of the *Talook*.

It was at first settled between *Sheodutt Singh* and his mortgagees, that *Seetaram Singh* should apply part of the Rs. 29,500 in paying off *Baijnauth* and *Bishun Dayal*; but it was ultimately arranged between those two persons and *Seetaram*, that the three should be jointly interested in the mortgage; the share of *Seetaram*

being taken to be Rs. 17,700, and that of the other two Rs. 11,800. The instrument of the 27th of May, 1828, by which this so-called partnership was effected, provided, that if it should be deemed advisable thereafter to dissolve the partnership, the property should be divided and held separately in the proportions above specified.

They entered into possession of the mortgaged property in June, 1828, and in 1831 dissolved their so-called partnership; thereupon *Bishun Dayal* and *Baijnauth* became mortgagees in possession of twelve, and *Seetaram* became, or ought to have become, mortgagee in possession of the remaining seventeen villages of the *Talook*.

We say "or ought to have become," because it appears, from the subsequent proceedings, that he never was in possession of five of these villages; they having been transferred by *Sheodutt Singh* prior to the mortgage to his wives and two other persons.

Seetaram carried on his general business in partnership with one *Sheosuhai*; and on the dissolution of their partnership, and a consequent division of its assets, this mortgage fell to the share of *Sheosuhai*. He was never, however, recognized as mortgagee by *Sheodutt Singh*, nor was his name recorded as mortgagee until after June, 1838, when the period of ten years, during which the possession of the mortgagee was to continue, expired. *Sheosuhai* and the other parties then in possession of the mortgaged premises, retained possession after June, 1838; they allowed the Government revenue to fall into arrear, in consequence of which the estate was attached, and let in farm, for six years, to one *Ilahee Buksh*, whose security, *Torab Ali*, acquired by assignment the whole of the interest, as mortgagee (if any) of *Sheosuhai*, and also the mortgage rights of *Baijnauth*. Those of *Bishun Dayal* became vested in some other parties.

Torab Ali instituted proceedings on the mortgage securities against *Sheodutt Singh*, claiming the balance alleged to be due on them; but these proceedings, though successful in the Court of first instance, were ultimately dismissed by the *Sudder* Court, apparently on the ground that the mortgage debt had been satisfied by the perception of rents during the possession under the ten years' lease.

In this state of things, and on the 17th of June, 1842, *Sheodutt Singh* brought the first suit of which we have any mention against the Appellant and his brother, since deceased, as the sons and representatives of *Seetaram Singh*, and against all the other persons who in the course of the transactions lastly above stated had become interested in the mortgage securities or had been in possession of the mortgaged premises. The object of the suit was to recover possession of the property, on the double ground that the principal and interest of the mortgage debt had been liquidated by the collections, and that the period for which the property had been mortgaged had expired; and it also claimed a large sum for the mesne profits of the four years during which it was alleged possession had been wrongfully retained.

It is unnecessary to consider very minutely the merits of this suit, because a final decree had been made in it before February, 1850, when the widow of *Sheodutt* executed to *Bunseedhur* the *Ikrarnamah* in question. It is sufficient to state that although the plaint expressly stated that the principal and interest of the mortgage debt had been liquidated by the collections, the Appellant did not dispute that fact. His defence was simply that by reason of the assignments to *Sheosuhai* by his father *Seetaram*, he had ceased to have either interest of liability in the matter.

The course of the suit was as follows:—On the 26th of June, 1843, the Principal *Sudder Ameen* decreed in favour of the Plaintiffs for redemption and possession of the estate after the expiration of the farm, but nonsuited the claim for mesne profits and damages. On a remand from the *Sudder* Court, the same Officer, by a decree, dated the 28th of November, 1843, made the Appellant and his brother, as co-heirs of *Seetaram*, liable jointly with *Sheosuhai* in the sum of Rs. 16,570 7 as. 9 p., as mesne profits for the year 1246, but dismissed the claim for damages for the years 1247, 1248, and 1249 B. S. It should also be mentioned that he expressly found in his judgment that the mortgage

debt had been discharged. There was an appeal from this second decision, and the *Sudder* Court by its original decree on that appeal held, that the Appellant, as the then sole heir and representative of *Seetaram* (his brother having died,) was solely liable to the Plaintiffs for the mesne profits and damages due to him; and that the sum awarded by the Principal *Sudder Ameen* ought to be increased by the mesne profits for the years 1247, 1248, and 1249. Their decree seems to have proceeded on the ground that *Seetaram* and his estate were primarily liable to the mortgagor for the nondelivery of the possession when it ought to have been redelivered; and were accountable for the mesne profits of the whole estate, notwithstanding the transfer to *Baijnauth*, *Bishun Dayal*, *Sheosuhai*, and others.

The Appellant applied for and obtained a review of this decree on the grounds that he was improperly charged with the mesne profits of the twelve villages held in possession by *Baijnauth* and *Bishun Dayal*; that he was improperly charged with the profits of the five villages of which, by reason of their assignment to *Sheodutt's* wives and others, *Seetaram* was never in possession; and that he was improperly charged with a certain amount under the head of *Sayer*. And he again raised the question that the effect of the transfer to *Sheosuhai* was to determine the liability of *Seetaram* for the profits of any part of the estate. The majority of the Court decided against the Appellant on the last point, and in his favour on the three others; and the final decree was against him for the sum of Rs. 14,865 10 as., being the amount of the profits claimed in respect of the twelve villages of which *Seetaram* was unquestionably in possession after the dissolution of the so-called partnership between him and *Baijnauth* and *Bishun Dayal*. This final decree was dated the 1st of March, 1846. The Appellant satisfied this judgment by payments into the Court to the amount of Rs. 26,211 12 as. 9 p.; and these moneys were afterwards paid out through the *Mookhtar* of *Sheodutt Singh*, and are those or some of those which in the third clause of the *Ikrarnamah* are alleged to have found their way into the hands of *Mohun Lall*.

The Appellant, having thus satisfied this decree, instituted in the year 1847 a suit against *Sheodutt Singh*. His claim was founded on the wrong done to *Seetaram* by reason of his not getting possession of the five villages assigned to the wives of *Sheodutt Singh*, and was for the profits of those villages during the ten years of the mortgage lease. The gross amount claimed was Rs. 27,129 6 as. 6 p. principal, and an equal sum for interest. The proceedings in this suit are not amongst the documents in the Appendix, and for the facts we are referred to the short report of the case in the fourth volume of the *Sudder* decisions for the North-Western Provinces (1849), p. 60.

From that, it appears that the Principal *Sudder Ameen*, on the 31st of December, 1847, decreed in favour of the Appellant upon the ground, certainly erroneous, that he had been made to pay the profits of these villages; but he awarded him only so much of the profits as fell within the period of twelve years prior to the institution of the suit; treating the rest of the claim as barred by the Regulation of Limitation. The *Sudder* Court on appeal reversed this decree, and by its decree of the 26th of March, 1849, dismissed the Appellant's suit altogether. The reasons for the judgment are not very clearly expressed; but the Court seems to have been of opinion, that if *Seetaram* had any claim for damages in respect of the failure to give him possession of these villages, he should have sued during the currency of the lease; and that at all events his representative (the Appellant) could not then maintain that action. The Appellant obtained leave to appeal to Her Majesty in Council against this decree; and his appeal was pending in 1850 when the *Ikrarnamah* was signed.

In the meantime, and in 1848, *Sheodutt Sinyh* had brought his suit against the Appellant for the profits of the *Talook* during the years of the farming lease which were not covered by the former suit, and had obtained a judgment for the sum of Rs. 7,480 4 as. 9 p., which is the subject of the fourth clause of the *Ikrarnamah*. He had also commenced a third suit against the Appellant in the name of his son, the Respondent, in respect of pro-

perty derived by the Respondent from his mother. That suit was undecided on the 3rd of July, 1849, when *Sheodutt Singh* died.

Hence at the date of the *Ikrarnamah* the position of the Appellant and the Respondent's guardian with reference to the antecedent litigation was this. The Appellant had been decreed to pay and had paid Rs. 26,211 12 as. 9 p. in respect of the final decree of 1846. By the decree of 1848 he had been found liable to pay, but had not paid, Rs. 7,480 4 as. 9 p., with (probably) interest and costs. Another suit was pending against him, but had not been decided. On the other hand, he had brought a suit to enforce a claim for upwards of Rs. 50,000 against the estate of *Sheodutt Singh*. But this claim had been only partially decreed in his favour by the *Zillah* Court, had been wholly dismissed by the *Sudder* Court, and was the subject of an appeal to *England*.

This being the position of the parties, what were the provisions of the *Ikrarnamah* which the guardian was induced to sign? The first clause, after stating that the Appellant had been unjustly made to suffer the losses which he had sustained, by reason of *Sheodutt Singh's* first suit, partly in order to compensate him for such losses, and partly in order to induce him to abandon the appeal in his own suit, made the estate liable to pay him Rs. 27,000, without interest. This clause was obviously against the Minor's interest, in so far as it re-opened the questions closed by the final decree of the 1st of March, 1846; admitted the injustice of the claim on which it was founded; and gave compensation to the Appellant for the loss which it had inflicted upon him. It is contended, however, that the success of the appeal was so probable, and the consequences of that success were so serious, that the guardian was justified in spending Rs. 27,000 to avert that danger from the estate. This is the point which has been most laboured at the Bar, but their Lordships can find in the facts before them no reasonable grounds for such a conclusion. In the course of their ingenious argument, the learned Counsel for the Appellant were almost constrained to admit that the particular action was misconceived, inasmuch as it was brought to recover the mesne profits of certain villages of which *ex concessis* the Defendant had not been in possession. They were further obliged to admit that under Reg. XXXIV. of 1803, the interest of the holder of a usufructuary mortgage in the property would cease on the liquidation by the usufruct of the principal and interest of his debt; and consequently that in any action founded on the breach of the agreement, express or implied, to give possession of the five villages, it was essential to allege and prove that, by reason of the nondelivery of such possession, something still remained due on the mortgage.

Their Lordships have extreme difficulty in seeing how such a suit could have been maintained by the Appellant; since in the first suit of *Sheodutt Singh* against him it had been alleged and proved as a fact, that the mortgage debt had been fully discharged; and he, instead of taking issue on that allegation, had sought to escape liability by showing that by reason of *Seetaram's* assignment to *Sheosuhai* he had no interest whatever in the mortgage. But assuming that he might have maintained such a suit, they have to observe that it would have been founded on a cause of action different from that on which the suit actually brought proceeded; and that it is not to be supposed that if the appeal had come here, this Committee would have taken the unprecedented course, suggested by Mr. *Pontifex*, of reversing a decree that had dismissed a suit improperly conceived, and of remanding the cause in order that it might be moulded into a suit of an entirely different character. To their Lordships it appears that the appeal occasioned no such danger to the Minor's estate; and that there are no grounds for saying that the stipulations of the first clause, so favourable to the Appellant, were for the benefit of the Minor, or could have been reasonably supposed to be so.

The third clause appears to their Lordships to be of the same character. No plausible reasons have been assigned why the guardian should embark in an expensive litigation in order to recover back from *Mohun Lall* sums for which he would

necessarily have to account in the general account then open, and unsettled between him and the estate; or why, in consideration of advances for the purposes of that litigation, she should agree to divide with the Appellant moneys which, if recovered, would belong to the Minor's estate. The latter objection affects also the seventh clause.

There is a conflict of evidence concerning the alleged payment of the sum of Rs. 7,480 1 an. 9 p. mentioned in the fourth clause. The oral evidence to negative the payment is undoubtedly very loose and unsatisfactory, and the *Gomastash* of the Appellant has given some evidence of the fact of payment, which he corroborated by the production of an entry in the Appellant's Books. On the other hand, it is remarkable that the Appellant, though examined as a witness on other points, did not depose to this payment; and the circumstance that the claim in respect of which this sum had been decreed was of precisely the same character with those which the first clause of the document had pronounced to be unjust tends to justify the conclusion of the Courts below, that this clause was under colour of an admission of a payment that was never made,—the release of a judgment debt to the prejudice of a Minor's estate. Their Lordships do not think it is necessary to decide the question whether this payment was really made. If it was not made, the clause, no doubt, affords another strong argument against the validity of the *Ikrar;* but if it was made, it would not in any degree cure the other defects of that instrument, which would have to be considered as if this clause were not inserted in it. The fifth clause seems to imply the abandonment of the suit pending at the date of *Sheodutt Singh's* death. It was, therefore, also to the prejudice of the estate.

If the above-stated view of the particular clauses of the *Ikrar* be correct, the only ground on which the instrument can be supported is, that the transaction, as a whole, was for the benefit of the estate, because the necessity for obtaining the pecuniary assistance of the Appellant was so urgent that the guardian was justified in submitting to the extraordinary and usurious terms on which it was to be given. There is no proof of such a necessity; and it might be sufficient for the purposes of this appeal to say that, in their Lordships' judgment, the Appellant has wholly failed to relieve himself of the burden which the law casts upon him of showing that he had good grounds for supposing that this transaction was for the benefit of the estate.

Their Lordships, however, are disposed to go further, and to say that the Courts below were warranted in imputing the character of fraudulent contrivance to this transaction.

The negotiation out of which it sprang was one between a *Purdah* woman acting as the guardian and manager of an infant's estate, and a keen man of business, at that time a debtor to the estate. She is induced to sign an instrument which transforms the debtor into a creditor, and heavily burdens her ward's property without consideration, except the merely colourable one of the abandonment of the appeal, and the promise of future advances for the purposes of litigation, of which a portion, at least, was neither necessary nor prudent; of litigation which, if unsuccessful, would be ruinous to the estate, and, if successful, was to result in a division of spoils absolutely incompatible with her duty as guardian. It is not shown that, in coming to this agreement, she had the assistance of proper or independent advisers. On the other hand, it is not shown affirmatively by what practice (if any) upon her ignorance or her fears she may have been induced to execute the document. She may or she may not have been fully informed as to what she was doing. But whether she was herself defrauded, or whether she acted in collusion with the Appellant, the transaction was in either case a fraud upon the Respondent.

It has, however, been strongly urged that this finding of the invalidity of the *Ikrar* is not fatal to the title of the Appellant as purchaser at the execution sale. It has been contended that his rights are identical with those which a stranger purchasing at the same sale would have had; that the execution was good, at least, to the extent of the Rs. 26,987 advanced to save the property from sale at the suit of *Mohun Lall;* and that the rights of the Respon-

dent against the Appellant, taking them at their highest, are limited to the recovery of the difference between the last-mentioned sum and the price bid at the execution sale. Another argument in favour of this conclusion was, that the Respondent had not really been injured by the sale of his ancestral property under this execution, because he would equally have lost it if it had been sold at the suit of *Mohun Lall*.

As to the latter argument, it seems sufficient to observe that we have to deal with the rights of the parties in the events that have happened, not in those that might have happened; that the salvation of the property by other means from the sale at *Mohun Lall's* suit was not absolutely impossible; and that, in any case, an execution for Rs. 26,987 is less formidable than one for upwards of Rs. 70,000. Again, it is to be observed that if the Repondent has been wronged by the sale of his property at the suit of the Appellant, the relief suggested falls very far short of an adequate remedy for that wrong. The property of which he has been deprived was ancestral; and the feeling on the subject of ancestral property is so strong in those Provinces, that the policy of allowing it to be taken in execution and sold under judicial sales has been seriously questioned. And even if no account is to be taken of that feeling, it is notorious that landed property when sold under an execution, rarely, if ever, realizes its full value. It follows, therefore, that to restore the property to the Respondent on the terms of paying to the Appellant what may be justly due to him is far more equitable than the proposed limitation of his remedy to the surplus proceeds of the sale; and the only question is whether the sale has interposed an effectual bar to the application of the more appropriate equity.

Their Lordships concur with the learned Judges of the *Sudder* Court in dissenting from the authority of the case which is stated to have been decided in 1847 by two out of three of the then Judges of the *Sudder* Court of the North-Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

In the present case, the judgment by cognovit, the execution, and the sale are all tainted with the fraud which entered into the original transaction, the execution of the *Ikrar*. All are parts of the contrivance by which the Respondent has been deprived of his property, and the Appellant has acquired it. Their Lordships, therefore, are of opinion that both the Courts below were right in decreeing that possession of the property should be restored to the Respondent. In considering on what terms this should be done, their Lordships concur with the *Sudder* Court in thinking that the only principal sum for which the Appellant was entitled to receive credit was the Rs. 26,987. That he had no title to the Rs. 27,000 follows obviously from what has been already said. Nor has he, in their Lordships' opinion, shown any better title to the Rs. 1,354. That sum had been advanced for costs for the litigation in which he involved the guardian under the 3rd clause of the *Ikrar*. Of that litigation, if it had been successful, he would have had half the fruits. It was unsuccessful. He cannot be allowed to carry on this kind of speculation at the risk and cost of an infant's estate.

The only remaining point—and it is one on which their Lordships have felt some difficulty—is the rate of interest to be allowed on the Rs. 26,987. The Attorney-General has insisted that it was a favour to the Appellant, in the circumstances, to give him any interest at all on that sum; that the rate was in the discretion of the Court below; and that their Lordships should not interfere with that discretion. On the other side, it has been argued that the rate ought to be twelve per cent., such being the current rate of interest, and that which the judgment debt of *Mohun Lall* would naturally have carried. The contention below on the hear-

ing of the application for a review was, that the rate should be six per cent., or the contract rate, as shown by the confession of judgment. Their Lordships have come to the conclusion that the third course is that which should be adopted. If interest was to be allowed at all—and they think the Court below was right in allowing it—the rate should be fixed according to some principle, not according to the arbitrary discretion of the Judges. On the other hand, the Appellant has no right to complain if he receives interest at the rate for which he stipulated when he made the advance. It may be true that he would not have advanced his money on terms so favourable to the estate if he had not had in view the corrupt advantages for which he had stipulated in the *Ikrar*. But there is no reason why the Court, because it will not let him reap the benefit of those improper stipulations, should make a new contract for him in respect of this particular advance.

On the whole, then, their Lordships will humbly recommend to Her Majesty that the decree of the *Sudder* Court be modified by the allowance of interest on the Rs. 26,987, at the rate of six per cent. instead of that of five per cent. per annum, but that in all other respects that decree be affirmed with costs. They do not think that so slight a modification ought to deprive the Respondents of the costs of this appeal.

7th and 8th February, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

MAHARAJAH RAJUNDUR KISHWUR SING, BAHADOOR,* ... ... } *Appellant,*

versus

SHEOPURSUN MISSER, ... *Respondent.*

Birt—Evidence—Confirmation of Title—Misjoinder of causes of action—Multifariousness.

A. had brought a summary rent-suit for arrears due by B. under a *Kabooleat* for some *Mouzahs*. B. denied the *Kabooleat* and pleaded possession under a *Bhakee Birt* tenure. The Deputy Collector considered the *Kabooleat* not proved and dismissed the suit.

A. then brought a regular suit against B. for (1) establishing A.'s proprietary right in the *Mouzahs* (2) setting aside the summary decision and (3) recovering arrears of rent under the *Kabooleat*. The Defendant in addition to the pleas urged by him in the summary suit, pleaded misjoinder of claims.

Held, that as Courts in *India* are Courts both of Law and Equity, a claim for rent in arrear could unobjectionably be added to a claim to remove clouds on the title to demise raised by the tenant;

A landlord may waive a forfeiture, and may treat a tenancy or interest as continuing which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently the mere inclusion of a claim for rent in such a suit cannot make it multifarious, unless it could be treated as such if it insisted on the repudiation or forfeiture.

Decree of the *Sudder* Court, dismissing the suit for misjoinder, reversed with costs of the appeal, and case remanded for trial on the merits.

10th February, 1866.

JUDGMENT having been reserved, was now delivered by

THE RIGHT HON. LORD CHELMSFORD:

This is an appeal from a decision of the late *Sudder Dewanny Adawlut* of *Bengal*,

* 10, Moore's I. A., p. 438.

which reversed a decision of the Zillah Court in favour of the Appellant, the Plaintiff in the suit. The decision of the *Sudder* Court proceeded solely on the ground of misjoinder of causes of action in the Plaintiff's suit. That objection had been raised in, and overruled by, the Court below. It is necessary for the due consideration of this objection to ascertain carefully what are the causes of action which are stated in the plaint. The plaint states them with sufficient precision in the first paragraph. It alleges that the Plaintiff sues, not summarily, but in due form, for possession of certain *Mouzahs* which it describes by names and boundaries, which it alleges to be his hereditary property; and also to recover certain arrears of rent, amounting to Rs. 1,030. 9½ for 1260, *Fusly*, for which a summary suit was pending; and Rs. 2,305 13 as. 2 p., the rent for 1261, *Fusly*, inserted in the *Kabooleat*, dated the 5th of the month of Assin, 1258, *Fusly*, by the annulment of a summary award of the Deputy Collector of the District of *Chumparun*, dated the 29th of May, 1854, and by the cancellation of a letter affirming the *Bhakee Birt* tenure, dated the 17th of the month Assin, 1232. This specification of the causes of suit is accompanied with statements of the falseness of the claim to the *Bhakee Birt* tenure, of the danger which the Plaintiff apprehends to his proprietary title from the summary decision above-mentioned, that its annulment is impossible without a regular suit, and he concludes the paragraph by stating that he sues, therefore, for the reversal of the summary award, the confirmation of his proprietary interest and possession, and the refutation of the allegations of the Defendant respecting the *Bhakee Birt* tenure.

The case, then, as alleged in the plaint, if the plaint be regular, must be brought within the principles stated in Mr. *Macpherson's* Book on "Civil Procedure," page 111 [3rd Ed.], where he says, "A plaint may have an appearance of doubleness when it prays, not only for possession, but that the transactions upon which the Defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and, in fact, forms part of, the former, because possession cannot be given without first removing the existing impediments." This question is distinct from any that relates merely to defect of proof or error in law, in a Plaintiff's view of his case in the whole or part, that may warrant a dismissal at the hearing wholly or in part. The question here relates to unity of title, and connection and dependence between the claims of the Plaintiff. In this suit the Plaintiff's title is one; it is his proprietary right as *Zemindar*. We must look to the Plaintiff's admitted title as *Zemindar* and to the interference with such title by an established tenure of this kind, to learn what is meant by the term "possession." The *Mouzahs* are part of the Plaintiff's *Zemindary*; the Plaintiff is the assessed proprietor under the Decennial Settlement. The Defendant claims that which would, if established, be a dependent tenure, the *Zemindar* being his immediate superior in the holding. It is not a *Ryotwary* tenure at all, and no question as to *Ryot's* title to occupancy can arise in this dispute. All the distinct portions of the Plaintiff's claim flow from, support, and have relation to and connection with his proprietary title, which *primâ facie* entitles him to the collections. The farming lease supports it, the rent payable under that lease supports it, and the removal of the adverse title would confirm it.

If this tenure be not interposed between the *Zemindar* and the cultivators, the ordinary relation between him and them exists; but if it be interposed, the *Zemindar's* general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some *jumma* from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a *Zemindar*, and may materially interfere with his successful management of his *Zemindary*. Such an intermediate tenure cuts off the possession, that is, the *Zemindar's* title to the rents and profits immediately derived from the cultivators.

In this sense, the term "possession" is used in this plaint. Now, this injury, supposing the claim to the *Bhakee Birt* tenure to be groundless, is not the less a

wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right, derived from the *Zemindar;* as, for instance, by a farmer of a portion of the *Zemindary*. If such a claim were preferred by a person having such an interest, it would certainly be competent to the *Zemindar*, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession, and the quieting of the claim also; because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits.

A *Zemindar*, or landlord, may waive a forfeiture, and may treat a tenancy or interest as continuing which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently, the mere inclusion of a claim for rent in a suit of this character cannot make the suit multifarious, unless it could be treated as multifarious if it insisted on the repudiation or forfeiture.

If the *Bhakee Birt* tenure be valid, the Plaintiff has no title to possession in the sense in which he uses that term. He might have a right to rent for a time on the footing of contract, or estoppel even from a *Birt* tenant, if the latter accepted a lease, but that would rest on special grounds, and would not flow from his general proprietary title. Until this claim to a *Birt* tenure, therefore, be removed, the Plaintiff cannot have the "possession" which he seeks, since, in some way or other, the Defendant stands between the Plaintiff, as owner of the *primâ facie* proprietary right and the cultivators. Had the Defendant admitted the tenancy under the *Kabooleat*, the Plaintiff's title to the rent would have been established, but that admission, unless qualified, would also have removed those impediments to the Plaintiff's proprietary title which he desires to have removed; but as the Defendant repudiates that tenancy altogether, he, at least when the Plaintiff fails to prove it, cannot urge it against the Plaintiff's title. See in the case of *Raja Oodit Purkhash Singh* v. *Martindell* (4 Moore's I. A., p. 451, 1 P. C. J., p. 384,) Lord *Kingsdown's* judgment in affirmance of the general principle.

This lease being removed (the Plaintiff having failed to prove it, and the Defendant renouncing it,) what bar is there to the assertion of the proprietary right to the collections, unless the *Birt* tenure interpose one? On that bar the Defendant does rely, and unless it be removed, the Plaintiff can scarcely expect to lease or otherwise manage his *Zemindary* with effect. It is an impediment in the way of his possession, which the suit is instituted to remove. The reasons alleged in the *Sudder Ameen's* Court for overruling the objection seem to be unsatisfactory; for as the title to mesne profits supposes a wrong, and the title to rent proceeds on contract, the union of such causes of action would be contrary to principle. But as these Courts have the divided jurisdiction of a Court of Law and a Court of Equity substantially united in one Court, a claim for rent in arrear, and a claim to remove clouds on the title to demise raised by the tenant, seem to be unobjectionable, and no authority was cited to support the objection. In truth the claim to rent under the farming lease supports the proprietary title.

No inconvenience can result from the inclusion of these subjects in one suit, since the defence to the claim for rent in fact raised them all, and they were dealt with without confusion or difficulty.

Their Lordships think, therefore, that the *Sudder* Court should have heard the appeal upon the merits. Their Lordships ought, upon general principles, to give now the decision which the *Sudder* Court should have given; but a difficulty has been interposed in the Court of the *Sudder Ameen*, which renders a decision on the *Birt* tenure impossible by this Board. The question of this *Birt* tenure has not been adjudicated upon in the Court below. The *Sudder Ameen* should have allowed the Defendant to get his documents stamped, and, if necessary, should have adjourned the hearing for that purpose. The Court, however, excluded them from evidence, as unstamped, and as documents which were inadmissible unless stamped. The Plaintiff ought not in any way to be prejudiced by this neglect of the Defendant, and to allow the Defendant to reagitate these questions as to the *Birt* tenure in another suit would

be a serious injustice and wrong to the Plaintiff. The proper course, then, to be adopted is to reverse the decisions of the *Sudder* Court and of the *Sudder Ameen*, and to remand the cause to the lower Court, not for the purpose of taking further evidence, or of hearing the cause on fresh materials other than the stamped documents, but to enable the Defendant to get the instruments stamped. The inferior Court should then decide on the evidence already taken in the cause, and on those documents, if stamped, with reference to all the issues raised on the cause, giving a complete decision on them all. Their Lordships will forbear from expressing any opinion upon the validity of the *Birt* tenure, on the evidence in its present imperfect state; but they think it proper to observe that if the *Birt* tenure be displaced, that displacement will tend considerably to fortify the Plaintiff's proof of the *Kabooleat;* for the Defendant's possession would then have no apparent title, unless one derived from a lease from the *Zemindar*, the sole proprietor; no person (on that hypothesis) intervening between the cultivators and the proprietary title of *Zemindar*.

This Order for remanding the cause to be thus reheard, will entitle the Plaintiff to have the matter of his appeal to the *Sudder* on the *Kabooleat* reopened. It is in favour of his appeal so far as to subject the decision against the *Kabooleat* to review upon the reconsideration of the whole case upon the merits. The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of a claim, or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in *India*, where fabrication of seals and documents is so common and so skilfully conducted.

Their Lordships will recommend to Her Majesty that the decrees of the *Sudder* Court, and of the *Sudder Ameen* be reversed; that the Appellant should have the costs of the appeal; that the cause be remanded to the High Court, with directions to send the cause back to the *Zillah* Court for re-trial, on the issue of the existence of the *Birt* tenure, giving the Respondent an opportunity of having the unstamped documents stamped, if he shall be so advised, but making him liable for the costs of the first trial, which his omission to have those documents stamped has made abortive.

8th, 9th and 10th February, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

RAMPERSHAD TEWARRY,* *Appellant,*

versus

SHEOCHURN DOSS, or LOLL TEWARRY, MUSSUMAT THOOKRA and others, *Respondents.*

And in a cross appeal by

SHEOCHURN DOSS, ... *Appellant,*

versus

RAMPERSHAD TEWARRY, *Respondent.*

And in another cross appeal by

MUSSUMAT THOOKRA, ... *Appellant,*

versus

RAMPERSHAD TEWARRY, *Respondent.*

Construction of the plaint—Hindu Law—Undivided family—Ancestral property—Burden of proof—Banking business.

Held upon a true construction of the plaint, that the Plaintiff's claim was really based upon his alleged rights as a co-sharer, in a joint and undivided Hindu estate, and not simply as a member in a mercantile firm.

* 10, Moore's I. A., p. 490.

D. with his four brothers constituted an undivided Hindu family, having a nucleus of ancestral property, which however did not contribute in any material degree to the acquisition of the funds employed in trade which formed the bulk of the disputed property. D. laid the foundation of the future fortune of the family, but instead of keeping his acquisitions separate, D. for many years before his death associated his brothers with himself as partners, and thence forward all five carried on business together each contributing by his exertions to the increase of the common stock. D. having thus voluntarily brought his earlier gains into the common stock, making them the capital on which he and his brothers were to trade, all future gains made by their joint exertions would, under Hindu Law, be the joint property of the family whilst undivided, and be partible as such on a partition.

The burden of proof of any special contract which impressed the character of mercantile partnership as distinguished from joint or separate property in the Hindu sense, upon the disputed property, lay on the Defendants and the burden had not been discharged.

The *Sudder* Court having established that the family was joint and the property undivided, left in the hands of one of the brothers a gross sum out of the estate, calculated to make the widow of one of the brothers a monthly payment out of interest for maintenance. *Held* that although a Court of Equity in *England* would have set apart a certan sum to a separate account during the life time of the widow, yet from the want of machinery in the Native Courts in *India*, such practice could not be carried out. The arrangement was therefore upheld, with a declaration that it was to be without prejudice to the right of the Plaintiff or of his representatives to claim on the death of the widow a proper share in the capital of the maintenance fund.

Where a party refused to render accounts, and there was evidence of spoliation of the Banking Books, the Court charged him with the principal sum for which he was accountable, with interest at 12 *per cent.*, in lieu of the profits he failed to account for, that being the rate claimed by himself on the sums due to him.

A slight modification of the decree would not entitle the Appellant to any costs.

17th March, 1866.

THE consideration of their Lordships' judgment was reserved, and now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The suit out of which these appeals have arisen was brought by *Rampershad Tewarry* to enforce his claims against the other members of a joint and undivided Hindoo family. The common ancestor of the Plaintiff and the Defendants was one *Sheodutt Tewarry*, who lived at *Jhoosee*, a village on the *Ganges*, opposite to *Allahabad*, and exercised there the functions of a *Purohit*, or Priest. He died in 1802, and is not shown to have left any property except the house, such as it was, in which he lived, and the *Huqq Purohittai*, or Priests' fees, the right to which seems to have been hereditary. He left five sons, *Gungapershad*, *Moona Loll*, *Radakishen*, *Deenanath*, and the Plaintiff, *Rampershad*.

Radakishen died in 1840, leaving three sons, *Buldeo Doss*, *Bhyronpershad*, and *Seetulpershad*, all of whom were Defendants below; but *Seetulpershad* has since died, leaving three infant sons, who are represented on the record by *Mussumat Bilassa*, their mother and guardian.

Gungapershad died in 1846, leaving three sons, *Sheochurn Doss* or *Loll Tewarry*, the principal Defendant below and Respondent here; *Bheekum Singh*, a Defendant below, who has since died wthout issue; and *Bhugwan Doss*.

Deenanath died in 1850 or 1851, without issue, but leaving a widow, *Mussumat Thookra*, one of the Respondents and a cross Appellant.

Moona Loll, who survived *Deenanath*, is dead; but there is some confusion as to the date of his death. From the partition deed of the 23rd of February, 1852, which is afterwards referred to, we should infer that he was dead at that date. From other parts of the record, it would appear that he was alive in April, 1857, and died between that month and June, 1858. Whenever he died, he left an only son, *Sheopershad*, a Defendant below, who has since died, leaving two sons, the Respondents, *Soorujpershad* and *Ramnath*.

The evidence concerning the precise history of the family after the death of *Sheodut* is conflicting and will be afterwards considered. It is, however, undisputed that for a considerable period between the years 1818 and 1848, the five brothers or their children carried on a flourishing Banking business, on some terms of partnership or joint interest, under five different firms. Of these, one was established at *Jhoosee*, the ancestral seat of the family, under the style of "*Moona Loll & Gungapershad*;" another at *Agra*, under the style of "*Radhakishen & Deenanath*;" a third at *Benares*, under the style of "*Gun-*

gapershad & Rampershad;" a fourth at *Ghazeepoor*, under the style of "*Rampershad & Sheochurn Doss;*" and the fifth at *Mirzapoor*, also under the style of "*Rampershad & Sheochurn Doss.*"

The *Mirzapoor* firm was under the management of the Plaintiff, *Rampershad;* and it is alleged by the Defendants, though not admitted by the Plaintiff, that about the year 1848 he separated himself from the rest of the family, appropriating to himself the assets and property of that firm. That about that time he was on bad terms with the other members of the family, and ceased to render the accounts of the *Mirzapoor* to the *Jhoosee* firm according to the course of business theretofore subsisting, seems to be pretty certain; but there is no proof of a formal separation or dissolution of partnership at that date.

On the 23rd of February, 1852, the adult members of the family other than *Rampershad*, viz., *Sheopershad*, as representing *Moona Loll; Sheochurn*, for himself and as guardian of his infant brothers, as representing *Gungapershad; Buldeo Doss*, for himself and as guardian of his infant brothers, as representing *Radhakishen;* and *Mussumat Thookra*, as representing her husband *Deenanath*, executed a deed of partition, which stated that the five brothers had been associated in partnership in trade and banking since 1874 *Sumbut* (corresponding with A. D. 1818); that the five before-mentioned Banking firms had been established; that in 1904 *Sumbut* (1848) *Rampershad*, who was at *Mirzapoor*, having taken as his share Rs. 1,16,197 10 as. in cash and houses situated at *Mirzapoor*, had separated himself and ceased rendering accounts and correspondence in regard to the property in his possession; and that similarly, he having no concern with the firms of *Agra*, *Jhoosee*, *Ghazeepoor*, and *Benares*, the undersigned being the partners of those firms, with a view to obviate future disputes and contests, had examined the accounts of the firms and the property appertaining thereto, and found in cash Rs. 5,03,418 8 as., which they had amicably divided into four equal shares, each share amounting to Rs. 1,25,996 4 as., and had separated themselves. The deed then provided for the future division of some outstandings, which were to be held jointly until realization; and for the division of certain boats, and the warehouses and shops there mentioned, but stated that the houses situated at *Jhoosee* were to remain in the joint possession of the four parties. The effect of this instrument was to exclude *Rampershad* from any participation in the property which was the subject of the partition, and to give a fourth share to *Mussumat Thookra* as the widow and representative of *Deenanath*. This fourth share she afterwards, by an instrument dated the 7th of September, 1855, assigned to *Sheochurn Doss*.

The suit was commenced on the 4th of January, 1856, in the Court of the Principal *Sudder Ameen*, whence it was transferred to the Civil Court of *Agra*. The plaint claimed a one-fourth share of the property therein specified, giving credit for Rs. 1,16,197 10 as., the assets of the firm of *Mirzapoor* in Plaintiff's possession; and to set aside the deed of partition of the 23d of February, 1852, and the deed of gift of the 7th of September, 1855.

It may be necessary to examine the pleadings more particularly hereafter, for the purpose of considering the weight of certain arguments which were addressed to their Lordships on the hearing of these appeals. At present it is sufficient to say, that the material questions in the cause were, whether the property of which a share was claimed, and in particular the property of the Banking firms, was the joint and undivided property of the family; and consequently, whether, by the Hindoo law, as it obtains in the North-Western Provinces, the Defendant, *Mussumat Thookra*, was incapable of taking a share of it; and further, whether, by his conduct in 1848, the Plaintiff had effectually separated himself from the rest of the family, and had conclusively bound himself to take the assets of the *Mirzapoor* firm in full satisfaction of his share and interest in the joint concerns.

The Civil Judge of *Agra*, by an Order of the 7th of March, 1857, referred these questions, as well as various questions of account, together with the partnership Books, to two native Assessors or Commis-

sioners; and upon their report of the 15th of March, as well as upon his own view of the evidence taken before him, he, by his decree of the 28th of March, 1857, determined both the before-mentioned questions in favour of the Plaintiff, and awarded to him, in full satisfaction of his claims up to the date of the decree, the sum of Rs. 1,37,508 5 as., with subsequent interest to the date of realization, and costs. For this amount all the Defendants were made liable.

Against this decree there were four appeals to the *Sudder* Court. Two of them, viz., those of *Mussumat Thookra* and *Sheochurn Doss*, went to the merits of the suit. Of the other two, one was presented by *Sheopershad* as representing the interest of *Moona Loll*, and by the guardian of *Bhugwan Doss*, the infant son of *Gungapershad;* and the other was presented by the sons and representatives of *Radakishen*. Both of them were confined to the point that the Appellants were improperly made liable for any part of the sum decreed to the Plaintiff; since, upon his mode of taking the accounts, they would be entitled to more than they had received under the partition deed of the 23rd of February, 1852.

The *Sudder* Court dealt with the merits of the case upon the appeal of *Sheochurn Doss*. Before doing this, however, and on reading the papers in all the appeals, they made an Order on the 9th of May, 1860, whereby they referred the case to two native Commissioners (being the same persons who had acted in that capacity in the Court below) for inquiry and report upon three new points. The first was, what were the profits of the *Mirzapoor* firm during the four years between 1904 *Sumbut* and 1908 *Sumbut*, *i. e.*, between 1848 and 1852. The second involved certain disputed items in the accounts. The third was the amount of maintenance to be allowed to *Mussumat Thookra*, should it be ultimately determined that she was not entitled to a share of the property in dispute.

On the 21st of May, 1860, the Commissioners reported that the account of profits rendered by the Plaintiff under the first head of inquiry was incorrect, and begged that either the Plaintiff's Pleader should be required to furnish a proper account within a given time, or that they (the Commissioners) should be allowed to submit a report on the two other points.

On the 22nd of May the Court gave the Plaintiff one week within which he was to file correct accounts. On the 29th of May the Commissioners made their report, which was to the effect that for want of proper accounts furnished by the Plaintiff they were unable to report on the profits realized by the *Mirzapoor* firm; reporting on the disputed items of account; and finding that Rs. 125 *per mensem* was a proper sum to be allowed for the maintenance of *Mussumat Thookra*. On the 4th of June the Plaintiff presented a petition to the Court objecting to this report. On the 5th of June the Court, after hearing the verbal assertions of the Commissioners and the Pleaders of the parties, passed an Order that the case should be adjourned, the Commissioners dismissed, and the petition of the Plaintiff objecting to the report placed with the record.

By its decree of the 9th of June, 1860, the Court disposed of the appeal of *Sheochurn Doss*. They concurred with the Court below in holding that the property in dispute was joint and undivided; that *Mussumat Thookra*, as the widow of one of the co-sharers, was not entitled to take a share in it; and that the Plaintiff had not forfeited his rights as a co-sharer by separating himself from the rest of the family in 1848. They held, however, that *Mussumat Thookra* was entitled to maintenance according to the scale proposed by the Commissioners, and that Rs. 15,000 must be set aside out of the divisible assets to provide for it. They further reduced the divisible assets by the amount of certain bad and irrecoverable debts and other items pursuant to the finding of the Commissioners. And inasmuch as the Plaintiff had failed to account for the profits of the *Mirzapoor* firm between the years 1848 and 1852, they charged him with interest on the principal sum for which he was accountable at 12 per cent. The amount was Rs. 55,280. The effect of this decree was to reduce the sum presently payable to the Plaintiff to Rs. 17,478 12 as. 9 p., for which, having regard to the shares taken by him and by

the other parties under the deeds of 1852 and 1855, they held *Sheochurn Doss* to be solely liable.

Pro formâ Orders giving effect to this decree were passed on the same day upon the other three appeals.

The Plaintiff has appealed against these decrees to Her Majesty in Council. He submits that they should be affirmed in so far as they affirm the decree of the *Zillah* Court, and ought to be set aside, reversed, or varied, in so far as the vary or differ from that decree. The particular relief which he has claimed at the Bar will be more conveniently noticed hereafter.

Sheochurn Doss has presented a cross appeal against the decrees below. He insists that they are unjust and erroneous in so far as they affirm the decree of the *Zillah* Court, and that the Plaintiff's suit ought to have been dismissed with costs. He further submits that, if the decree of the *Sudder* Court against him was substantially right in other respects, it was erroneous in making him solely responsible for the sum decreed to the Plaintiff.

Mussumat Thookra has also presented a cross appeal. Her appeal is not distinguishable from that of *Sheochurn Doss*, except that she does not quarrel with that part of the decree which makes him solely responsible for the amount (if any) payable to the Plaintiff; and on the other hand insists that if the decree impeached was substantially right, positive directions should have been given and provision made for the payment of the maintenance to which she was found entitled.

In dealing with these appeals, we shall first consider whether both the Courts below were right in holding that the property in question was the joint and undivided property of the five brothers; and in deducing as a consequence from that finding, that the Plaintiff, notwithstanding his acts and conduct in 1848, was in 1852, the date up to which the accounts have been taken, entitled to one-fourth share of it.

The case of the Defendants and cross Appellants upon the first of the points is that the partnership property was in no degree acquired by the use of ancestral property; that *Deenanath* left his native village to seek his fortunes some years after his father's death with nothing but his brass *lotah*, or drinking vessel; that he took service with one *Peeroo Mull*, a native Banker at *Agra;* that whilst in that service he realized a small capital by means of some private adventures; that with the capital so acquired and its accretions he established first the *Agra* and afterwards the other firms; that he associated with himself, from motives of family affection, first *Radhakishen* and *Moona Loll*, and afterwards the other two brothers; employing them in the business rather as dependants than as partners on an equal footing with himself; and that the property of the different firms, if not wholly the separate and self-acquired property of *Deenanath*, was nevertheless partnership property, to be dealt with according to the rules which regulate mercantile partnerships between strangers, and was not subject to the rule of Hindoo law which excludes a widow from the succession to her husband's share of the joint property of an undivided family. If this contention be well founded, the Plaintiff was entitled to at most a fifth share in the partnership assets, and when he brought his suit had received even more than his due in the assets of the *Mirzapoor* firm.

Before dealing with the evidence upon the question now under consideration, it may be well to notice the arguments of the Attorney-General to the effect that the pleadings of the Plaintiff are in fact inconsistent with the case on which he now relies, and tend to confirm that of the Defendants. To show that the Plaintiff did not sue as one of the co-sharers of a joint and undivided family, but as an ordinary partner, he relied on the phrase "The claim is brought in virtue of right of copartnership" at the commencement of the plaint, and the use of the word "partnership" in other parts of the pleadings; and also on the circumstance that the Plaintiff claimed only one-fourth part of *Deenanath's* share, whereas the Hindoo law of succession, which he was supposed to invoke, would have given him one-half of that share; inasmuch as by that law nephews cannot take by representation in competition with the surviving brothers of a deceased co-sharer.

Assuming the latter proposition to be correct, which their Lordships consider it to be, it may show only that the Plaintiff has to some extent mistaken his rights, and claimed less than he might have claimed. The presumption arising from this misstatement of his rights as co-sharer in an undivided Hindoo estate, is by no means conclusive. It may be outweighed by the proof that the property was in part joint, which the conduct of the family, and the mode in which they kept their accounts, afford. And it may be observed that the claim made is also inconsistent with the hypothesis of a partnership governed by the rules which regulate the rights of mercantile partners as such *inter se*. Nor is it possible to read the whole plaint without seeing that the ground on which the claim to any portion of *Deenanath's* share rests is the rule of law which excludes the widow from the succession to a share in a joint and undivided Hindoo estate, and limits her rights to maintenance. Upon the argument founded on the word "copartnership," their Lordships have to observe that the pleadings before them have been translated from those in the native language; that the word is ambiguous; that the phrase "is brought in virtue of right of copartnership" covers the whole claim, which includes the *Huqq Purohittai*, admitted to be ancestral property and no part of the assets of the mercantile firms. Looking to the whole scope of the pleadings, their Lordships have no doubt that the Plaintiff's claim was really based upon his alleged rights as a co-sharer, in a joint and undivided Hindoo estate, and that, as such, it was sufficiently well pleaded.

Upon the facts it must be admitted that the evidence falls far short of proof that the ancestral property contributed in any material degree to the acquisition of the funds employed in trade which formed the bulk of the property in dispute. The family was, however, an undivided family, and there was a nucleus of ancestral property. It may be further admitted that *Deenanath* laid the foundation of the future fortune of the family. But there is no proof that he kept as separate, or treated as separate, property that which he acquired at *Agra*. On the other hand, it is shown that many years before his death he associated his brothers with himself as partners, and that thenceforward they carried on business together each contributing by his exertions to the increase of the common stock. The partition deed of the 23rd of February, 1852, itself negatives the hypothesis that he employed his brothers as servants or dependants, since under that instrument they share as partners and take an equal share with his widow and assumed representative. There is nothing *primâ facie* improbable in the hypothesis that he brought his earlier gains voluntarily into the common stock, making them the capital on which he and his brothers were to trade. All future gains being made by their joint exertions would, according to the general principle of Hindoo law, be the joint property of the family whilst undivided, and be partible as such on a partition. There is no proof of any special contract (and the proof of such lay on the Defendants) which impressed the character of partnership as distinguished from joint or separate property, in the Hindoo sense of these terms, upon the property in question. In this state of things we have not only the judgments of the two Courts below in favour of the Plaintiff upon this question, but we have also the finding of the two native Assessors to whom it was expressly referred, founded on the pregnant evidence afforded by the Books and accounts of the family. These persons are shown, by later proceedings in the cause, to have had no undue bias in favour of the Plaintiff, and they brought to the examination of the matters referred to them that intimate knowledge of native usages to which a European rarely, if ever, attains. Their Lordships cannot adopt the construction which the Attorney-General would have them put on the Assessors' report of the 15th of March, 1857. They believe the first finding in that report to be that the property was joint in the Hindoo sense of the term. And they see no sufficient grounds for dissenting from that conclusion, or from that to which the Assessors and the Courts below also came, upon the question whether the Plaintiff had effec-

tually separated himself from the rest of the family in 1848.

This being so, the remaining questions for determination, with the exception of one touching the provision for *Mussumat Thookra's* maintenance, are those which arise upon the Plaintiff's appeal, and involve the consideration of the deductions made by the *Sudder* Court from the amount awarded to him by the *Zillah* Court.

That it was right to call upon the Plaintiff to bring into the account the profits made by the *Mirzapoor* firm between the years 1848 and 1852, appears to their Lordships to be too clear for argument. It is, however, insisted that the Court has improperly visited his failure to produce the accounts required, by charging him with interest on the principal sum for which he was accountable at the rate of 12 *per cent.*; that they ought to have given him further time to produce his accounts; and that the cause ought to be sent back to *India*, in order that the account of profits may be now taken. Their Lordships have to observe that the time to be allowed was a matter for the discretion of the Court; that the account was presumably one which the Plaintiff, as a Merchant and Banker, ought to have been able to produce at short notice; that the time actually allowed was not unreasonably short; that in the circumstances it was competent to the Court to charge the Plaintiff with interest in lieu of the profits for which he had failed to account; and that the rate of interest was only that which he himself claimed on the sums due to him. The Defendants are willing to accept the interest in lieu of the profit, and their Lordships can see no ground for sending the cause back upon this point at the instance of the Plaintiff. The sum of Rs. 14,316 2 as. 6 p., mentioned in the examination of the Commissioners of the 28th of March, 1857, was obviously one item of profit appearing in the Books; not the measure of the profits of the *Mirzapoor* firm for the whole of the four years in question. The other items of account which the Plaintiff disputes, and on which he asks to have the cause sent back for further trial, have all been investigated by the native assessors or commissioners. These were persons peculiarly conversant with native accounts; they appear to have been examined on their report in open Court on the 5th of June, 1860; and the Judges of the *Sudder* Court expressly state that, after going over the several items with the Commissioners, they entirely concurred in their opinion. To remit a cause to *India*, for the purpose of reopening accounts so taken is obviously a course which their Lordships would not be justified in adopting, unless they had a clear conviction that there had been a miscarriage of justice. They have no such conviction in the present case. It may be true that the Commissioners have not required evidence *dehors* the Books; but the Plaintiff, as a member of the joint family and a partner in the several firms, was *primâ facie* bound by the entries in the books. If he impeached them, it lay on him to falsify them.

Their Lordships do not think that the amount of maintenance decreed to *Mussumat Thookra* is excessive. It is, however, objected by her that positive directions should have been given, and provision made for the payment of her maintenance. And the Plaintiff, on his side, complains that he is by the decree deprived of his right to claim a share of the principal sum deducted to meet this claim of maintenance on the death of *Mussumat Thookra*.

A Court of Equity in this country, if administering the whole estate, would no doubt have carried over the sum set apart for this purpose to a separate account; would have directed that the annual income should be paid to *Mussumat Thookra* during her life; and that the parties who had a reversionary interest in the principal should be at liberty to apply concerning it on her death. The Country Courts in *India* have, however, no machinery which enables them to take any such course. Nor was the suit one for the general administration of the estate. It was, in form, a suit to obtain present payment of the balance which the Plaintiff alleged to be due to him on the proper division of the property and adjustment of the accounts. The course, therefore, which the Court

took was to deduct from the gross amount of divisible assets the sum of Rs. 15,000, which at 10 *per cent.* would produce the annual sum of Rs. 1,500, and to leave it as residue undivided in the hands of *Sheochurn Doss*, in which it was found, subject to the obligation of paying the maintenance. *Sheochurn Doss* and *Mussumat Thookra* being co-Defendants, and there being no proof of the precise terms and conditions on which she had made over to him the share which she took under the deed of the 23rd of February, 1852, the Court was hardly in a condition to make more precise provision for the payment of her maintenance by him. Nor is it expedient that their Lordships should now make any Order on that subject. Again, if the *Sudder* Court had simply deducted the Rs. 15,000, as so much undivided residue, without saying anything about the Plaintiff's future rights, their Lordships, considering the form of this suit, would have doubted whether he had any grounds for impeaching the decree on this point. The judgment, however, says, "We decide that the best mode of settling her claim will be to deduct from the total divisible assets the sum of Rs. 15,000, the proceeds of which shall be devoted to *Thookra's* maintenance, and in respect to which the Plaintiff is declared to possess no right." These last words are certainly calculated to embarrass the Plaintiff, or his representatives, in asserting the right, which they seem to possess, to claim a share of this sum when the purpose for which it has been deducted from the divisible assets, the maintenance of *Mussumat Thookra*, has been satisfied. Their Lordships, therefore, propose to add to the decree a declaration, that it is to be without prejudice to the right of the Plaintiff, or of his representatives, to claim on the death of *Mussumat Thookra*, such share as he or they may be entitled to in the sum of Rs. 15,000, retained to provide for her maintenance.

Their Lordships, however, do not think that this slight modification of the decree ought to affect the costs of the appeal. And the Order which they will humbly recommend Her Majesty to make is, that the cross appeals of *Sheochurn Doss* and *Mussumat Thookra* be both dismissed with costs; and that, on the appeal of the Plaintiff, the decree in No. 62 be varied by the addition of the declaration abovementioned; that in other respects the decrees appealed against be affirmed; and that the Appellant, *Rampershad*, do pay the costs of his appeal.

12th February, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

TARAKANT BANERJEE,* ... *Appellant,*

versus

PUDDOMONEY DOSSEE, RASMONEY DOSSEE, & others, } *Respondents.*

Limitation, Ben. Reg. III. of 1793, sec. 14—Practice, giving possession under a judicial sale by removing one in possession under a bonâ fide title—Pleading, the decision in a suit in which Plaintiff's application to intervene was disallowed, not to bind the Plaintiff—Trial of issues in appealable cases—Transcript Record.

Held on a review of the previous litigation that the Plaintiff's suit was not barred by the limitation laid down in *Bengal* Regulation III. of 1793, sec. 14, as it was instituted within twelve years from the summary order made by the *Sudder* Court in 1845 which finally ordered his dispossession.

It is the practice of the Courts in *India* not to give possession under a Judicial sale by removing one who is in possession under an apparent *bonâ fide* title. As a debtor can only assert his title to possession by a regular suit, so a decree-holder who derives his title through him must do the same.

The Plaintiff could not be bound by the decision in a suit in which his application to intervene was disallowed and in which the decree was passed so shortly after the above refusal as to allow no time either for an appeal or for the institution of a se-

* 10, Moore's I. A., p. 476.

parate suit. The Defendants could not be permitted to plead in bar a decree so obtained in the absence of the party really interested in contesting the matter with them.

Case remanded for the trial of the remaining issues between the parties with the observation that in appealable cases the Courts below should as far as may be practicable, pronounce their opinions on all the important points. Their neglect to do so is a serious evil to the parties litigant as it may involve the expense of another hearing in *India* and a second appeal to *England*.

The practice condemned of including in the transcript record prepared and printed in *India*, voluminous accounts and receipts wholly unnecessary to the question at issue in appeal.

Directions given in taxing costs to disallow all expenses occasioned by the insertion of such unnecessary papers.

26th February, 1866.

THE consideration of the judgment was adjourned, and now pronounced by

THE RIGHT HON. THE LORD JUSTICE TURNER:

The suit of the Plaintiff was instituted on the 28th of August, 1856. It was brought to recover 1,384 *beegahs*, and 14 *cottahs* of land, described as "*jote*," set out by fixed boundaries, and situate in certain *Mouzahs* or *Kismuts* called respectively *Narainpore*, *Khoondkarkandee*, *Goonerkandee*, and *Kuddumpoor;* and also to reverse a summary Order of the *Sudder Dewanny Adawlut*, bearing date the 18th of November, 1845, made in a miscellaneous or summary suit in that Court. The *Zillah* Court dismissed the suit of the Plaintiff on two grounds,—first, that it was barred by the law of limitation, and secondly, that the matter had been decided adversely to the Plaintiff's claim in a former suit, by which the Court adjudged him to be bound. The *Sudder* Court, on appeal by the present Appellant, decided the case against him on the law of limitation only, and expressed no opinion on any other point. The decision of the *Sudder* Court on the law of limitation proceeded on a different ground from that on which the Lower Court had founded its decree, dating possession under the adverse title from a time latter than that which the *Zillah* Court had fixed for its commencement. The Appellant reckoned the time of his dispossession from the 18th of November, 1845, the date of the decree for the reversal of which his suit is brought. If he is right in this view of the subject, his suit was brought in time. The *Sudder* Court carried the adverse possession back to an earlier Order of the Court, bearing date the 11th of April, 1844, and counting the time of adverse possession from that last date, it held the suit to be barred by effluxion of time. The *Zillah* Court, in their judgment, had carried the time still further back to the year 1841, considering that the Plaintiff's dispossession was effected by possession having, as the Court considered, been at that time delivered to the Plaintiff in another suit, to which we shall presently refer, by one *Ramgottee Rae*, the *Ameen* delegated by the Court to execute the decree in that suit. The case is somewhat complicated by reason of the long continuance of litigation between different parties, and the conflict of claims in two different concurrent suits. It is necessary, therefore, to state the nature of this litigation and the titles of the Appellant and of the principal original Respondent, *Rasmoney Dossee*, in order to clear the subject of possession from some confusion in which it has become involved.

The *jote* tenure is a dependent tenure within and part of a *Zemindary*, called *Pergunnah*, *Taleehate*, *Ameerabad*. In the month of February in the year 1814, a litigation commenced between the *Zemindar* and three persons named *Reazooddeen Mahomed*, *Fyzooddeen Mahomed*, and *Mahomed Cossim*, termed the *Moonshees* (a description which for the sake of brevity it will be convenient to adopt). The *Moonshees* complained that they had been dispossessed by the *Zemindar* of their *jote* tenure, including the lands claimed in this suit; the *Zemindar* denied that inclusion, and claimed them as part of his *Zemindary*. At this time the *Moonshees* were possessed of a *Talook* called *Ooturnarainpore*, paying revenue direct to Government; and throughout their litigation with the *Zemindar*, during their claim to the one property and concurrent possession of the other, they insisted that these lands were included in their *jote* tenure, and made no claim to them as included in the *Talook*; proof of this inclusion in the *Talook* would have been a complete answer to the claim of the

Zemindar, and would have freed them from dependence on his title and the risks attendant on a subordinate tenure.

The *Moonshees* succeeded in that litigation, and the decree in their suit declared the lands to be part of the *jote* tenure, and limited the *Zemindar's* claim to a title to assess them for rent. The *Zemindar* appealed against this decree, which was, however, affirmed, and *Byrubchunder Bannerjee*, an *Ameen*, was ordered to give possession of the lands to the *Moonshees*. This was done in conformity to the decree, and possession was given in the usual way by the *Ameen*, by taking *Kabooleats* from the cultivators, and by fixing bamboos to mark the boundaries. The *Ameen's* report to this effect was in evidence before the Court. There is no evidence of any subsequent disclaimer on the part of the *Moonshees* of this tenure so pleaded, proved and adjudged, nor of any attempt to withdraw any part of the lands from the *jote* tenure, on the ground of mistake or otherwise, and to ascribe them to the *Talook* title before the time of the judicial sale which is now about to be stated. The rent of the *jote* tenure fell into arrear, the *Zemindar* sued the *Moonshees* for rent, recovered in the suit, and caused the *jote* tenure to be sold in satisfaction of the debt due under this decree. This sale took place on the 10th of June, 1836, and one *Juggutchunder Rae* was the purchaser. The Appellant's title is derived from him under two intervening private sales, one by *Juggutchunder Rae* to one *Ramdhone Sircar*, and the other by the sons and heirs of *Ramdhone Sircar* to the Appellant. By this purchase, *Juggutchunder Rae* obtained the right, title, and interest of the *Moonshees* in the *jote* tenure. He became, by force of this purchase, in the same relation to the *Zemindar* in which the *Moonshees* before stood. As against the *Moonshees* themselves and the *Zemindar*, the title of the purchaser was that which the *Moonshees* had had adjudged to them in their suit against the *Zemindar*. The possession given to the purchaser was co-extensive with that given to the *Moonshees*, and it was in strict conformity to the law which obtains in those Courts. The tenants were properly directed to attorn, and properly attorned to that title. It is important to keep this origin of the possession clearly in view.

The *Moonshees* appear to have disputed at that time, the title of the auction purchaser to have these lands included in his purchase; they claimed them then as included in their *Talook*. It is the practice of those Courts, and it is one perfectly consistent with reason and justice, not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *bonâ fide* title. If the debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court, therefore, leaves the purchaser to assert his title by regular suit. In this case, however, the *Moonshees*, the debtors under the decree, were themselves in possession. The decree was for rent of the *jote* tenure; the *Zemindar* caused the tenure, including these lands, to be put up to sale; the *Moonshees*, in claiming these lands, had pleaded this tenure, and it was adjudged in thier favour by a suit which bound both them and the *Zemindar*. The suit for rent was against them as *jote* tenants, for rent due under that very tenure, and the demand included the rent of these lands; consequently, the Court which directed the execution of the decree was perfectly justified in acting on their own pleaded, and by them admitted title, and putting the decree purchaser in possession. This was done in the regular mode, by taking *Kabooleats*, except as to one small part, as to which, however, possession was also given, and the purchaser was thus put in complete possession of these lands under the *jote* tenure. This appears from the report of the *Ameen*, dated the 7th of August, 1839. Unless this possession was changed at some intermediate period between the 5th of August, 1839, the date of the delivery of the possession above stated, and the 18th of November, 1845, the date of the Order of the *Sudder* Court which is sought to be reversed, the objection that the suit is barred by limitation of time is groundless. If that possession was displaced, in fact, it would be unimportant whether the disturbance took place in a suit to which the purchaser was a stranger,

or in one to which he was a party, the possession being alike adverse on either supposition. In considering this question, it is not necessary to state minutely all the intermediate steps before the delivery of possession by the *Ameen*, *Ramgottee*, on which the *Zillah* Court relied. That *Ameen* was acting in the execution of a decree in another suit which had been pending between the *Moonshees* and their mortgagee of their *Talook*. A dispute had arisen between them of this nature: the mortgagors had mortgaged the *Talook*, but, as they contended, excepting these lands from it, as to which they were carrying on a litigation with the purchaser of the *jote* tenure. The mortgagee, on the other hand, insisted that these lands were included in the mortgage. The suit was decided in favour of the mortgagee, and, as between him and the *Moonshees* these disputed lands were adjudged to be within the *Talook;* but as the *jote* tenant was not a party to that suit, the decision in it did not bind him. The mortgagee obtained execution of that decree, and it was under this proceeding the *Zillah* Court considered that the Appellant was dispossessed, and the possession given to the mortgagee in the year 1841. The proceedings and the decree, however, are not in evidence in this appeal. In the execution of that decree a conflict arose between the purchaser of the *jote* tenure and the mortgagee, as decree-holder, each party claiming the same lands, but the *jote* tenant being in possession.

If this title of the mortgagee could be successfully asserted against the purchaser of the *jote* tenure, it could be asserted legally in no other mode than by a regular suit instituted for that purpose, for such a possession as that of the *jote* tenant could not be changed merely in proceedings to execute a decree. This appears to have been entirely overlooked, both by the *Ameen Ramgottee Rae*, and by the *Zillah* Court in the consideration of his acts. It appears that the *Ameen* did, in effect, attempt to disturb the possession of the *jote* tenant, and that he took fresh *Kabooleats*, from the cultivators who had before attorned to the *jote* tenant under the direction of the Court. The Court, however, on the complaint of the *jote* tenant, set that matter right, and directed, in substance, the cancellation of the new *Kabooleats*. The legal effect of this Order of the Court was, to set up the original *Kabooleats*, and to restore or confirm the *jote* tenant's possession. Now, there is not only no evidence of any subsequent change of possession before the decree of the *Sudder* Court of the 18th of November, 1845, pronounced by Mr. *Reid*, but the very language of that judgment conflicts with such a supposition, for by that judgment, which was adverse to the *jote* tenant, the possession was ordered to be restored by him to the *Talookdars*. It is plain that there is no error in the language of the judgment; it is language perfectly consistent with the Order of the Court directing the second set of *Kabooleats* to be brought in, and it is also consistent with the course of practice in executing decrees. It is plain, therefore, that both Courts have fallen into error on the point of possession, and that the Appellant is perfectly correct in maintaining that he was dispossessed only by virtue of the decision which he seeks to reverse. The act of the Court which directs the cultivators to attorn is, of course, not designed to expose them to risk of forfeiture; their simple obedience to the act of the Court, in pursuance of the mode in which it executes a decree, could not be attended with that consequence; and when the Court corrected its error, it meant to restore, and did in law restore, the old possession. As their Lordships think that the possession was not, in fact, disturbed until within the period of twelve years from the institution of this suit, it becomes unnecessary to consider whether the claim would have been kept alive through the whole time by the litigation as to the execution of the decree.

The other point on which the *Zillah* Court decided against the Appellant was, that the matter was already adjudged in a suit by which he was bound. It has been stated that the original purchaser at the auction sale of the *jote* tenure, sold to one *Ramdhone Sircar*. Before this sale, he had instituted proceedings against the decree-holders under the title of the *Talook*. *Ramdhone Sircar* purchased, therefore, *pendente*

lite. He applied to be substituted in the suit, in lieu of *Juggutchunder Rae*, which application was granted. This litigation terminated in the *Zillah* Court in favour of *Ramdhone Sircar*, the *jote* tenant. From that decision *Rasmoney Dossee* appealed. On her appeal the *Sudder* Court reversed that decision. This was the decree of Mr. *Reid* of the 18th of November, 1845, which this suit seeks to set aside.

On this, *Ramdhone Sircar* instituted a regular suit against *Rasmoney Dossee* and others, claiming, in substance, the same relief which is sought by this suit. Pending that suit, *Ramdhone Sircar* died, and his three sons, *Mohemachunder Sircar*, *Anundchunder Sircar*, and *Greeschunder Sircar*, were substituted in his place on the record. Pending this litigation, the present Appellant purchased the *jote* tenure from the sons of *Ramdhone Sircar*. He applied in his turn to be substituted on the record and to conduct the suit. One of the sons, however, denied the purchase, and the Court refused the application. In a few days afterwards, the cause was decreed for the Defendants. It is alleged that the actual Plaintiffs conducted their case negligently, if not collusively. On the argument before their Lordships, the Attorney-General abandoned the case of fraud, but contended that the Plaintiff was not barred by this decision; that he was not a party to the suit; and that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; that the decision followed so promptly on the refusal to allow him to intervene, that he could not reasonably be expected in the interval either to appeal against the order refusing him leave to intervene, or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in *India* of secret collusion. Their Lordships think that the Defendants who obtained their decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter with them, should not be permitted to prevail by this objection.

The cause has not been decided in either Court on the principal point—whether the lands formed part of the *jote* tenure or of the *Talook*. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points. In the present case, the merits not having been entered into in the Courts below, their Lordships find themselves unable to dispose of the suit; and as they do not agree in the opinion either of the *Sudder* or of the *Zillah* Court, they will humbly recommend to Her Majesty that the decisions of both Courts should be reversed, and that the High Court at *Calcutta* should remand the cause for hearing in the *Zillah* Court on the issues on the merits other than the issues already decided in this Court on appeal.

Their Lordships will further recommend that the costs of the appeal be paid to the Appellant, and that it be referred to the Registrar of this Court to tax the costs of the appeal, with directions to disallow all such costs and expenses as may have been unnecessarily occasioned by the inclusion in the transcript sent from *India* of matters which he shall consider to have been improperly introduced therein, and that any taxation which may be had in *India* be regulated by the course which the Registrar of this Court may adopt.

Their Lordships have observed with regret the frequent inclusion of voluminous papers, accounts, and receipts in the transcripts printed in *India*, and sent over in that form to the Registry of the Privy Council, an evil which appears to be on the increase; and their Lordships trust

that the attention of the Courts in *India* from which appeals lie to Her Majesty, will be directed to the subject, with a view to provide a remedy for a very serious evil (*a*).

13th and 14th February, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

JOWALA BUKSH, SON OF MEETA RAM,* ... } *Appellant*,

versus

DHARUM SINGH, *alias* IMDAD ULEE KHAN; MUSSUMAT BAJAH KOONWUR and others, } *Respondents*.

Title—Compromise—Joint Family—Awards—Succession—Hindu converts to Mahomedanism—Mahomedan Law.

A Defendant in possession cannot be ousted without proof of a better title to the estate in the Plaintiff.

A compromise as to title by inheritance between Plaintiffs and another Defendant R. K. (whom the Sudder Court considered entitled to the estate) would not justify a decree for possession against J. the Defendant in possession inasmuch as (1) no question of title could be determined in the Plaintiff's suit as between the co-defendants J. and R. K. and consequently J.'s possessory title would be defeated without giving him an opportunity of contesting the title finally used against him (2) the decision in effect indirectly sustained an union of titles which could not have been directly advanced in union against J.'s possession.

Held on the evidence that the Plaintiffs had wholly failed to prove that they or their immediate ancestors were ever in possession as co-sharers since 1753.

The general rule of Hindu Law that the possession of one member of a joint family is the possession of all, does not apply where the claimant has been clearly excluded. In the latter case the possession is adverse and time will run.

Muhpal Singh v. *Gya Dutt* and *Bunseedhur and another* v. *Cheddumnee Lall* cited.

The Collector's order for mutation of names in 1843 held not to be an award of the nature contemplated by Act XIII. of 1848. The operation of that Act is limited to Awards made by the Collectors under *Regulations* VII. of 1822, IX. of 1825, and IX. of 1833.

Held that the Plaintiffs had failed to prove the legitimacy of their ancestors and the suit must fail for defect of title, independently of limitation.

The succession *inter se* of the descendants of a Hindu convert to Mahommedanism must on general principles be governed by Mahommedan Law.

Abraham v. *Abraham* (*Ante*, p. 10, IX. M. I. A., p. 195) and *Macnaghten's Principles of Hindu Law*, Vol. II. pp. 131, 132, cited and distinguished.

Quære? Whether, a Hindu family, though converted to Mahommedanism, but conforming for several generations to Hindu customs and usages, can by virtue of the retention of Hindu customs and usages, set up for itself a special and customary law of inheritance. To control the general law, if indeed the Mahommedan law admits of such control, much stronger proof of special usage would be required than had been actually given in the present case.

18th June, 1866.

THE consideration of the case was adjourned, and their Lordships' judgment now pronounced by

THE RIGHT HON. SIR EDWARD V. WILLIAMS:

This is an appeal from a decree of the *Sudder* Court of the *North-Western* Provinces, reversing a decree which the Principal *Sudder Ameen* of *Meerut* had made in the Appellant's favour, by dismissing the suit against him.

That suit was brought by *Aram Singh* (who is since deceased, but is represented on the record by the four first Respondents) and the Respondent, *Golol Singh*, to recover from the Appellant possession of the *Talook* of *Ourungabad Kaseer*, in the district of *Bolundshuhur*, with mesne profits; and to cancel and invalidate a deed of sale of that *Talook*, which was executed on the 17th of October, 1842, by *Mussumat Maha Kooer*, wife of *Tara Singh*, in favour of the Appellant's father, *Meeta Ram*.

The Appellant was in possession of the property claimed under the following title:—The *Ourungabad* estate, and also

(*a*) The transcript record (which was printed in India, under the Order in Council of the 13th June, 1853, sec. III.), contained upwards of 1000 pages, a great portion of which consisted of accounts and receipts.

* 10, Moore's I. A., p. 511.

another estate called *Chukathul*, which was situate in the Collectorate of *Allyghur*, formerly belonged to one *Roop Singh*, otherwise called *Pahulwan Ulee Khan*, who died A. D. 1753. He was by extraction a *Gujar*, a race of Hindoos common in the *Doab*, of which Professor *Wilson* says in his Dictionary, "They profess to descend from *Rajpoot* fathers by women of inferior castes." *Roop Singh*, however, became a convert to the Mahomedan faith, and thenceforth adopted the Mussulman *alias* of *Pahulwan Ulee Khan;* and the custom of bearing both a Hindoo and a Mussulman name seems to have been continued in his family. He left a son, *Lootf Ulee Khan*, otherwise *Tara Singh*, who succeeded him in the enjoyment of his property, and died without issue in 1805. He was succeeded by his widow, *Thookranee Maha Kooer*, who became, as the Appellant contends, sole and absolute proprietor of both *Talooks*, and, as such, enjoyed them for many years. In 1842 she sold the *Ourungabad* estate to *Meeta Ram* (the father of the Appellant) for Rs. 30,000, and executed to him the Bill of sale of the 17th of October, 1842, which the Plaintiffs in this suit seek to have set aside. This document was registered on the 23rd of February, 1843; and certain proceedings were had before the Collector of *Bolundshuhur*, which resulted in *Meeta Ram* being recorded, in the month of December, 1843, in the Books of that Collectorate as "*Zemindar*, *Lumbardar*, and *Malguzar*" of the whole of this *Talook*, with the exception of one village. *Meeta Ram* died in August, 1844, and on an application by his son, the Appellant, for a mutation of names, the *Thookranee* raised some objections to the validity of the deed executed by her. These, after inquiry, were overruled by the Collector, and his decision was confirmed by the Commissioner on the 21st of February, 1845. From that time, and at least up to the date of the decree under appeal, the Appellant was the registered proprietor of the *Ourungabad* estate, and in actual possession of it. *Thookranee Maha Kooer* died on the 8th of September, 1853; and the suit was instituted on the 14th of August, 1854.

The case made by the plaint, in opposition to the Appellant's title, was to this effect:—

The *Ourungabad* and *Chukathul Talooks* were both the ancestral property of *Pahulwan Ulee Khan*, who is termed "the great ancestor" of the Plaintiffs. He had three sons, *Mohun Singh*, *Tara Singh*, and *Mokund Singh*. The two latter died without issue, but *Mohun*, the youngest, left a son, *Loll Singh*, who was the father of the Plaintiffs. The first settlement of the estates after they came, by the conquest of the Provinces in which they lie, under British rule, was made in 1213 *Fuslee* (1806), when the only surviving representatives of the great ancestor were *Loll Singh* and *Thookranee Maha Kooer*, the wife of *Tara Singh*, who, by mutual consent, lived together in partnership. A summary settlement was made in 1216 *Fuslee* (A. D. 1809), with the assent of *Loll Singh*, with the *Thookranee;* but in the following year some arrears of revenue having then accrued, another inquiry was made as to the proprietorship of the estates, and both the *Thookranee* and *Loll Singh* having been declared disqualified, both *Talooks* were, by an Order of the 9th of April, 1811, placed under the management of the Court of Wards. *Gunga Ram*, the father of *Meeta Ram*, was at one time manager of both *Talooks* under the Court of Wards, and was, in 1825, succeeded by *Meeta Ram*, who was afterwards dismissed for misconduct from the management of *Chukathul*, but continued in that of *Ourungabad*, which had been transferred to the Collectorate of *Bolundshuhur*. The plaint then gives the subsequent history of the *Chukathul* estate. It alleges that *Meeta Ram* caused a document, dated the 21st of June, 1840, and purporting to be a deed of sale of that property by *Thookranee Maha Kooer* to his nephew *Nittianund*, for the pretended consideration of Rs. 50,000, to be fabricated; and on the 1st of March, 1842, obtained a fraudulent and collusive decree founded on that instrument. It shows that these transactions were afterwards impeached and set aside by a decree of the Civil Court of 26th of January, 1849, affirmed by one of the *Sudder* Court of the 19th of February,

1851; whereupon "the proprietary right reverted to its former *status*." These decrees proceeded chiefly on the ground that the estate at the date of the alleged sale was under the management of the Court of Wards, and that the disqualified proprietor had, therefore, no power of alienation. The plaint then alleges that the same objections applied to the sale of the *Ourungabad* estate to *Meeta Ram* in October, 1842, that estate being also under the management of the Court of Wards. It insists that "under these circumstances the deed of sale executed by one unqualified proprietor, notwithstanding the existence of the other heirs of the great ancestor, cannot be held to be legal." It also charges that the transaction was fraudulent, and that not a single portion of the alleged consideration money was ever paid.

The plaint having been filed, the Plaintiffs were met by the difficulty occasioned by a third claim of title. *Thookranee Maha Kooer* had been registered as the sole owner of both the *Chukathul* and *Ourungabad* estates. After the sale of the former to *Nittianund* had been set aside, she had again been recognized by the Revenue authorities as the sole owner of that estate; and when she died the question arose, who was entitled to succeed as her heir. The Collector of *Allyghur* determined this question in favour of the Plaintiffs; but this decision was overruled by the Government, which treating, apparently, the possession of the *Thookranee* as that of a sole and absolute proprietor, and the succession as governed by the Mahomedan law, determined that one *Mussumat Rutta Kooer* was, as her niece, entitled to succeed to her; and accordingly placed or continued the estate under the management of the Court of Wards for the benefit of that lady. The Plaintiffs, or rather *Aram Singh* alone, had brought a suit to contest the title of *Mussumat Rutta Kooer* to the *Chukathul* estate; and feeling that her title as alleged heiress of the *Thookranee* might embarrass them in this suit for the recovery of *Ourungabad*, they applied for and obtained leave to file a supplemental plaint, in order to make her a Defendant to this suit also. This supplemental plaint thus stated the title of the Plaintiffs:—"During the life-time of *Tara Singh*, *Loll Singh*, the Plaintiff's father, was entitled to one-half of the ancestral property; and after the death of *Tara Singh*, his wife, *Mussumat Maha Kooer*, was entitled to only one-fourth of the estate; but in consequence of her being the elder relative, her name was registered in the Collector's office by mutual consent, and the said *Thookranee*, and the Plaintiff's father, and after his death, the Plaintiffs lived together in partnership, and appropriated the produce. The registration of the name of one of the members of the family was sufficient for all the members of the family. The principal Plaintiffs being Hindoos of the *Rajpoot* tribe, the Mahomedan Pentateuch is not observed in their family; besides this, they are called by Hindoo names." And again, "The fourth share held by *Thookranee Maha Kooer* in the estate of *Tara Singh*, does not descend by custom to *Mussumat Rutta Kooer*. In accordance with the usage prevailing in their family, and by heritage, the Plaintiffs are the owners of the entire estate."

The defences set up by the answer of the Appellant, and of his mother, who was joined with him as a Defendant, are reducible to the following heads: first, that the *Thookranee* having been in sole possession of the property up to the date of the sale to *Meeta Ram*, to the exclusion of the Plaintiffs and their father, their suit was barred by Regs. II. of 1803, sec. 18, and II. of 1805, sec. 3, the general Regulations of Limitation; secondly, that the claim of *Loll Singh* and of the Plaintiffs having been rejected by the Revenue authorities in 1838 and 1843, the present suit was barred by Act, No. XIII. of 1848, without reference to the other Regulations of Limitation; thirdly, that the Plaintiffs' grandfather, *Mohun Singh*, and their father, *Loll Singh*, were both illegitimate, the former being the son of a slave girl; the latter, of a female minstrel; fourthly, that *Loll Singh* was never in joint possession and enjoyment of the property with the *Thookranee*; that the revenue settlements were made with her alone; and that she was, in fact, sole proprietor

of the estate, and registered as such, not as one of several co-sharers; fifthly, that the *Ourungabad* estate, at the time of the sale to *Meeta Ram*, was no longer under the management of the Court of Wards, and sixthly, that there was no fraud in that transaction, and that the purchase-money was really paid.

There is a good deal of other matter in the answer, but it is more in the nature of evidence pleaded in support of one or other of the above allegations, than of matter raising other and distinct issues.

The replication insisted that the Plaintiffs and their father possessed and enjoyed the property jointly with the *Thookranee;* that the registration in the name of the latter afforded no conclusive presumption against that joint possession; and that these facts were both an answer to the plea of the Regulations of Limitation, and gave the Plaintiffs a present title to the property. It sought to explain the revenue settlements with the *Thookranee* by saying that they were made with her as the elder relative or member of the family. And it met the plea of Act, No. XIII. of 1848 by saying, that the present suit was not brought for reversal of the settlement and Orders under the provisions of Regulations VII. of 1822, IX. of 1825, and IX. of 1833, but for reversal of the sale to *Meeta Ram* within the period of twelve years.

The other pleadings are not of importance. It may be mentioned, however, that those between the Plaintiffs and *Rutta Kooer* raised more distinctly the question, whether the succession to this property from the great ancestor and from the *Thookranee*, was to be governed by the Hindoo or by the Mahomedan law of inheritance; the Plaintiffs insisting on the application of the former.

It has been mentioned that *Aram Singh* had brought a suit against *Mussumat Rutta Kooer* for the recovery of the *Chukathul* estate. The issues raised in that suit were necessarily almost identical with those raised in this suit between the Plaintiffs and *Rutta Kooer*. And in so far as they involved the questions of the legitimacy of the Plaintiffs' father and grandfather, the nature of the interest which *Thookranee Maha Kooer* had in both the *Talooks* in her life-time, and the heirship to her, they were also similar to the issues to be tried between the Plaintiffs and the Appellant. This being so, the suit for *Talook Chukathul* was by Order of the *Sudder* Court, transferred from the Civil Court of *Allyghur* to that of the Principal *Sudder Ameen* of *Meerut*, in which the suit for *Ourungabad* was pending. Both causes were heard together, and the evidence, common to both, was taken in both. On the 29th of August, 1856, the Principal *Sudder Ameen*, by separate judgments, dismissed both suits. His conclusions upon the issues common to both were stated at length in the judgment in the *Chukathul* case. He found that neither the father nor the grandfather of the Plaintiffs was legitimate; that neither the Plaintiffs nor their father had been joint in estate with *Thookranee Maha Kooer;* and that, by reason of her long and adverse possession, the claim was barred by lapse of time. He also held that the succession to the *Thookranee* was determinable by the Mahomedan, and not by the Hindoo law, and that accordingly *Mussumat Rutta Kooer* was her heir and representative. And having thus found the Plaintiffs to be the heirs neither of *Pahulwan Ulee Khan*, nor of *Thookranee Maha Kooer*, "but to be entire strangers, not having any concern with the estate," he deemed it unnecessary to inquire into the genuineness or otherwise of the deed of sale of the 17th of October, 1842.

Aram Singh and his brother appealed to the *Sudder* Court against both these decisions. Pending these appeals a compromise was entered into between *Aram Singh* and *Golol Singh* on the one part, and *Mussumat Maha Kooer* on the other; the effect of which was that they were to divide the *Chukathul* estate, and the *Ourungabad* estate if it could be recovered, in certain proportions; and a decree was made by consent, in the *Chukathul* suit, on the 5th of December, 1861, giving effect to this compromise. The *Sudder* Court, on the 25th of December, 1861, heard the appeal in this suit; and on that occasion, after adverting to the compromise, and without coming to any conclu-

sion concerning the Plaintiffs' title, it proceeded to consider whether the deed of the 17th of October, 1842, was illegal and without consideration. It determined this question against the Appellant, mainly on the ground that at the date of the deed, *Talook Ourungabad*, like *Talook Chukathul*, was under the Court of Wards. But it also held that the payment of the consideration was not proved, and that the relation of *Meeta Ram* to the *Thookranee*, and his antecedents, afforded certain presumptions of fraud. It accordingly decreed possession of the property, with mesne profits, to the Plaintiffs and *Mussumat Rutta Kooer*, in the terms of the deed of compromise; meeting the objection made by the Appellant's *Vakeel* that it lay on the Plaintiffs first to prove their title, by referring to the compromise and to the decree passed thereon in the former suit, and by observing that "it would indeed be but an idle and unprofitable prolongation of litigation to dismiss the suit of *Aram Singh* only to enable *Mussumat Rutta Kooer* to sue the Appellant for that which she was willing to share with *Aram Singh*."

Their Lordships are of opinion that this decree of the *Sudder* Court cannot be supported. The Appellant was in possession of the estate. He and his father had held continual possession of it from December, 1843, if not from October, 1842. His own possession of it had been unquestioned since February, 1845, when he was recorded as the proprietor of it. It was essential, therefore, for any party seeking to oust him from that possession to show a better title to the estate, *i. e.*, a title which would give the Claimant a right to the estate failing the title impeached. The judgment of the *Sudder* Court assumes that the title set up by the Plaintiffs may be wholly bad; but it says, if they are not entitled to recover the estate on showing that the Appellant's title is bad, *Mussumat Rutta Kooer* would be so entitled; and as they have agreed to divide the spoils with her, it matters not on which title the property is recovered. The title of *Mussumat Rutta Kooer* could not be tried between her and the Appellant in this suit. The effect, therefore, of the judgment is to defeat the Appellant's possessory title, without giving him an opportunity of contesting the title of the party by whom he is turned out of possession. Their Lordships cannot give their sanction to this course of proceeding, which appears to them to be in violation of the legal principles which protect possession, as well as of the substantial principles of justice which regulate the joinder of parties and union of titles to sue in one suit. The decision, in effect, sustains an union of titles indirectly, which could not have been directly advanced in union against the Appellant's possession. It is difficult to estimate the full weight of the grave dangers to which so irregular a course might expose possession. They conceive that the first question which the *Sudder* Court ought to have decided, and which must now be decided on this appeal, is, whether the Plaintiffs have shown any title to this property.

In the determination of this question, the first material issue of fact to be considered is, whether, as the Plaintiffs allege, *Loll Singh*, and afterwards the Plaintiffs themselves, were in the possession and enjoyment of the property jointly with *Thookranee Maha Kooer*, or whether her admitted possession was in exclusion of them. Upon the determination of this issue depend not only a material link in the title laid, but also the application of the Law of Limitation to the case, and various presumptions that have an important bearing on the solution of other questions raised in the cause, particularly that of the legitimacy of the Plaintiffs' line of descent.

That the *Thookranee* was in her time the sole recorded proprietor of the *Talooks* is incontestable. This, in an ordinary case, might be a circumstance of little moment; because it has been ruled, and is consistent with reason, that one member of a joint Hindoo family may be so recorded on behalf of the family. But in the present case arises the question, why the name in which the property was recorded should be that of the female rather than that of the male member of the family, particularly when, upon the application of the ordinary Hindoo law to the facts as stated by the

Plaintiffs, that male member (*Loll Singh*) would, upon his uncle's death, have been entitled to the whole estate, and the female member (the *Thookranee*) would have had only a right to maintenance. It is no satisfactory answer to this question that this was done because the *Thookranee* was the elder member of the family; for it appears on the evidence that she was, in fact, younger in years than *Loll Singh*, and whether young or old, she was equally excluded by the Hindoo law from the inheritance to her husband's share in joint and ancestral property.

This recognition of her, therefore, as apparently sole proprietor, raises a presumption against the case of joint possession and enjoyment set up by the Plaintiffs.

Again, the broad facts deducible from the documentary evidence, so far from rebutting, positively confirm this presumption. The first settlement of both *Talooks* was made after inquiring into the title with the *Thookranee* in 1809. Two years afterwards, the revenue being in arrear, both *Talooks* were placed under the Court of Wards as "the estate of the widow of *Tara Singh*." In the proceeding of the Collector of the 10th April, 1811, by which this was done, there is no mention of *Loll Singh*. The assumption of the estate by the Court of Wards would have been irregular under sec. 4 of Reg. LII. of 1803, if there had been then any co-proprietor not disqualified under sec. 3 of that Regulation. That *Loll Singh* was disqualified, by mental incapacity or otherwise, under that section, or had been declared to be so, there is not the slightest proof. The only foundation for the suggestion that he had been declared disqualified seems to be a loose statement in the Deputy Collector's letter of the 2nd of March, 1811, which, assuming *Loll Singh*, to be the heir of the *Thookranee*, says, that he is not qualified (and as such he could not be qualified) to have a settlement made with him.

Again, though *Talook Chukathul* remained under the custody of the Court of Wards, *Talook Ourungabad* was released from that custody some time about the year 1833. In 1833 a new settlement of *Ourungabad* was made with the *Thookranee*. In the Collector's proceedings it is stated that she then claimed the entire *Zemindary*, and asserted that there was no co-sharer of the estate who could call for division. A similar statement appears in the proceedings of the Collector of the 5th of September, 1836, which extended the settlement. A further extension of the settlement took place in 1839.

In 1837 we have evidence of his exclusion from *Loll Singh* himself. In December of that year, and again in April, 1838, he presented petitions to the Collector of *Allyghur*, praying for an investigation of his right as a co-sharer in *Chukathul;* treating the *Thookranee* as in possession, and himself as poor, destitute, and excluded by her. On the 10th of July, 1838, a proceeding was had before the Collector. In this it is distinctly stated that neither the Claimant nor his father, *Mohun Singh*, were ever in possession of the estate. The illegitimacy of the *Loll Singh's* descent was also a point distinctly raised by the *Thookranee* on this occasion. The result was that the claim was dismissed, and *Loll Singh* referred to the Civil Court for the assertion of his alleged rights. In September, 1841, he applied to the Principal *Sudder Ameen* for leave to sue *in formâ pauperis* for a moiety of both the *Chukathul* and the *Ourungabad* estates. His right to sue *in formâ pauperis* was contested by the *Thookranee*, who, in her petition to the Court, repeats her objections to his title, as well as the grounds on which she sought to dispauper him. Nothing came of the suit, if it was really instituted, and *Loll Singh* died in 1842.

Again, the proceedings of the Collector of the 9th of December, 1843, on the application of *Meeta Ram* to be recorded as purchaser and *Lumbardar* of *Ourungabad*, on which occasion *Aram Singh* and others appeared as objectors, is also inconsistent with the theory that the Plaintiffs were from the time of *Loll Singh's* death to the date of the sale in the possession and enjoyment of the property as co-sharers with the *Thookranee*. On the application for the mutation of names in 1846, they did not even appear as objectors, leaving the contest to the *Thookranee*, who resisted it in the character of sole proprietor.

The petition of *Aram Singh* touching his under-tenure is also consistent with the theory that *Mohun Singh*, *Loll Singh*, and the Plaintiffs were treated as illegitimate relations and dependants of the family. It is inconsistent with the theory that they were ever admitted to the rights of co-sharers in a joint ancestral estate. The proceedings also, which resulted in setting aside the sale of *Chukathul*, and are so strongly relied upon for another purpose, are destructive of this part of the Respondents' case. These proceedings were instituted by and with the authority of the Court of Wards, the Collector, on the part of Government, being a party; and the result of them was to replace the Court of Wards in possession of the estate on behalf of the *Thookranee*. Yet, as has been shown above, the possession of the Court of Wards would have been wholly irregular, had *Aram Singh* and his brother then been co-sharers in that estate. The Plaintiffs, therefore, have upon the evidence wholly failed to prove that they or their immediate ancestors were in possession or enjoyment of this property as co-sharers at any time during the tenure of *Thookranee Maha Kooer*, or indeed at any time since the death of "the great ancestor," in 1753.

The Counsel for the Respondents, when pressed by this difficulty, had recourse to a theory that the property was in the nature of an impartible *Raj*, and was, therefore, held by the elder to the exclusion of the junior branch of the family. But, to say nothing of the absence of any evidence of the existence of this supposed tenure, and of its inconsistency with the title set up by *Loll Singh* in 1837, and now pleaded by the Plaintiffs in this suit, it is obvious that though the theory might explain the enjoyment of the property by *Tara Singh* in exclusion of *Mohun Singh*, and afterwards of *Loll Singh*, it would afford no explanation whatever of its enjoyment by *Thookranee Maha Kooer* in exclusion of *Loll Singh* and his sons. For, by the Hindoo law, *Loll Singh*, if the legitimate male heir of the great ancestor, would have taken the *Raj* on the death of his uncle, *Tara Singh*, to the exclusion of the widow, the property being assumed to be ancestral, and the family undivided. In the case of *Katama Natchier* v. *The Rajah of Shivagunga* (*ante*, p. 25, 9, Moore's I. A., 539), it was admitted that this would have been the course of descent according to the *Mitacshara*, if the property had been ancestral. The reason why in that case this Committee, overruling the decision of the Court below founded on the opinion of the *Madras* Pundits, preferred the title of the daughter to that of the nephew of the last possessor, was, that the *Shivagunga Raj* was the separate acquisition of the deceased, and, therefore, passed according to the Canon which regulates the descent of separate property, and not according to that which determines the succession to the joint or ancestral property of an undivided family.

The facts relating to the possession of the property having now been determined, it may be convenient next to dispose of the questions arising under the different Regulations of Limitation which were so much debated at the Bar. Their Lordships are of opinion that no ground has been shown for the application to this suit of the statutory bar of three years under Act, No. XIII. of 1848. The operation of that Act is limited to Awards made by the Collectors under the Regulations VII. of 1822, IX. of 1825, and IX. of 1833, which gave to the revenue authorities judicial power to determine certain questions of possession and other matters, with a right of appeal to the regular Courts against their Awards. That right of appeal is by the Act of 1848 subjected to the three years' limitation. But the order for the mutation of names in the Register in 1843, to which alone it is important to apply the three years' bar, does not seem to be an Award of the same nature with those contemplated by the Act. Nor, in their Lordships' opinion, could the Award of the Collector conclude any of the questions of title, as distinguished from possession, which are raised in this suit. These, therefore, can only be affected by the general law of Limitation. The applicability of that law to the present case depends very much upon the nature of the title on which the Plaintiffs are to be taken to rely. If they are to be

taken to sue as the heirs of *Thookranee Maha Kooer*, to set aside a conveyance obtained from her by fraud, their right of action accrued at the date of the conveyance, and their suit was just within even the twelve years' limitation. If they are to be taken to sue as the next heirs of her husband, to set aside a conveyance which, whether fraudulent or not, she, considered as a Hindoo widow, was incompetent to execute, their right of action accrued at the date of her death, and this suit was *à fortiori* within the legal period of twelve years. But, in so far as their title was adverse to that of *Thookranee Maha Kooer*—and it is difficult to treat the title laid as not being of that nature—the facts proved touching her possession show that the claim is obnoxious to the objection that it is barred by lapse of time. The general rule, that the possession of one member of a joint Hindoo family is the possession of all, does not apply where the Claimant has been clearly excluded. In the latter case the possession is adverse, and time will run. The cases of *Mukpal Singh* v. *Gyadutt*, 1854, and *Bunseedhur and another* v. *Cheddumnee Loll*, 1852, in the decisions of the *Sudder* Court of *Agra* for those years respectively, are instances of the general rule, and of the exception.

It is unnecessary, however, to invoke the Regulations of Limitation if the Plaintiffs have failed; as their Lordships think they have failed, to establish the legitimacy of either *Mohun Singh* or *Loll Singh*. That is an objection fatal to their title, in whatever character they are taken to sue. It has been seen that the illegitimacy of these persons was alleged by the *Thookranee* certainly as early as 1837. Oral testimony of it, whatever that may be worth, has been given by the Appellant in this suit. The Plaintiffs have given no evidence of the legitimacy of their ancestors. They seem to rest on certain vague statements and admissions in the earlier Revenue proceedings, to the effect that *Loll Singh* was the grandson of the great ancestor, and the heir of the *Thookranee*. The presumption of their illegitimacy is almost irresistible. There is nothing to show why, if they were legitimate, *Mohun Singh*, and, after his death, *Loll Singh*, did not share the property with *Tara Singh*; or why, on *Tara Singh's* death, *Loll Singh* did not succeed to it. On the other hand, the dévolution of the property and all the facts proved concerning their exclusion, and the sole possession of the *Thookranee* in succession to her husband, are consistent with the hypothesis that they were legitimate; and, as illegitimate connections of and dependants on the family, received, by means of their under-tenure or otherwise, support and maintenance, and were to a certain extent recognized as relations.

The case has hitherto been treated upon the assumption, which the Plaintiffs seem to have made part of their case, that this family, though converted to Mahomedanism, is to be taken as still conforming to the Hindoo laws and usages; and that, consequently, the questions of title raised in this cause are to be governed by Hindoo law. Their Lordships, however, are far from admitting the correctness of that assumption.

This case is distinguishable from that of *Abraham* v. *Abraham* (*Ante*, p. 10, 9 Moore's I. A. Cases, p. 195.) There the parties were native Christians, not having, as such, any law of inheritance defined by Statute; and in the absence of one, this Committee applied the law by which, as the evidence proved, the particular family intended to be governed. But the written law of *India* has prescribed broadly that in questions of succession and inheritance the Hindoo law is to be applied to Hindoos, and the Mahomedan law to Mahomedans; and in the judgment delivered by Lord *Kingsdown*, in *Abraham* v. *Abraham*, *ante*, p. 15, it is said that "this rule must be understood to refer to Hindoos and Mahomedans, not by birth merely, but by religions also." The two cases in *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. II. pp. 131, 132, which deal with the case of converts from the Hindoo to the Mahomedan faith, and rule that the heirs according to Hindoo law will take all the property which the deceased had at the time of his conversion, are also authorities for the proposition that the devolution of his subsequently acquired property is to be governed by the Mahomedan law. Here

there is nothing to show conclusively when or how the property was acquired by "the great ancestor." There was no conflict, as in the cases just referred to, between Hindoos and Mahomedans touching the succession to him. Whatever he had is admitted to have passed to his descendants, of whom all, like himself, were Mahomedans; and it seems to be contrary to principle that, as between them, the succession should be governed by any but Mahomedan law. Whether it is competent for a family converted from the Hindoo to the Mahomedan faith to retain for several generations Hindoo usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance, is a question which, so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide that question in the negative, and their Lordships abstain from doing so. They must, however, observe, that to control the general law, if, indeed, the Mahomedan law admits of such control, much stronger proof of special usage would be required than has been given in this case.

The title advanced by the Respondents, the Plaintiffs in this suit, is that of Hindoo heirs claiming under a Hindoo title, and it is not necessary, therefore, for their Lordships to give any opinion upon the question how the case would have stood if the Plaintiffs' title had been vested upon the Mahomedan law; but as this view of the case was put forward by the Respondents' Counsel, in the course of his argument, their Lordships may observe that it does not seem to them that the Plaintiffs' case would have stood any better under the Mahomedan than under the Hindoo law, for, according to Mahomedan law, *Mohun Singh*, if legitimate within the wide sense allowed by that law to the term, would have taken an equal share with *Tara Singh* in the inheritance of "the great ancestor," and *Loll Singh*, if legitimate, would have succeeded to his father's share, and would also, on *Tara Singh's* death, have come in as "residuary" for a portion of his uncle's share; and the proved exclusion of *Mohun Singh* and of *Loll Singh* would raise as strong a presumption of their spurious birth as has been already shown to prevail against the Plaintiffs' title, as rested upon the Hindoo law.

The Plaintiffs having thus failed to establish a title to the property, their Lordships do not think it would be right to express a judicial opinion upon the validity of the sale to *Meeta Ram*. They will only observe that the principal ground on which that transaction was impeached by the *Sudder* Court entirely fails; Mr. *Leith* having fairly admitted that on the evidence the *Ourungabad* estate must be taken to have been released by the Court of Wards long before the date of the sale. It may also be doubted whether sufficient weight was given to the proceedings before the Collector in 1843 and 1845. The transaction is not impeached as a purchase obtained by undue influence for inadequate consideration, but as one by which the property was obtained, under colour of a fictitious sale, for no consideration at all. It seems improbable that so gross a fraud should have escaped detection on either of the two local investigations referred to.

Their Lordships' decision, however, is to be taken to proceed wholly on the Plaintiffs' failure to prove a title to the property; and the Order which they will humbly recommend Her Majesty to make is, that the appeal be allowed; that the decree of the *Sudder* Court be reversed; that the decree of the *Zillah* Court, dismissing the Plaintiffs' suit, do stand; and that the costs of this appeal be paid by the Respondents.

17th, 19th and 26th February, 1866.

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

NAWAB SIDHEE NUZUR ALLY KHAN,* ... } *Appellant,*

versus

RAJAH OJOODHYARAM KHAN, ... } *Respondent.*

Objection in bar—Allegations in plaint—Limitation—Fraud—Jurisdiction—Supplemental suit.

In dealing with an objection in bar to a Plaintiff's suit before a trial on the facts, the Court is bound to assume the truth of the allegations contained in the plaint.

The general period of limitation, twelve years, is inapplicable where the possession and title of the Defendants are alleged in the plaint to be founded on fraud.

In the case of a fraudulent sale under Act I. of 1845 by the Mortgagee's representative in possession, that Act did not apply so as to defeat the Mortgagor's equity of redemption such a sale was to be considered as a private sale, and impressed a trust on the estate which passed under it. The limitation provided by sec. 24, Act I. of 1845 was inapplicable in such a case.

The mere pendency of a suit in the Supreme Court does not operate as a bar to the prosecution of a suit in a Mofussil Court intended to be simply in furtherance of and supplemental to the suit in the Supreme Court.

17th March, 1866.

JUDGMENT was reserved, and now delivered by—

THE RIGHT HON. SIR EDWARD V. WILLIAMS:

After stating the above facts, his Lordship proceeded as follows:—

Before entering upon the particular questions raised by this appeal, it may be right to observe, that the Courts in *India*, in disposing of the case, were bound to proceed, as the High Court appears to have proceeded, upon the facts alleged by the plaint, and upon the assumption of the truth of those facts. When a Plaintiff, on certain alleged facts, asks relief, and is unable to obtain a trial of the facts, and a hearing on the facts that he may establish, by reason of the conclusions of law which the Judge forms on the case in its then condition, justice requires that the Court should proceed upon the Plaintiff's allegations. The case must be determined as if it had arisen on a demurrer to a pleading or to evidence where such procedure exists. Courts cannot be justified in refusing to allow cases to go to proof upon any other assumption than that the facts alleged are capable of proof, and are proved. This assumption of the truth of the facts alleged must, however, be limited to the consideration of the legal effect of the facts alleged upon the bars raised against the trial of those facts, and their Lordships, therefore, abstain from expressing any opinion upon the points urged at the Bar, which do not arise out of the Plaintiff's pleadings and documentary proofs, or which, if they arise, are not necessary to the decision of this appeal. Observations were made by Mr. *Leith* upon the omissions in, and nature of, the answers put in by the Defendants to the Respondent's plaint; but their Lordships, for the above reasons, do not think it right to refer to those observations. The answers can only be looked at for the purpose of ascertaining whether they raise the legal bars insisted on. Throughout the following observations their Lordships must be understood to proceed upon a hypothetical case of fraud, and to express no opinion on its truth or probability.

The first bar to the Plaintiff's claim set up by the Appellant was that of limitation of suit by effluxion of time. The first period of limitation insisted on by the Appellant was that under Act, No. I. of 1845, sec. 24. That objection necessarily supposed the suit to be brought to set aside the revenue sale; this remedy, however, the suit did not seek, but, relying on the agreement of the 15th of April, 1848, antecedent to the sale, the Plaintiff

* 10, Moore's I. A., p. 540.

claimed a right, as it were, to confess and avoid that sale, by imposing a trust on the estate which passed under it. The question, therefore, as to this period of limitation is, whether the Plaintiff is well founded in claiming the right thus claimed by him, in effect whether the Plaintiff can treat the auction sale, as against those Defendants who rely on it, as a private sale. Before dealing with this point, however, it will be convenient to consider the other period of limitation on which the Appellant relies as a bar, the general law of limitation of twelve years. As to this, it is sufficient to observe that on the allegations in the plaint that bar cannot be set up; for the title and possession of the Defendants against whom the redemption is prayed by this suit, is expressly alleged to be founded on fraud. This period of limitation, therefore, may be laid out of the case; and we come then to what has appeared to their Lordships to be the real question in the case (the question to which we have above referred), whether the Plaintiff can, in point of law, insist, notwithstanding the auction sale for arrears of revenue, that as against him, that sale ought to be viewed as a private sale. The title to redeem in this suit as against the parties subsequent to *Abbott* is rested on that ground, and the case which the Plaintiff alleges by his plaint, and by the documentary proof appended to it, is one of fraud between *Abbott* and *M'Arthur*, to deprive him of his title to redeem the *Zemindary*, by means of a secret purchase of it between them for three *lacs* of Rupees, including a fraudulent device of a sale by auction for arrears of revenue, such arrears to be designedly incurred. By that agreement *Abbott* would become directly interested that the estate should sell for a low price, since the proceeds would be subject to the Mortgagor's claim, and the lower the price obtained at the auction sale, the larger the share would be which *Abbott* would take of the three *lacs*. Parties to a secret fraud intend it to be secret, and the price realized at the auction sale would alone be known. These facts and conclusions are directly taken and derived from the plaint, and the agreement of the 15th April annexed to it, and from *M'Arthur's* examination before the Supreme Court, which are all parts of the Plaintiff's proofs.

If these facts cannot be displaced, the agreement was undoubtedly a gross fraud on the Mortgagor, committed by both the actors in it, viz., *Abbott* and *M'Arthur*. But it was argued that even if this case were true, the remedy under the Act I. of 1845 was for damages only. This argument was in conformity to the opinion of the *Zillah* Judge. But it is to be observed that this argument assumes the very question under discussion, which is, whether the Act extends to the present case. Mr. Justice *Bayley* thought that the Act was not designed to protect a fraudulent purchaser. He put his decision on the ground that a man is not allowed by law to take advantage of his own wrong; and he treated the case of such a purchaser as beyond the protection intended to be given by the Act to purchasers under an auction sale.

No authority founded on the decisions of the late Company's Courts was referred to by the Judges of the High Court, and none such has been quoted before their Lordships on the argument of this appeal. The case is, however, not altogether new in *India*. The question was considered in the decision of the Supreme Court in the cause so often referred to, to which this suit is alleged to be supplemental. Mr. Justice *Colvile*, in that judgment, whilst he declares a Government sale for arrears of revenue to give a title against all the world, with certain exceptions, engrafts on that general rule this exception, that a fraudulent purchase at such auction sale by a Mortgagee will not defeat the equity of redemption. The subject is treated in Mr. *Arthur Macpherson's* Book on Mortgages, at p. 91, who there quotes a prior decision, *Kelsall* v. *Freeman*, of the Supreme Court to the same effect. The author, now a Judge of the High Court at *Calcutta*, expresses a similar opinion, and as his Book is one well known and frequently consulted in *India*, the decision under review cannot be regarded as unsettling a previously settled state of the law, and as raising for the first time an exception to the general protection which

this legislative title affords to purchasers. In support of this view we may refer to other authorities. In the celebrated opinion of C. J. *De Grey* in the House of Lords, in *The Duchess of Kingston's case* (*a*), he says, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled." "Fraud," his Lordship proceeds to state, "is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord *Coke* says, it avoids all judicial acts, Ecclesiastical or Temporal." The Chief Justice then proceeds to state that fines and recoveries may be avoided for covin by strangers, and gives other illustrations of the same principle. The case of *Collins* v. *Blantern* (2 Wils. 341) is an authority to show, if any were needed, that a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is. In addition to these authorities, it may be observed that the principle embodying this distinction pervades the law. Under sales in market overt, the purchaser acquired a title against all the world; but this protection did not extend to a fraudulent buyer who knew that the seller had no real authority to sell. If the thief who sold in market overt repurchased the article, the defrauded owner could then assert his title against such reacquisition. See *Viner's* Abr. tit. "Market Overt," A 1. In *Bacon's* Abr. tit. "Fraud," p. 768 (*Gwillim* and *Dodd's* edition), it is said, "If goods are sold in market overt by covin between two, on purpose to bar him that has right, this shall not bar him thereof. 2 Inst. 713, *Cro. Eliz.* 86." The same principle applies to Bills of Exchange and other negotiable instruments, made or which become payable to bearer, and pass by delivery.

Again, a title by stoppel is a well-known title. The doctrine that a man cannot take advantage of his own wrong, as used and applied by Mr. Justice *Bayley* to this title to redeem, is a correct application of that doctrine, if the facts support him. Assuming, as we must, the agreement to be proved, was this sale, as between *Abbott* and *M'Arthur*, really meant to be a sale under the Revenue laws for arrears of revenue, or was it a device—part of the machinery, as it were—to effect a fraud? Under a private conveyance, in the state of the title and of these parties, the estate, if conveyed by *Abbott* to *M'Arthur*, would have been redeemable by the Plaintiff. If the sale were intended to have been a real sale under the Revenue laws, what would have been *Abbott's* interest? His estate would have been extinguished, and all that he would have been entitled to would have been a Mortgagee's interest in the surplus of the money realized by the sale over the arrears. Would a real vendor seek to reduce that surplus? The price was a fixed sum of three *lacs;* the parties contemplated a sale under that sum by the auction proceeding; and it may be well to repeat that it was *Abbott's* interest to cause, as far as he could cause it, that the auction price should be low, since, though the auction sale was public, his agreement was not known to the Mortgagor. What, then, if the sale were to be real, could be the consideration which *M'Arthur* was to receive for the excess of the three *lacs* over the auction price? The estate would have passed to him for the lesser sum. This suffices to show that, as between them, the sale was meant to be under the terms of the agreement in the case that has happened, which was a case contemplated by *Abbott* at least. These parties, therefore, are estopped or precluded by their acts from setting up, as against a third person, the Mortgagor, the object of their fraud, and a stranger to the agreement, the illegality of the agreement itself. The Plaintiff is entitled to say, this agreement is the real contract. Two cases decided by the House of Lords upon the effect of the Sale of Encumbered Estates Act for Ireland, *Rorke* v. *Errington* (7 H. L. Cases, 677,) and *Power* v. *Reeves* (10 H. L. Cases, 645,) were referred to by the Appellant's Counsel, in sup-

(*a*) Howell's State Trials, Vol. 20, p 544.

port of the Appellant's case, but it is sufficient to say that these were not cases of a fraudulent use of the provisions of an Act of Parliament for effecting a fraudulent purpose. They do not appear to their Lordships in any way to affect the present case.

The various questions that have been put in the course of the argument, of notice, of knowledge, of purchase by an innocent principal through a fraudulent agent, need not here be answered. They do not arise on the facts before us. Those facts may not be the real facts. Any opinion expressed upon these points would be not merely an *obiter dictum*, it would be by anticipation an opinion hazarded on supposed facts, and evidence, if the cause be still untried, might be made to fit them.

This decision proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to interests derived under a real auction sale. The opinion of their Lordships upon this point disposes of the first bar of limitation by effluxion of time under Act, No. I. of 1845.

The questions remaining for consideration are, whether the pendency of the suit in the Supreme Court, or the nature of the decree, or any acting under that decree, present a bar to the prosecution of the suit, which the decree under appeal has remanded for trial on the facts. The mere pendency of the suit cannot operate as a bar, since the suit in the *Zillah* Court was intended to be simply in furtherance of and supplemental to it. The nature of the decree requires more consideration. Had that decree been one which could not have been modified or varied by further proceedings in the Supreme Court itself, in the nature of a supplemental suit on the new matter discovered since the decree, the objection might have been tenable; but the law of the Court is otherwise. Had the *Nawab* and the parties Defendants subsequent to him been subject to the jurisdiction of the Supreme Court, the relief which is now sought to be obtained against them in the *Zillah* Court might have been prosecuted by a further suit, in the nature of a supplemental suit, properly constituted in the Supreme Court. The decree, as to the account and the inquiries directed as to alienated lands, might upon the new facts have been varied there, and the same relief may be obtained in this suit. The Defendant in possession is charged in substance as assignee of the mortgage, and in that character redemption is prayed against him. The relief is subject to the same conditions and equities which would have attached to it in the Supreme Court.

It would be unjust to exclude the relief by reason of mere personal exemption from the jurisdiction of the Supreme Court. To rely on this bar would be to plead an impediment against a suit instituted to remove it. The direction to inquire as to the alienated lands, and the relief consequent on that inquiry, are introduced for the benefit of the Mortgagor, in case the pledge should turn out to be irrecoverable through the fault of the pledgee. Such relief in this case is in the nature of compensation for a wrong. If it be subsequently discovered that the pledge can be restored or recovered, the Mortgagor may waive that benefit, and prosecute his right as to the thing itself. Lastly, with reference to the dealing under the decree, it is to be observed, that the mere prosecution of an inquiry, especially under a mistaken impression, would not raise a case of election, or amount to a waiver of a tort. This is all that the facts alleged disclose. They disclose that, at the time of the decree, the estate was supposed to be irrecoverable, and that the Court, in directing the inquiries which it directed, acted on that impression. They do not disclose what has been done in the way of satisfaction under the decree. The case alleged in this suit is one of fraudulent misdealing with the property pledged. The case of *Hope* v. *Liddell* (21 Beav. 183,) quoted by the Attorney-General, was not a case of fraud. The observations of Lord *St. Leonards*, quoted by the Master of the Rolls, relate to a *bonâ fide* purchaser for value, and to the proper mode of working out his equity against that of a Plaintiff whose property has been alienated by mistake.

The facts in the case of *Hope* v. *Lid-*

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dell differ widely from the alleged facts in the case under appeal; and the grounds on which that decision proceeded do not exist in this case, as it now appears. In the case of *Hope* v. *Liddell*, the original Testator, Dr. *Spencer*, devised the lands in dispute to one *Thompson*, a Trustee, on certain trusts. *Thompson* devised all his estates by general words, to his sister, *Grace Thompson*. This devise was erroneously supposed to pass the trust estate, which really went by descent to the heir-at-law of the Trustee. One of the *cestui que trusts* contracted to sell the estate to the Defendant, *Liddell*. The sale was perfectly *bonâ fide* on both sides. The price was adequate, and was paid. It was paid by the purchaser into the hand of the *cestui que trusts* by the direction of the supposed Trustee, *Grace Thompson*. The purchaser was by the trust deed not required to see to the application of the purchase money. The Court said, that if *Grace Thompson* had really been the devisee in trust, as she was supposed by all to be, the transaction could not have been impeached. The defect was the want of the legal estate. On the second question in the cause, the Court found that the children, the objects of the trust, had, with full knowledge of all the circumstances and of their rights, taken the purchase money in lieu of the land. In this case, however, at the time of the decree in the Supreme Court, it was supposed that the land was gone irredeemably. In that state of belief there could have been no matters between which to choose. Afterwards, when it was discovered that the auction sale had been contrived under the agreement of the 15th of April, 1848, a new state of facts appeared. The matters between which to elect would then have been the land, and the full price the three *lacs*, not simply the auction price. Nothing appears further on the alleged facts, except that the inquiry before the Master went on; but that it might well do, subject to final correction and due adjustment. There is no ground, therefore, for applying the decision of *Hope* v. *Liddell* as an authority to govern this case in the present state of the facts.

The same cause which has induced their Lordships to refrain, in the earlier part of this judgment, from expressing an opinion upon the law applicable to an unascertained state of facts, operates also here to induce reserve. Distinctions may exist between claims of this nature, founded on actual fraud by a combination between several wrong-doers, all liable to make satisfaction up to one, complete satisfaction for the injury done, between whom there may be, *inter se*, no right to contribution, and remedies founded on contract, or converted by the choice of the sufferer into claims *ex contractu;* but, for the reasons already given, this subject cannot now be pursued further. Their Lordships will humbly recommend to Her Majesty that this appeal be dismissed with costs.

27th February and 1st March, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

MUDHUN MOHUN DOSS, agent of the firm of DWARKA DOSS and MUDHOBUN DOSS,* ... *Appellant,*

versus

GOKUL DOSS,... ... *Respondent.*

Practice—Unlawful attachment, Resistance to—Damages—Costs.

In actions of *tort* the Plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action.

A man is not bound to give effect to a wrongful invasion of his possession even when the invasion is under color of legal process.

After a wrongful attachment the Plaintiff was not bound to accept the permission alleged to have been given to him to use his own property; nor would the right of action be lost, if the permission had been accepted.

* 10, Moore's I. A., p. 563.

Bayliss v. *Fisher* (7 Bingh., 153) cited and approved.

Held that under such circumstances the Plaintiff's suit had been improperly dismissed and that he was at the very least entitled to nominal damages.

The Privy Council being of opinion that the Plaintiff was entitled to some damages, and having the whole evidence before them, proceeded to assess the amount of damages as had been done in the case of *Le Breton* v. *Ennis* (4 M. P. C., 323).

No costs awarded in the appeal and proportionate costs in the *Indian* Courts.

17th March, 1866.

THEIR Lordships' judgment having been reserved, was now pronounced by

SIR JAMES W. COLVILE:

This suit was brought to recover the damages alleged to have been sustained by the nominal Plaintiff's employer, *Dwarka Doss*, in consequence of an attachment made at the instance of the Respondent as the holder of a decree.

Dwarka Doss and the Respondent had conflicting claims upon an indigo Factory lying between the villages of *Putteetah* and *Sirswabur*, called in the record sometimes by the one and sometimes by the other name. This Factory, with three others, belonged to two persons, named *Chunder Churun* and *Esserchund Neoghy*.

At the beginning of the year 1856 the *Neoghys* were indebted to *Mussumat Ooman Soondree*, the wife of *Tara Pershun Bagjee*, in the sum of Rs. 17,761, partly for moneys advanced by her, and partly for moneys advanced by *Dwarka Doss* on her husband's guarantee, for the purpose of carrying on the Factories; and those advances were secured by certain instruments of mortgage, dated the 20th of January, 1852, the 18th of April, 1853, and the 1st of January, 1856. These securities embraced the block of all the Factories, and their crops at least for the year 1856-7.

On the 1st of January, 1856, *Mussumat Ooman Soondree*, by an instrument called a deed of re-mortgage, assigned all her interest in the Factories, under the before-mentioned securities, to *Dwarka Doss*, in order to secure the sum of Rs. 9,761, being the balance then due in respect of his former advances, together with the future advances to be made by him for carrying on the Factories. And it was thereby provided that he should take the Factories under his control and management during the year 1263 *Fuslee*, or 1856-7; thereby giving him the first charge or lien on the crop.

It does not very clearly appear whether under this stipulation he took possession of the Factories; or, if he did so, how long he continued in possession. But on the 7th of July, 1859, he obtained a decree in the Civil Court of *Benares* against *Mussumat Ooman Soondree* and the *Neoghys*, for the sum of Rs. 23,672, as then due to him upon his mortgage; and on the 15th of the same month he and the *Neoghys* filed in Court a petition embodying the terms of a compromise into which they had entered. The effect of this was that *Dwarka Doss* was to suspend the execution which he had taken out under the decree for Rs. 23,672; was to advance further sums for manufacturing indigo from the stumps then on the ground; and was to have the disposal of all the indigo manufactured. The works were to be superintended by one *Balgobind Doss Seith*, whom the *Neoghys* had nominated as their Agent for that purpose. The rights of *Dwarka Doss*, under the execution for any balance that might remain to him after the sale of indigo, were expressly reserved to him both against the Factories and against all the Defendants to his suit. This arrangement was carried out by placing a servant or Agent of *Dwarka Doss* in charge of the Factories.

On the day on which this instrument of compromise was filed in the *Benares* Court (the 15th of July, 1859), the Respondent obtained a decree in the Court of the Principal *Sudder Ameen* of *Mirzapore* against the *Neoghys* for the sum of Rs. 764, alleged to be due to him upon a mortgage of the *Putteetah* Factory, dated in *Phagoon Budee* 1st *Sumbut* 1911 (being some time in A. D. 1855). *Dwarka Doss* intervened in this suit as an objector, insisting that the Factory had been attached for money due to him, and that the claim was fraudulent. But the Principal *Sudder Ameen* held that the objection could not be tried in that suit, and was no bar to

the making of the usual decree in a suit based upon a simple mortgage-bond. He accordingly passed the ordinary decree against the Defendants (the *Neoghys*) and the mortgaged property for the sum found due.

The Respondent took out execution on this decree for Rs. 878 10 as. He first obtained an Order for the attachment of both the *Putteetah* Factory and another Factory known as the *Soorma* Factory, with the appurtenances of each, and of fifty *maunds* of indigo alleged to be at the former, and of thirty *maunds* of indigo, or thereabouts, alleged to be at the latter Factory.

But on the 17th of September he made a further application to the Court, wherein he expressed his desire to abandon the execution against the *Soorma* Factory, and submitted a more detailed list of the property at the *Putteetah* Factory. He limited also the quantity of indigo to be attached at his suit to eight *maunds*. The Order of the Court was that the attachment should be limited to the property comprised in this last list.

On the 23rd of September, the *Ameen*, accompanied by two servants of the Respondent, who went to point out the property, proceeded to attach the Factory and other property detailed in the application of the 17th of September. He made an actual entry upon the lands, and took an inventory of the property attached. He could not, however, complete the attachment of the eight *maunds* of indigo by actual seizure. These were part of a much larger quantity kept in a storehouse, which was under lock and key; and the servants of *Dwarka Doss* refused to give him access to the storehouse, or to remove this lock. In these circumstances he put his own lock also upon the door, and retired, leaving two *Peons* in charge of the property attached.

The Appellant, having heard of the applications for the attachment, had on the 22nd of September applied to stay it. But as the *Dusserah* holidays, during which the Courts are closed for some weeks, began on the 24th, this application was ordered to stand over until after the vacation; and the same cause prevented any further application touching the actual attachment.

In October the *Ameen*, armed with a Magistrate's Order, and accompanied by a Blacksmith, went to the storehouse for the purpose of breaking *Dwarka Doss's* lock, but appears to have desisted on the threat of the people in charge of the Factory to quit the premises if the lock was broken, and to leave him responsible for all the indigo there.

On the 5th of November, these circumstances having been brought to the notice of the Principal *Sudder Ameen*, he passed an Order to the effect that if the Defendants to the Respondent's suit, or their Agents, should fail to appear in Court within a week, and substantiate their objection to the opening of their lock, it should be broken, and the eight *maunds* of indigo be forcibly attached.

On the same day he required the Respondent, as the decree-holder, to answer the Appellant's objection of the 22nd of September within four days.

On the 25th of November, the *Ameen* having in the meantime received no Order to suspend the attachment of the indigo, proceeded, under the Order of the 5th of November, to remove the lock, attached eight *maunds* of indigo pointed out to him by a servant of the Respondent; and made two inventories, one of the eight *maunds* of indigo attached, the other of the property found in the storehouse, which was not attached. Owing, however, to some difficulty about weighing the indigo, all this property remained in the storehouse, apparently under the lock of the *Ameen*, or in charge of his *Peons*, until the 8th of December, when the eight *maunds* were finally weighed and removed to a separate place, and all the other contents of the storehouse were left at the disposal of *Dwarka Doss's* people.

On the 12th of December the *Ameen* submitted to the Court a further report of his proceedings, and stated that he had, according to the Respondent's request, attached no property belonging to the Factory except the eight *maunds* of indigo. The objection filed by the Appellant on the 22nd of September appears to have been thenceforward confined to these; and

it was finally disposed of by an Order of the 3rd of January, 1860, which, on the ground of the preferential claim of *Dwarka Doss*, directed the release of the eight *maunds* of indigo from attachment.

Some difficulty in carrying out this Order was occasioned by the refusal of *Dwarka Doss's* Agents to receive back this indigo, except on terms with which the *Ameen* would not comply; but ultimately the eight *maunds*, and whatever else had been under attachment, were, by Order of the Court, left at the disposal of those who were in possession and charge of the Factory; and the *Peons* were withdrawn from the premises on the 28th of February, 1860.

Upon this statement of admitted facts, it appears clear to their Lordships that *Dwarka Doss* had, by reason of the attachment of the 23rd of September, 1859, and subsequent proceedings, sustained an injury, for which he was entitled to claim substantial damages. The attachment was wrongful and irregular. The right of the Respondent, under his decree, was to sell the Factory pledged to him, subject to the rights of *Dwarka Doss* under his prior mortgage. He had no right to invade or disturb the possession of the prior Mortgagee by placing *Peons* upon the property, in order to attach the Factory as a step towards the judicial sale. Under the procedure, as it existed before 1859, this could not have been done. The attachment must have been constructive. But under the new Code of procedure, which had come into force on the 1st of July, 1859, the proper course was to issue and publish a written notice under the 235th and 239th sections of Act, No. VIII. of 1859. For the actual seizure of the eight *maunds* of indigo, to which the execution was ultimately reduced, there was even less justification. The manufactured indigo was not included in the Respondent's mortgage. And that it was not part of the general property in the possession of the *Neoghys*, that *Dwarka Doss* had or claimed a lien upon it, the Respondent had had ample notice in his own suit, wherein *Dwarka Doss* had intervened as objector, and by the proceedings of the 12th of May, 1859, touching a distress for rent which has been put in evidence in the cause. And the manner in which this wrongful attachment was carried out, the placing by the *Ameen* of his lock upon the door, subjected *Dwarka Doss* to the additional wrong of having the contents of the *godown*, to which *ultra* the eight *maunds* of indigo the Respondent made no claim, taken out of his control and dominion from the 23rd of September until the 8th of December. It is idle to say that his people ought in the first instance to have given the *Ameen* access to the *godown*, and delivered the eight *maunds* of indigo, or that they ought to have acted according to the directions of the *Ameen* concerning the use of the two locks, supposing those directions to have been given to the *Peons*. The case cited by Mr. *Leith* from *Bingham's* Reports, shows that in this country a Plaintiff, in an action for a trespass of very similar character, may, without proving special damage, recover substantial damages. Nor can it be said that in this case there is no evidence of the malicious character which the plaint imputes to the trespass.

The plaint in this case was filed on the 25th of February, 1860. The damages claimed were all in the nature of special damages, and consisted of three items, viz., Rs. 14,000, "on account of loss of 70 *maunds* of indigo at Rs. 200 per *maund*;" Rs. 5,545, on account of indigo which it was alleged *Dwarka Doss* was prevented from manufacturing from indigo plants; and Rs. 2,250, on account of indigo which it was alleged he was prevented from manufacturing from indigo stumps.

Both the Courts below have found, and their Lordships can see in the evidence no sufficient grounds for disputing the justice of that finding, that the Plaintiff has failed to establish any claim to damages in respect of indigo which, but for the wrongful attachment, might have been manufactured from either plants or stumps. The evidence shows pretty clearly that there had been no indigo plant to be manufactured, and leaves it more than doubtful whether all the stumps had not been converted into indigo before the 23rd of September; and whether, if any had then remained to be used in the manufacture of indigo, the

attachment would have prevented them from being so used. The two last items of damage may, therefore, be dismissed from consideration.

The claim, however, to recover damages for loss on account of the manufactured indigo, was disposed of by the Courts below in a different way. The Principal *Sudder Ameen* held that, though the Plaintiff did probably, as stated by the European indigo Factors, sustain some trifling loss, owing to the storehouse having remained locked up, this was due "to the refusal of his Agent to unlock the door on the *Ameen's* application, and that this resistance of a legal process on their part, joined with a disposition to break the peace, caused the loss to the Plaintiff." And the *Sudder* Court considered that no good proof had been furnished that the Plaintiff's Agents were ever prevented from having free access to the *godown*, for the purpose of turning and drying the indigo cakes; but that, on the other hand, the Plaintiff, instead of entering his objections in a legitimate way to the attachment of the property, did, through his Agents, contumaciously obstruct the *Ameen* employed to distrain. The learned Judges seem to rest the first of their conclusions partly on the ground that the Plaintiff ought not to have kept his lock on the *godown*; partly on the evidence given by the *Ameen* of his instructions to the *Peons* to open his lock, whenever the Plaintiff's people opened theirs.

Their Lordships think that neither Court has assigned grounds which warrant the conclusion at which both have arrived. They have already expressed their opinion that the attachment was wrongful. The proposition that a man whose possession was wrongfully invaded ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, appears to them to be untenable. The argument that the Plaintiff ought to have entered his objection in a legitimate way is met by the facts that he had already entered an objection to the execution, and that, by reason of the closing of the Court during the *Dusserah* vacation, he could neither follow up that objection nor make any further objection to the acts of the *Ameen* until the holidays were over. Again, the case of *Bayliss* v. *Fisher* (7 Bingh., 153), already referred to, shows that even if the instructions said to have been given by the *Ameen* to the *Peons* were really given (as to which there is a conflict of evidence), the Plaintiff was neither bound to accept the permission to use his own property so accorded to him; nor, if he had accepted it, would have lost his right of action. It appears, therefore, to their Lordships that the Plaintiff's suit has been improperly dismissed with costs, and that he was, at the very least, entitled to a judgment for nominal damages. If it be important in *India* to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

It has been argued for the Respondent that the suit was properly dismissed, inasmuch as the Appellant was by the form of his plaint limited to the three heads of special damage therein laid, and, having failed to prove any such special damage, was precluded from recovering general damages for the trespass.

Their Lordships, however, are of opinion, that there was evidence in the action on which the Courts below might have awarded some damages on account of the loss sustained in respect of the manufactured indigo. Nor are they prepared to allow that if this had not been the case, the Plaintiff could have recovered nothing. The plaint might have been more accurately drawn, but, substantially, it seeks damages generally, as consequent on the wrongful attachment of the Factory. The principle ordinarily applied to actions of *tort* is, that the Plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. Thus in an action of slander for words actionable *per se*, when the Plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the jury think right to give him. It would be otherwise if the words were not actionable *per se*.

In the present case the gist of the action is not the special damage, but the unlawful attachment; and the Plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

Taking this view of the case, their Lordships feel that it is not desirable to remit the cause for the assessment of damages in *India*, since no case has been made for taking fresh evidence, and the Judge below would have only those materials for a judgment which are now before their Lordships.

They have, therefore, determined to take the course which was taken by this Committee in the case of *Le Breton* v. *Ennis* (4 Moore's P. C. Cases, 323), and to assess the damages themselves. It must be confessed that the Appellant has not given the best evidence that he could have given on this point. He might have proved for what the indigo had been sold, and for what it might have been sold if it had not been damaged, and had been sold at the proper time. Weighing, however, all the circumstances of the case, their Lordships feel justified in assessing the damages at Rs. 500.

Their Lordships have felt some difficulty about the costs of the Courts below, and those of this appeal. The costs of an action in *India*, particularly the stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in *India*, when a Plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the Appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of Rs. 10,000; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the Appellant could not have appealed to Her Majesty.

In these circumstances, their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the Courts below, and that they ought not to give to either party the costs of this appeal. In making the apportionment, the Appellant will, of course, receive credit for any costs which he may have paid under the decrees reversed.

The Order, therefore, which their Lordships will humbly recommend Her Majesty to make is, that the decrees both of the *Sudder* Court and of the Civil Court of *Mirzapore* be reversed; that the Appellant be declared entitled to recover damages to the amount of Rs. 500; that the cause be sent back to the *Sudder* Court, with directions to enter judgment for the Plaintiff for that sum, and to deal with the costs in both the Courts below according to the practice of those Courts in like cases, and that each party do bear his own costs of this appeal.

18th June, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Petition from the High Court at Fort William, Bengal.

GOREE MONEE DOSSEE, and others,* ... } *Appellants*,

versus

JUGGUT INDRO NARAIN CHOWDERY, and others, } *Respondents*.

Petition for special leave to appeal to the Privy Council, framing of—Verification by affidavit, effects of failure of.

A petition for special leave to appeal ought to contain a full statement of the law and facts of the case to enable the Privy Council to judge of the propriety of granting the leave prayed for. The facts alleged in the petition must be verified by affidavit; otherwise it must either be dismissed with liberty to renew, or stand over for amendment.

Petition entertained, after proper amendment.

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* 11, Moore's I. A., p. 1.

THE LORD JUSTICE KNIGHT BRUCE:

"THEIR Lordships are of opinion, that the statements, both of law and fact, contained in the petition are of too general a character to enable them to judge of the propriety of granting the special leave to appeal prayed for. The petition, therefore, must be either dismissed, with liberty to present another petition, or stand over to amend the petition. In either case the facts alleged in the petition must be verified by an affidavit.

The petition was amended, and, after fully detailing the proceedings in the Courts in *India* and the decrees of the Principal *Sudder Ameen* and *Zillah* Judge of *Rungpoor* and the High Court, alleged that the Petitioners, feeling aggrieved by the decrees, presented a petition for leave to appeal, which was rejected by the High Court (the Hon. *G. Loch* and the Hon. *F. A. Glover* present), the Court saying, "The Order passed on the petition of *Bamundass Mukerjee*, No. 265 of 1865, is applicable to this petition, which is rejected" (*a*). That the Petitioners were precluded by the practice of the Court and their interpretation of the Order in Council of the 10th April, 1838, and of the Charter of the High Court, from obtaining the leave of such Court to appeal to Her Majesty in Council; that the value of the subject matter in the original decree of the 26th June, 1837, was, at the date of the judgment of the High Court sought to be appealed against, considerably in excess of Rs. 10,000, the appealable

(*a*) The judgment in the case of *Bamundass Mukerjee* referred to and set out in the petition was as follows:—

"This is an application for permission to appeal to the Privy Council against the Order of the High Court passed in the execution of a decree of the Privy Council. Notice was ordered to be issued to the opposite party to come in and show cause against this application within one month from the date of service of notice. Subsequently, both parties having appeared, and as the case involved a new point of considerable importance, it was ordered on the 26th August, 1865, to be brought up before the miscellaneous Bench of Judges. It accordingly came before the Court (present, Justices *Loch* and *Glover*) on the 13th September, 1865. Mr. Justice *Loch* delivered judgment and an Order was passed by this Court on the 27th April, 1865, confirming an Order passed by the Principal *Sudder Ameen* in execution of a decree for a sum above Rs. 10,000, and application is now made to the Court for permission to appeal to the Privy Council under section 39 of the Charter of the High Court. The words of the Charter quoted in support of the application are from any 'final judgment, decree, or Order' of the said High Court made in appeal. The words, no doubt, are very wide: we think that they are not intended to extend the privilege of appealing to the Privy Council in miscellaneous cases, or to alter the present rules which restrict an appeal to 'judgments, decrees, or decretal Orders.' In Regulation XVI. of 1797, the word 'judgment' was alone used, but, notwithstanding, parties had been allowed to send miscellaneous cases to the Privy Council: the practice was put a stop to in 1837 by a construction of the late *Sudder* Court, dated the 18th August, 1837, No. 1102. In 1838 an Order in Council was passed, bearing date the 10th April, issuing rules for the admission of appeals to the Privy Council; and in the first of these rules we have the words 'judgment, decree, or decretal order,' all of which words, we think, are intended to have one and the same meaning, viz., 'the judgment or decisions come to in a suit,' and that they do not refer to Orders passed in execution of a decree. Such has been the interpretation put upon the words by the public, for up to the present time no application has been made to submit miscellaneous appeals to the Privy Council through this Court since the rules of 1838 were promulgated. In the Charter of the High Court the same words are used, with the omission of the word 'decretal' before 'Order:' no doubt it is a remarkable omission, but reading it with the assistance we have from the letter of the Secretary of State for *India*, of the 14th May, 1862, par. 37, we do not think that so material a change in the past practice of the Court as the permission to appeal from miscellaneous Orders would have been passed by without comment, when he notices very particularly the introduction of a section in the Charter allowing of appeals from interlocutory Orders with the permission of a Judge of the High Court. In the paragraph of the letter referred to it is distinctly stated, that in regard to appeals to the Privy Council the object has been to avoid unnecessary innovation; that the existing rules which regulate these appeals are, therefore, left in force, with one or two additions only; and the writer proceeds to instance the introduction of a section permitting appeals from interlocutory Orders: and we think that there is a very great and sufficient reason why an appeal from Orders passed in execution of a decree should not be allowed, which is, that if allowed it would open a fresh door for harassing an Opponent who has already had to fight his battle perhaps up to the Privy Council, and deprive him of the power of executing his decree without further trouble and vexation. We think, therefore, that this and such like appeals cannot be received, and we reject the application."

amount, the sum which was sued for in the original suit being Rs. 9,925, and the amount awarded by the decree being Rs. 5,800, with interest at the rate of 12 per centum, per annum to the date of payment; that the grounds on which the Petitioners applied for special leave to appeal were, amongst others:—First; that the construction put by the High Court upon the Order in Council of the 10th April, 1838, and the Charter of the High Court was incorrect. Second; that by *Ben.* Reg. of 1814, and by the express terms of the Act, No. VIII. of 1859, ss. 207 to 217, it is rendered obligatory that applications for execution should be made to the Court which passed the decree; and it had been repeatedly adjudged by the Indian Courts, that applications for execution to a Court without jurisdiction were void, and, therefore, wholly insufficient to prevent execution being barred by limitation. Third; that the Indian law requires, in order to enable another Judge than the one who passed the decree to execute it, that an execution case should be referred to such other Judge by the Judge who passed the decree, and when such execution case has been struck off the file of the Judge to whom it has been referred, his jurisdiction is ended, and to revive it a new reference is required. Fourth; that according to decided cases of Indian law and the principles of jurisprudence, the process of a Court not having jurisdiction can in no case be legalized by the subsequent sanction of the Judge having jurisdiction, but new process must be issued. Fifth; that the proceedings in the Court of the Principal *Sudder Ameen* were, therefore, wholly void from the 19th June, 1844; and that, consequently, any money recovered thereunder was illegally exacted, and would not prevent the operation of the rule of Limitation; and that under the old law of Limitation the execution is void. Sixth; that the execution was also barred, under the provisions of the Act, No. XIV. of 1859, ss. 20 and 21, no proceedings having been taken in a competent Court within three years from the passing of that Act. Seventh; that the decision contained in the judgment of the High Court was at variance with both previous and subsequent decisions of the *Sudder* and High Courts respectively, and if unreversed would cause great uncertainty and confusion as to the limits of the jurisdiction of the inferior Indian Courts, and also as to the law of Limitation of executions, and the construction and operation of the Acts hereinbefore referred to, which it is of the greatest importance to have accurately defined, maintained, and settled; and prayed for special leave to appeal from the decrees of the Civil Judge and the Principal *Sudder Ameen* of the *Zillah Rungpoor* of the 9th of June, 1864, and the 22nd of June, 1864, and also from the decrees of the High Court of Judicature at *Fort William* in *Bengal*, of the 9th of January, 1865, the 29th of April, 1865, and the Order of the 13th of September, 1865, rejecting the petition of special appeal.

Upon this amended petition special leave to appeal was granted.

2nd and 3rd November, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

ESHANCHUNDER SINGH,* ... *Appellant*,

versus

SHAMACHURN BHUTTO, KOILASCHUNDER SINGH, and others, ... *Respondents.*

Pleadings—New statement of facts in appeal—Agent—Authority—Repudiation of contract.

The determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations in the plaint (which constitute the case the Defendant has to meet) but which are in reality contradictory of the Plaintiff's case.

Held that the High Court as a Court of special

* 11, Moore's I. A., p. 7.

appeal could not substitute a new statement of facts for that originally contained in the record, and further that even if the case substituted were admitted to be true, the legal conclusion drawn by the High Court from it was opposed to the settled principles of law or equity.

If an agent making a contract exceeds his definite authority by inserting an additional term therein, and the contractee is unaware of the agent's want of authority; in such a case the principal cannot enforce the contract without giving effect to the additional term which is an integral part thereof.

But where the agent acting under definite directions enters collaterally into a distinct and separate contract with a third party, the principal is not bound by the additional liability which he never contemplated.

THE RIGHT HON. LORD WESTBURY:

THIS case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. Unfortunately, in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the Plaintiff, and devoid not only of allegation, but also of evidence in support of it.

The case made by the Plaintiff alleges a distinct agreement between the Plaintiff and two brothers (whose names have been pronounced in a short manner—the one *Koilas* and the other *Eshen*), that the three should be joint purchasers and joint owners—owners in common, at all events—of a certain lease which was put up by a *Zemindar* to be taken by public tender at a particular time. The plaint proceeds upon the allegation that that lease was taken by *Koilas* on his own behalf, and on behalf of *Eshen*, and on behalf of the Plaintiff, and that, in conformity with the agreement between the three, *Koilas* subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations, therefore, in the plaint are inconsistent with the hypothesis of *Koilas* having no interest and acting in the transaction as Agent only of *Eshen*. The plaint also proceeds upon a clear and well-defined ground of relief, namely, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between *Koilas* and *Eshen* of principal and agent, and from the alleged fact of *Koilas*, in the execution of his authority, having given certain rights and interests to the Plaintiff without which his principal (*Eshen*) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of case is plain.

The decision of the Court of First Instance, that of the Principal *Sudder Ameen*, of the 17th of February, 1862, found the facts of the case to be in direct contradiction to the allegations contained in the plaint. It was found that *Koilas* had no interest at all; that the money paid to the lessor was not money in which *Koilas* had any interest or right; that *Koilas* acted from the beginning under the authority and as the Agent only of *Eshen;* that the contract was completed with the money of *Eshen;* and that there was nothing at all to show that *Eshen* in any manner was made aware of or was party or privy to the alleged transactions between *Koilas* and the Plaintiff. These facts being established by the judgment, and being, therefore, binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case wholly inconsistent with the recorded findings contained in the original judgment. That original judgment was the subject of an intermediate appeal, which, however, does not vary the matter, because the Judge of the first Court of appeal thought it right to dismiss that application and to affirm the original judgment.

We now come to consider the assumed state of facts, which is the basis of the decision of the High Court. The High Court takes it that *Koilas* was nothing more than the Agent of *Eshen;* but the High Court appears to have in some manner or other arrived at this conclusion, which does not appear to their Lordships to be warranted either by allegation or

evidence, viz., that at the auction, or previous to the auction, there was an agreement between the Plaintiff and *Koilas* that the Plaintiff should abstain from bidding; and that, in consequence of that abstinence on the part of the Plaintiff, *Koilas* succeeded in obtaining the estate at a less sum of money than otherwise he would have had to give; and that the Defendant, *Eshen*, took possession of the property with the knowledge of that transaction on the part of *Koilas*. It is obvious that every one of these propositions of fact is a statement which it was incumbent on the Plaintiff to have distinctly alleged, in order that it might be the subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the Defendant has to meet, but which are in reality contradictory of the case made by the Plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the Plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.

It is unnecessary, therefore, to say that it is impossible for their Lordships to accept anything like those conclusions of fact as furnishing a *ratio decidendi* in the present case. Without adverting further to its being incompetent to the Court of appeal to substitute a new statement of facts for that originally contained in the record, their Lordships further observe that, even if the case substituted were admitted to be true, and to be the competent subject of judicial inquiry, the legal conclusion which is attempted to be derived from those facts is not consistent with the settled principles of law or equity. Supposing it to be the case that a man sends an Agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the Agent accordingly goes to the auction, and, in the execution of that authority, he does bid, and the estate is knocked down to him; but collaterally, and in a bye manner, he enters into a distinct and separate contract with an individual, that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum; it is quite plain that, upon every consideration of justice, the principal cannot be bound by this bye transaction on the part of the Agent. If the Agent makes a contract on the part of the principal, having a definite authority, and he exceeds that authority by inserting a term in the contract itself, it would not be competent to the principal to say, "I will repudiate the inserted term in the contract, as being *ultrā vires* and unauthorized, but I will obtain performance of the rest of the contract." In such a case, although the Agent had no authority for the additional term, yet, as it is an integral part of the contract itself, and the party selling was not aware of the want of authority, the principal could not enforce that contract without giving effect to the additional term. But, in the other case, the act of the Agent, if effect were given to it, would subject the principal not only to the contract which he authorized, and which he may be required by the vendor or lessor to fulfil, but also to an additional liability which he never contemplated.

Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the Plaintiff, shall not be departed from; and they could not concur in the conclusion of law which has been drawn by the Court below, even if they were at liberty to take into consideration the state of facts which that Court assumed.

Their Lordships, therefore, will advise Her Majesty to reverse the decree that has been appealed from, thereby confirming the original decree, and the decree of the *Zillah* Court; and to give the Appellant the costs of this appeal, the application to the High Court being directed to be refused with costs.

6th and 7th November, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

SRIMUT RAJAH MOOTTOO VIJAYA RAGANADHA BODHA GOOROO SAWMY PERIYA ODAYA TAVER,* — *Appellant*,

versus

KATAMA NATCHIAR, *alias* COOLUNDAPOORY, Zemindar of Shivagunga, and ARMOOGA TAVER, — *Respondents*.

Defendant in possession—Pleas—Omission—Waiver—Second suit.

A Defendant in possession when resisting a Plaintiff's claim to an estate is bound to resist it upon all the grounds possible for him according to his knowledge then to bring forward.

What is in issue must be taken to have been decided by the judgment.

A party deliberately abandoning all right to a document as a Will and using it for a different purpose cannot in a subsequent suit between the same parties use the document as a valid Will.

THE RIGHT HON. LORD WESTBURY:

THE facts of this case have been lucidly presented to us, and the case has been argued very ably by the learned Counsel for the Appellant; but their Lordships feel no difficulty upon the point. All that has been urged is involved in and decided by the judgment of the Privy Council in the year 1863, and what passed before this Tribunal on that occasion.

To render our decision intelligible, it is necessary to make a short recapitulation of the leading facts of the case.

On the death of the *Zemindar*, the original proprietor, questions arose whether he was undivided in estate with his brother, and whether this property was to pass as undivided or divided estate. A document was produced in which the *Zemindar* made a testamentary gift of the estate to the Appellant's father, in the event of the child of one of his widows, who was enciente, not proving to be a son. A great deal of litigation ensued; but in the suits that were brought before the Privy Council in 1844, the exact issue, whether the family was undivided or divided, had not been so raised as to become necessarily the subject of judicial determination. The issue, however, of the validity of the alleged testamentary paper had been raised, and the decision of the *Sudder* Court was against it.

When the case came before the Privy Council in 1844, having regard to the law touching undivided property, their Lordships were of opinion that there must be a judicial determination upon the point, whether the family was divided or undivided before the question of the validity of any devise could arise. No opinion, therefore, was expressed upon the issue raised as to the validity of the testamentary paper, which remained until it had been ascertained that the property in question was capable of being devised. The Privy Council accordingly remitted the case, pointing the parties' attention to the necessity of having it determined, whether there was division or no division. It is plain that when the issue was raised, whether there was division or no division, the importance of determining whether the paper in question was a valid testamentary gift or not would immediately be felt; because, if it should turn out that it was a divided property, then the party in possession, claiming by virtue of his being a nephew of the deceased proprietor, would immediately have been enabled to set up the Will as constituting his title. But it has been contended before us to-day, that what was said by the Privy Council must be considered as amounting to a positive direction that there should not, in the subsequent litigation contemplated, be any question whatever raised except the question of division or no division. It is plain to us that the language used by the Privy Council on that occasion does not admit of any such construction. The same point was raised and insisted upon before the Judicial Committee in 1863; for it was then contended, on behalf of the present Appellant, or those who preceded him in title, that

11, Moore's I. A., p. 50.

the suits which had been instituted and were brought by way of appeal were suits that transgressed the limits imposed by the Order in Council of 1844 (being, in effect, the same argument that we have heard to-day); but that contention was overruled, and it was held that the Order in Council of 1844 did not at all interfere with or preclude the parties from bringing forward the claim, and instituting the suits which they had instituted subsequently to 1844, the decrees in which were the subject of the appeal to the Queen in Council in 1863.

We take as an example of these suits the form of the suit, No. 10, of 1856. One of the present Respondents filed her plaint in that suit for the recovery of the *Zemindary*, and the question of the forgery or genuineness of this alleged testamentary paper was distinctly raised in that plaint. By the answer to it, the present Appellant, answering by his guardian, did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property the brothers were undivided. Ultimately, all the suits came before the Judicial Committee of the Privy Council in 1863; and the Judicial Committee were of opinion that the question of division or no division was, after all, immaterial, because they found it clear that the *Zemindary* in question was self-acquired property; that is, that the deceased proprietor had been the first to acquire it; and they accordingly held, that even if the brothers were undivided, yet that the estate being self-acquired, was not governed by the law applicable to undivided property, but descended to the heirs general, and was capable, therefore, of being devised. Immediately it became most material, in the mind of the Judicial Committee of 1863, to determine the question with regard to the testamentary paper; but they were wholly relieved from the necessity of doing so, because the present Appellant, then appearing by most able Counsel, as the Respondent at the Bar, deliberately told their Lordships, that although the paper in question had been familiarly called a Will, the name had been introduced only as a short denomination of the instrument, which in reality was not testamentary, and neither had, nor was ever intended to have, the effect of devising the property; and that the Respondent did not claim any title under it as a testamentary devise; but used it only as conclusive evidence of what the opinion of the last proprietor was, viz., that this *Zemindary* was in reality undivided property. It is quite plain why the learned Counsel for the then Respondent adopted that course. In their minds it was thought safest to rest their case upon the question of division or non-division. They appear to have reasoned thus:—"If we set up this as a Will, then it is a conclusive declaration by the alleged Testator that the property was devisable; and if devisable, that it was not undivided. We will, therefore, abstain from treating that instrument as an instrument of title. We will abstain from insisting upon it as a devise, and we deliberately tell the Judicial Committee, that it is not to be regarded as being in any sense testamentary." The result, therefore, was, that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its judgment the fact that the Respondent's Counsel, had deliberately elected to disclaim any title under that instrument as a Will, and that, therefore, its validity or invalidity became no longer material for decision.

That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid Will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the Appellant had then the power of relying upon that document as being a valid Will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, first, have insisted that it was an undivided property, and that, therefore, the Plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, but if it

shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a Plaintiff claims an estate, and the Defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present Appellant might have insisted on the validity of the alleged Will; but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a Will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the Appellant of setting up the Will, were allowed.

On every ground, therefore,—first, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; secondly, upon the personal ground that the Appellant having used this document and abandoned all right to it as a Will, cannot now use it for a different purpose; we are of opinion, that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present appeal is brought, as a suit instituted without *bonâ fides*, and directly contrary to what the Appellant must be considered to be bound by; and we have no hesitation, therefore, in advising Her Majesty to affirm the decree, and to direct that this appeal be dismissed, with costs.

Sir *R. Palmer*.—It may be a satisfaction to your Lordships to know that what Sir *Hugh Cairns* did at the Bar was a mere repetition of what had been done in the printed answer to the appeal by the Respondent in *India*, and your Lordships will find it at p. 218, par. 39 of the Record of the appeal in 1863, which runs thus:—"In opposition to par. 64 of appeal petition, Respondent submits that the correspondence which passed at the time shows that the Government authorities did acknowledge the *primâ facie* right of the Respondent's grandfather, and that the Civil Court was correct in terming the Will a mere declaration of right. It is only necessary to refer to Reg. V. of 1829 to perceive that it could not possibly be more, and that in quoting it the Government Officers could only have viewed it in that light, and not as a bequest."

Lord *Westbury*.—I am very glad that you have stated that, because it removes from the case any possibility of its being supposed that Sir *Hugh Cairns* either mistook or exceeded his instructions.

Sir *R. Palmer*.—That was my motive for mentioning it.

14th November, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-West Privinces, Agra.

BABOO REWUN PERSHAD,* ... *Appellant*,

versus

JANKEE PERSHAD, ... *Respondent*.

Recording issues—Act VIII. of 1859, sections 139, 140, 141.

Evidence ought not to be gone into without settling and recording the issues in the suit in conformity with the provisions of sections 139, 140-1, Act VIII. of 1859.

THE RIGHT HON. LORD WESTBURY:

OBSERVING, that the proceedings before the Principal *Sudder Ameen* appeared to be wholly irregular, as he ought not to have gone into evidence without having first settled and recorded the points or issues in the suit, in conformity with the provisions of the Act, No. VIII. of 1859, which from the record transmitted did not appear to have done, and that in those circumstances the appeal must stand over for the production of the certified proceedings, in order to show whether this had

* 11, Moore's I. A., p. 25.

been done, or, in the alternative, that the cause should be remitted back to *India* to be heard upon regular issues so framed.

By the Order in Council made thereon, it was ordered that the further hearing be postponed, and the High Court of Judicature for the *North Western* Provinces was directed to inquire and certify forthwith to the Registrar of the Privy Council whether the *Zillah* Judge did, in conformity with the provisions of Act, No. VIII. of 1859, settle and record any and what issues in the suit, and if so the Court was to transmit forthwith a copy of the proceeding in which such issues were recorded; and if no issues were settled and recorded, then it was ordered, that the decree of the late *Sudder Dewanny Adawlut* of the *North Western* Provinces at *Agra*, dated the 26th of May, 1862, be set aside, and that the High Court do remand the case to the *Zillah* Court, with directions that the suit be forthwith tried on issues there to be settled and recorded, in conformity with the provisions of the above Act, and to direct and hear evidence on such issues.

14th November, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SREEMANCHUNDER DEY,* ... *Appellant*,

versus

GOPAULCHUNDER CHUCKERBUTTY, DOORGAPERSAUD DEY, RUSSICKLOLL DEY, & PROSONOMOYE DOSSEE, ... } *Respondents.*

Benamee Purchase—Evidence, Onus probandi—Witnesses, fresh examination of—Act VIII. of 1859, section 355.

Suit by a judgment-creditor's assignee to have it declared that the purchase in an execution-sale by Appellant did not effect any transfer of the ownership from Plaintiff's debtors and the property still liable to be sold in execution of the Plaintiff's decree.

Held that the *onus* lay upon the Plaintiff to prove in the affirmative that the *Talook* was still the property of the judgment-debtors and that the *onus* had not been sufficiently discharged. The decision of the Court in matters of this description should rest not upon suspicion but upon legal grounds established by legal testimony.

The power of the High Court under the Civil Procedure Code (Act VIII. of 1859, sec. 355) to examine new witnesses *ex mero motu*, should be exercised very sparingly, and the reasons for its exercise should always be recorded on the proceedings.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. LORD WESTBURY:

The Appellant in this case became the purchaser of the *Talook* under a decree for sale obtained by judgment-creditors of the owners.

A summary application to set aside the sale having been refused, the Respondent brought the present suit for the purpose of having it declared that the purchase did not affect any transfer of the ownership of the *Talook*.

The Respondent is not himself a judgment-creditor, but he is the Assignee of a judgment-creditor. It appears that the Respondent is a tenant upon the estate, and that, after some dispute had arisen between the tenants and the Appellant, he purchased this outstanding judgment, and, by virtue of that purchase and a transfer of the judgment, has taken the present proceedings. The issue which was raised in the action so brought by the Respondent, and the affirmative of which he has to maintain, is that the *Talook* in question is still the property of the judgment-debtors, and not the property of the Appellant, who was the purchaser. The affirmative lies upon the Respondent; he is to prove his case.

Undoubtedly there are in the evidence, circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the Appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony.

The case relied upon by the Respondent

* 11, Moore's I. A., p. 28.

is mainly this,—that the purchase-money, which appears to have been actually paid by the Appellant, was not in reality the money of the Appellant.

In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate. We have here a statement made by the Respondent himself, that the *Talook* was worth about Rs. 19,200 or Rs. 19,300, and we find that it was sold at the sale, at which the Appellant (being the Assignee of the original bidder) became the purchaser, for Rs. 19,000, which was actually paid.

That circumstance is not conclusive proof of a *bonâ fide* purchase; but it is a strong circumstance, in considering a case which consists of allegations, that there was a collusive agreement between the judgment-debtors, the original owners of the estate, and the Appellant, to buy in the estate for the benefit of the judgment-debtors.

The transaction appears to have been this:—A person of the name of *Petumber* attended the sale as the Agent of another person, who appears to be a man of property, of the name of *Moheschunder*. *Petumber* was declared the highest bidder, and consequently the purchaser. It seems from the evidence that *Petumber* exceeded the authority which had been given to him by *Moheschunder*, his principal. *Moheschunder* had limited the price to be given to a sum of money less than the amount which *Petumber* had bid; *Moheschunder*, therefore, either repudiated the contract or was desirous of getting rid of it. In that state of things *Petumber* applied to the Appellant to take a transfer of the contract, and the Appellant agreed so to do. The reason for the Appellant purchasing the property does not appear. It does not appear, nor is there any testimony that would warrant at all the inference, that *Moheschunder*, in sending *Petumber* to the auction, was acting as the Agent or on behalf of the judgment-debtors. It is said that *Moheschunder* was a distant relation of the judgment-debtor, but there is nothing like testimony to warrant the conclusion that *Moheschunder* was acting on behalf of the judgment-debtors.

No doubt that would not be material, if it were proved that the Appellant, the Assignee of *Petumber*, was himself the Agent or Trustee of the judgment-debtors. If he was so, of course the estate in the hands of the Appellant might be made available for the satisfaction of judgment-debts existing unsatisfied.

To prove this, the circumstances relied on by the Respondent are, first, the fact, which it is alleged appears on the judicial proceedings under which the sale was made, that two previous sales had been effected of this property, in both of which the real, though not the apparent, purchasers were the judgment-debtors, and that those sales had consequently been set aside. The Courts below and the Respondent here appear to have considered that those facts justified the inference that the judgment-debtors had formed the design in the present case, for the third time, to acquire the property through the instrumentality of a person acting apparently on their own behalf.

Although the fact of these former sales may be referred to, as they appear on the proceedings in the cause in which the sale was made, yet no legal inference affecting the integrity of the present proceeding can with any propriety be drawn from them.

The next circumstance relied upon by the Respondent is this: that the Appellant and the judgment-debtors appear to live still on good terms together; that they are not open and avowed enemies, which it is said would have been the necessary consequence if the Appellant had in reality been the purchaser of the judgment-debtors' estate for his own benefit.

That is a circumstance, again, from which we are of opinion that no legal inference results.

The next thing relied upon by the Respondent, and which is one of the main grounds of his case is this: that the Appellant is unable to give a satisfactory account—nay, may be supposed perhaps to have given a false account in part—as to the manner in which he became possessed of the money in question.

Their Lordships have been much struck with the unsatisfactory character of the

account given by the Appellant of the manner in which he alleges he obtained the money, but we cannot help feeling, that it is an inquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But this circumstance, although it may excite doubt, is not a thing from which we can legitimately infer that the Appellant was a bare Trustee of the purchase so made by him.

And, if it inclined us to doubt the Appellant's ownership of the money, there is still a great interval between that doubt and the conclusion that it was the money of the judgment-debtors, or that the Appellant acted in the matter on his behalf.

It is for the Plaintiff to prove that the money was the money of the judgment-debtors, or that it was supplied or found by some third person for the benefit of the judgment-debtors; but we find nothing which can be accepted either as direct proof of the fact, or as materials from which any such inference can be justly drawn. Two witnesses, called by the Respondent himself, state that, as far as their knowledge extends, the circumstances and the condition of the judgment-debtors were such, that they had not the means of supplying the money in question. The other evidence given by the Respondent is, that a person of the name of *Moheschunder*, some time after the transfer of the contract to the Appellant, raised a sum of Rs. 19,000, and that *Moheschunder* was a friend and second cousin of the judgment-debtors, and, therefore, the Respondent would have us infer that the Rs. 19,000 so raised by *Moheschunder*, being about the amount of the purchase-money for the *Talook*, was raised by him on behalf of the judgment-debtors for the purpose of completing the purchase of the *Talook*, or of repaying the money which it appears the Appellant obtained from certain Bankers at *Calcutta*, in order to complete his purchase.

We are asked, therefore, to hold that the distant connection between *Moheschunder* and the judgment-debtors, and the equality in amount of the sums, are sufficient grounds for the conclusion that the purchase-money was in reality the money of *Moheschunder*, and that he found and advanced it for the benefit of the judgment-debtors. If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe.

It is material that this purchase is not really challenged by the judgment-creditors. They have not originated this action, but it is the fruit of the angry feeling of a tenant on the estate, who has sought out a judgment-creditor, and got a transfer of his interest for the purpose of bringing forward this claim; and, therefore, the origin of the action and the circumstances under which it is brought are to be taken into account, when we are considering the truth and reality of the purchase by the Appellant.

It is natural to suppose, that if this purchase, had been generally felt not to be a *bonâ fide* purchase, it would have been questioned by the judgment-creditors themselves, and that they would not probably, for a small consideration, have parted with their judgments to another person, but would have instituted the suit themselves.

In the conduct of the suit, there is a circumstance which their Lordships think it right to advert to.

When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly; because, where it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new original inquiry by the High

Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice.

The opinion of their Lordships is, that the evidence which has been given, (there having been the fullest opportunity of giving evidence against the Appellant,) is not sufficient to warrant the conclusion that the Appellant was acting as the Agent of the judgment-debtors.

It is easy to suppose a case in which the Appellant might not in reality be the *bonâ fide* purchaser on his own account, and yet in which there would be no ground for holding that the estate was the property of the judgment-debtor. It is possible to suppose that some of the family of the judgment-debtors might have been willing to find, either wholly or partly, the money for the purchase; but if it were established that the money was not the property of the Appellant, we could not derive from that, the conclusion that the estate was, therefore, the property of the judgment-debtors.

It was said by the Counsel for the first Respondent that no other owner was suggested by the Appellant. There was no obligation upon him to suggest any other owner. He was under no obligation to show whence the money was derived; but, taking everything against the Appellant upon that point, there is still a great chasm between that inference and the conclusion which alone would support the suit of the Respondent, viz., that the estate is the judgment-debtors' property, both at law and in equity. That is neither established, nor can be legitimately inferred from any of the facts which have been proved.

We are, therefore, of opinion that the decree of the Court below must be reversed; and we shall humbly advise Her Majesty to order that it be reversed accordingly, and that the suit of the Respondent in the Court below be dismissed, with costs. It follows that the Appellant must have the costs of this appeal.

16th and 17th November, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Madras.

APPOVIER *alias* SEETARAMIER,* ... ... } *Appellant,*

versus

RAMA SUBBA AIYAN, VENKATARANA AIYAN, ANANTAMMAL, ANNA AIYAN, and ANANTANA RAIYANA AIYAN, ... } *Respondents.*

Hindu Law—Undivided Family—Partition.

According to the true notion of an undivided family under Hindu Law, no individual member, whilst the family remains undivided, can predicate of the family property that he, that particular member has a definite share.

But when the members agree among themselves with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares then the character of undivided property and joint enjoyment is taken away from the subject so agreed to be dealt with and each member has thenceforth a definite and certain share therein which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually divided by metes and bounds.

Held that the deed of March 1834, created a division of right in the whole property although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds till some convenient future period. The deed operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to a separate ownership.

THE RIGHT HON. LORD WESTBURY:

THIS is an appeal brought from a decree of the *Sudder* Court at *Madras*, which affirmed the decree of the *Zillah* Court of *Tinnevelly*, which itself affirmed the original decree of the *Sudder Ameen* of that District. It is, therefore, an appeal from three decrees, unanimous in rejecting the claim of the Appellant.

* 11, Moore's I. A., p. 75.

The present appeal is founded upon an allegation that certain property (shares in which are claimed by the Appellant) continues the undivided property of the family of which the Appellant was a member, and which was originally an undivided family. The foundation of the defence to the Appellant's claim is an instrument, which we will call, for the present purpose, a deed of division, dated the 22nd of March, 1834.

Certain principles, or alleged rules of law, have been strongly contended for by the Appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds.

Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject, to which the title is applied.

According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

With reference to the cases in the *Madras* High Court which have been relied upon by the Appellant, we believe, upon an examination of them, that there is not to be found in any one, clearly and affirmatively, the doctrine contended for with reference to an agreement for the conversion of joint ownership into separate ownership, namely, that such agreement is of no effect to convert an undivided family into a divided family without an actual partition.

In the last case cited and relied upon by the Appellant, decided in the month of February, 1865, in the High Court at *Madras*, that Court refuses to assent to the doctrine that nothing short of an absolute partition by metes and bounds in the life-time of the different members will make the shares of the property divided.

Undoubtedly their Lordships would be unwilling to reverse any rule regarding property which had been long and consistently acted upon in the Courts of the Presidency, but it is impossible for them here to come to the conclusion that the doctrine contended for by the Appellant is to be considered a rule, which has been so accepted or acted upon by those Courts. Upon an examination of the cases, it will be found that in some the deed of partition was not attended by any subsequent act, and had been repudiated by subsequent conduct of the parties; and in another of the cases cited, where there had been a decree of partition, it seems that the decree of partition had been abandoned.

If, then, the rules derivable from the true theory of an undivided family are such as we have described, and are not at variance with any settled course of legal decision,—let us apply those rules to the deed upon which this case in reality depends.

The Appellant admits that the deed was operative with regard to a certain number of villages, because, he says, those were actually divided; but he contended it was not a deed which made the family a divided family with regard to the rest of the

villages, because it has not been followed by actual partition.

It is necessary to bear in mind the two-fold application of the word "division." There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

The deed, after dealing with the villages that were intended at once to be the subject of an actual partition, proceeds thus:—"But inasmuch as it is not intended to divide now"—What is the meaning of the words, "divide now?" Clearly, to make the same partition of the villages that follow as had previously been directed to be made of the villages which precede. "But inasmuch as it is not convenient to divide now our moiety of the villages" (then follows an enumeration of the villages,) "we shall divide every year in six shares the produce of them, and enjoy it, after deducting the *Cirkar kist* and charges on the villages." Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought to the common chest, as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family, who are thenceforth to become entitled to those definite shares. Thus—using the language of the English law merely by way of illustration—the joint tenancy is severed, and converted into a tenancy in common.

Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.

The words with which this instrument of the 22nd of March, 1834, concludes, manifest an intention to become divided, for, after expressing that they have already divided the silver and brass utensils, the parties use these words:—"We have henceforward no interest in each other's effects and debts except friendship between us." We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

We have examined the whole of these papers with great anxiety and care; we have been very much assisted by the arguments at the Bar; and by the able manner in which the cases on both sides have been prepared. We have no doubt of the true principle which is applicable to the matter, or of the legal effect of this deed of March, 1834. It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz., that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter.

Upon all these grounds we concur with the decisions of the Courts below, and we think it right to advise Her Majesty to dismiss this appeal, and to dismiss it with costs.

As the Appellant admitted, with great propriety, that, provided the conclusion of their Lordships was that the property was divided, then the shares which he now claims have followed a course of descent with which he has no right whatever to interfere,—we say nothing upon the question of adoption. Her Majesty's Order will merely confirm the decree of the Court below.

17th November, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

CHARLES SEATON GUTHRIE and SOPHIA his wife,* ... ... } *Appellants*,

versus

FREDERICK GEORGE LISTER, *Respondent*.

Loan—Interest—Account—Augmented Interest—Nudum Pactum.

L. advanced to *I.* monies for trade under promissory notes at 5 per cent. interest. The trade proving highly lucrative, *I.*, without any fresh consideration, voluntarily debited himself with 8 per cent. instead of the legally demandable rate of 5 per cent., without executing any fresh agreement to that purpose.

L. sued *I.'s* estate claiming interest at 8 per cent.

Held on the conduct of the Plaintiff and the established facts in the case that the claim of interest at 8 per cent., founded upon a bare promise of the debtor to pay at the augmented rate, or upon the fact that the debtor has in his account voluntarily debited himself with the augmented interest, could not be maintained in law for want of consideration, amounting merely to a *nudum pactum*.

AT the conclusion of the arguments their Lordships' judgment was delivered by

THE RIGHT HON. LORD WESTBURY:

This is a suit of a painful nature, which has arisen between a daughter and her father, touching the rate of interest payable upon a loan made by the father to her deceased husband.

It appears that Mr. *Henry Inglis*, the son-in-law of General *Lister*, was engaged in trade; that the trade was lucrative; and that he applied to General *Lister* to advance him money, to be employed by him in that trade. General *Lister* assented, and lent to his son-in-law, on two several occasions in the same year, two sums of money, one amounting to Rs. 41,900, the other amounting to Rs. 19,500. On the occasion of these advances two promissory notes were given by his son-in-law to General *Lister*, and in both those notes (because, although one only is produced, it has been admitted at the Bar that there was another, and that the other must be taken to have been of the same tenor with that which is produced), there is a promise by the borrower, Mr. *Inglis*, to repay the money borrowed with interest at five *per cent.* at the expiration of three years. The contention now on the part of the General, the lender of the money, is, that he is entitled to interest at the rate of eight *per cent.*; that his interest is not to be limited to five *per cent.*, which is the prescribed rate of interest on the promissory notes. He might maintain that contention by proving either that at the end of the three years, the time for the repayment of the money, he forebore to press for the money, in consideration of an augmented rate of interest, or he might maintain that the contract, of the terms of which the notes are evidence, was superseded by a new contract, which allowed the money to remain for a longer period of time than three years, at an augmented rate of interest. But unless some such case can be proved, a claim of interest at eight *per cent.*, founded upon a bare promise of the debtor to pay eight *per cent.*, or upon the fact that the debtor has in account voluntarily debited himself with eight *per cent.* in lieu of five *per cent.*, could not be maintained in law for want of consideration, amounting merely to a *nudum pactum*.

It is satisfactory to find that the history of the introduction of the eight *per cent.* into the dealings between the parties is very clearly given by General *Lister* himself; and it is a history which is very creditable to his son-in-law, Mr. *Inglis*, but which is inconsistent with the General's founding upon the circumstances any legal claim. We do not refer to the allegations made in the plaint,—we prefer to take the letter of General *Lister* addressed to his daughter after the death of her husband, in which he gives her a narrative of the

* 11, Moore's I. A., p. 129.

transaction between himself and his son-in-law; and upon an accurate examination of the contents of that letter, it is clear that the General distinctly states there was but one contract on the subject of interest, which he made with his son-in-law. He states the stipulation was that the legal interest, *i. e.* the legally demandable rate of interest, should be five *per cent.*, but that on the occasion of the loan being made, the son-in-law, of his own accord, said, he would pay eight *per cent.* interest, because he was able to make more than three times that rate by the employment of the money in trade.

It is plain that the words in which this promise was made were not intended to supersede the written engagement. Independently of this, we find the General giving a striking narrative of what occurred between himself and his son-in-law subsequently, sometime after the notes had been made, when the son-in-law rendered a written account, in which he had charged himself with eight *per cent.* The General's words amount to this:—I pointed out to Mr. *Inglis* that he was charging himself with eight *per cent.* interest, whereas I was entitled only to five *per cent.;* but the son-in-law said, it is all right, I can make more than three times that amount by the use of your money, therefore, I desire to pay you eight *per cent.* That conversation, again, is a clear acknowledgment on the part of the General that he regarded himself as the legal creditor of his son-in-law for only five *per cent.* It is in perfect harmony with the account given in the letter that the engagement originally was for five *per cent.*, but that the son-in-law said, He could well afford to pay more; and the General answered, You can do as you please about it. It was left, therefore, to the *arbitrium* of the son-in-law, if he chose to pay eight *per cent.*, to pay that amount; but the legal relation which was created, was an engagement to pay five *per cent.* only. What was done subsequently is not inconsistent with that. We have the fact that, subsequently to the date of the promissory note, on several occasions the son-in-law rendered to his father-in-law accounts current, in which he debited himself with eight *per cent.* instead of five *per cent.*, and that he continued that practice down almost to his death; for in one of his repositories after his death his widow found three accounts or written papers, in which also he had debited himself with eight *per cent.* If there had been no written promissory note, or if there had been no history given by the creditor making the claim of the origin of the introduction of the eight *per cent.*, the accounts so made out by the debtor might be a legal ground for presuming that the original contract had been to pay eight *per cent.*, or that there had been a new contract to pay that rate of interest. They cannot, however, be used as evidence that the original contract contained in the promissory notes was done away with and a new contract substituted, for the reason we have already given, viz., that the General admits that when he saw the first account with interest at eight *per cent.*, he treated it as a thing to which he was not entitled. Clearly, therefore, there was no contract entitling him to eight *per cent.* existing at that time; and with reference to the subsequent accounts, with perfect notice of those accounts, because he had them in his possession, the General writes to his daughter the letter to which we have referred, explaining how it had arisen, giving, as we have already observed, a history of the introduction of the eight *per cent.*, that it was a voluntary offer by his son-in-law, and that the General did not fasten it upon him and make it part of the contract, but said to his son-in-law, "You shall be at liberty to do as you please about it."

The result of the whole, therefore, seems to be plainly this, that so far as the legal right is concerned, there is but one contract existing for valuable consideration and capable of being enforced, viz., the contract made at the time of the loan, in conformity with the written obligation for the loan contained in the promissory notes; that all departures from that in respect of interest are departures which have been made from mere goodwill and sense of duty on the part of the son-in-law, who is the debtor, but not as being the result of any legal contract or obligation between him and his father-in-law.

There is no trace that the father-in-law ever treated the matter, up to the time of making the demand, as one which entitled him as a matter of right to interest at eight *per cent.*; he always treats it as a matter of bounty and favour on the part of his son-in-law; and he tells his daughter he left his son-in-law at liberty to do as he pleased about it.

We regret that the demand has ever been made. It appears that when the interest is reduced to the legal rate, the sum paid by the Appellant, *Sophia Guthrie*, was more than would satisfy the whole demand of the General according to his just right, and the action, therefore, was brought when there was nothing due on the part of that Appellant. The consequence must be that the decree of the Court below must be reversed, and the plaint dismissed, and the costs of the proceedings below and of this appeal must be borne by the Respondent.

We will make our report and humbly advise Her Majesty accordingly.

25th November, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of Oude.

ASHRUFOOD DOWLAH AHMED HOSSEIN KHAN BAHADOOR, and WAZEEROON NISSA BEGUM,* ... ... } *Appellants*,

versus

HYDER HOSSEIN KHAN, *alias* ACHEY SAHIB, ... } *Respondent*.

Mahomedan Law—Marriage and Legitimacy—Presumption.

Under the Mahomedan Law the presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not ante-dated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock, if subsequently acknowledged, acquires the *status* of legitimacy.

The *onus* lay on the Respondent to prove his mother's marriage, and his own legitimacy as a child of that marriage. There was no continuing treatment by the Father as of a legitimate son, but treatment not inconsistent with the *status* of a son conceived before marriage. There was no proof of acknowledgment, but on the contrary the reputed father had absolutely repudiated paternity.

A deed of repudiation of the parentage by the father cannot alter the *status* of a son, legitimate by birth or by acknowledgment.

Khajah Hidayut-Oollah v. *Rai Jan Khanum* (1 P. C. J., 285, 3 M. I. A., 323) and *Mahomed Bauker Hoosain Khan* (1 P. C. J., 733, 8 M. I. A., 159) cited and approved.

Considering that the uncertainty in the *status* of the Respondent had been mainly caused by the conduct of the Appellants' ancestor, no costs allowed in the appeals in *India* and *England*.

15th December, 1866.

THE consideration of their Lordships' judgment was reserved, and now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This is an appeal from a decree of Mr. *Campbell*, made by him when Chief Judicial Commissioner of *Oude*, which reversed a decision in favour of the Appellants, the Plaintiffs in the suit, made by Mr. *Fraser*, the Civil Judge at *Lucknow*. The case comes before their Lordships *ex parte*, and, difficult in itself, occasions by its being heard *ex parte* an increase of anxiety and difficulty. The Appellants are son and daughter, and as such, heirs of *Ameenood Dowlah*, *Bahadoor*, the late *Vizier* of the ex-King of *Oude*. The Respondent claims to be also a legitimate son, and as such a co-heir of the late *Vizier*, founding his claim on a *Moottah* marriage of his mother, and on his birth, in due course, as a son conceived in wedlock of that marriage. He relies also on the acknowledgment of him for many years by the late *Vizier* as his legitimate son. The Appellants deny the alleged parentage, legitimacy, and acknowledgment.

The suit which gave rise to this appeal results from a precedent litigation between these parties, of which some account is

* 11, Moore's I. A., p. 94.

necessary to a complete understanding of the cause.

At the time of the *Vizier's* death, the Respondent was not *de facto* a member of his family, having been some time previously expelled by his reputed father, the *Vizier*, from the house, and renounced as a son, under a suspicion of a grave offence imputed to him. On that occasion the *Vizier* executed a formal instrument, which is described in the suit as "a deed of renunciation," declaring the Respondent not to be his son. At the time of the *Vizier's* death, the Respondent, whatever his legal *status*, was not *de facto* an apparent heir of the *Vizier*, and the possession of the *Vizier's* estate was, after his death, in some one or more of his undisputed heirs, and no risk of disturbance from disputes as to possession seems to have existed.

A portion of the property appears from the statements on the record to have consisted of Company's paper, indorsed generally to the heirs of the *Vizier*. But this state of indorsement did not require the institution of a merely possessory suit. In this state of things the Respondent preferred a claim to be admitted as co-heir to a joint possession of the estate of the late *Vizier*, and his claim being disputed by the Appellants, this gave rise to a summary suit to enforce his claim to possession. If a suit of this kind, which cannot determine rights, be instituted where the actual possession is quiet, and where the question in dispute necessarily involves rights, the Claimant should at once be directed to proceed in a regular suit; for if he proceeds under the Acts subsequently referred to, an expensive and inconclusive litigation is the probable result.

It is unnecessary to go through the history of this previous litigation in detail, or to examine the correctness of the course adopted in its several stages. It was attended with varying success, and finally ended with a decree of Colonel *Abbott*, on appeal, in favour of the Respondent. That gentleman, the Commissioner and Superintendent of the *Lucknow* division, after referring to the Acts of the Indian Legislature, Nos. XIX. of 1841, XX. of 1841, and X. of 1851, under one or more of which the summary proceeding was instituted, observes of them: "They cannot determine right, but they place the *primâ facie* heirs in possession, and leave the subject to litigation in the proper course of law." This decision, then, was intended to establish a *primâ facie* title in the Respondent as co-heir, leaving the right undetermined; but in this case no *primâ facie* title exists distinct from the complete title in dispute, the whole subject of litigation resting on legitimacy alone. The right to that *status* was left undetermined, and was to be decided in a regular suit, to which the Appellants were referred.

In consequence of this decision, the Appellants brought their suit in the Civil Court at *Lucknow*, on the 6th of June, 1861. The object of the suit, as it appears from the plaint, was to be relieved from the effects of that summary decree, and to establish the Respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plea is not set out at length, but an abstract of it is to be found in Mr. *Fraser's* judgment. The issues, as also the findings, are carefully framed, and evidence an accurate knowledge of the Mahomedan law as to legitimacy. The first, second, and third issues are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the fourth issue, which relates merely to the share, if legitimate, and a claim to maintenance, if illegitimate. The first, second, and third issues are as follows:—

First; did *Nawab Ameenood Dowlah* (deceased) contract *Moottah* with Defendant's mother before or after his birth?

Second; has the deed of repudiation (dated, 23 *Suffur*, 1272, *Hijree*) the effect of cancelling previous acknowledgment of Defendant's legitimacy, if such were made?

Third; if Defendant be not a legitimate son, is he an illegitimate son of deceased?

It was admitted on the pleadings that a *Moottah* marriage at some time had been contracted between the late *Vizier* and the Respondent's mother, but the Plaintiff stated in effect that the conception and birth of the Respondent preceded that marriage. The plea distinctly stated the

marriage, though without assigning a date to it, and alleged the legitimacy of the Respondent as a child born of that marriage. The existence of a *Moottah* marriage, therefore, at some time was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word "sonship," which might include an illegitimate son, the word "legitimacy," and uses the word "acknowledgment" in its legal sense, under the Mahomedan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son. The first and second issues include the two legal grounds of legitimacy, viz., marriage and acknowledgment, to which the plea is limited. Acknowledgment in the sense of treatment, as evidence simply of marriage or of legitimation, could not have been included with propriety in the issues, though as evidence it would not lose any part of its efficacy by reason of the wording of the issues.

It is not necessary to state the evidence in detail, nor to weigh the conflicting direct evidence; since both Courts, viz., the Civil Court and the Court of the Commissioner, agreed in their view of the facts generally on which the decision turned, the latter adopting the facts as stated in the judgment of Mr. *Fraser*. Mr. *Campbell's* judgment was founded mainly on the inferences which he drew from those facts.

Mr. *Fraser* was assisted in his decision of this important and difficult case by a *Punchayet*, as it is termed, formed out of twenty Mahomedan gentlemen, selected with care, and reduced to ten by five challenges on either side; and as the reduced number consisted of ten men, including the High Priest, and another Mussulman Priest, all of whom are stated to have been mutually approved on both sides, a more competent Tribunal could hardly have been appointed for the decision of such a case. Their opinion against the claim of the Respondent was unanimous. Their opinion had substantially the concurrence of the Judge, Mr. *Fraser*, who made it the ground of his decision, treating them as Assessors, and concurring in their finding.

On a question of Mahomedan law, so closely allied as it is with the religion of the Mahomedans, the opinion of Priests of the dignity of these would be entitled to respect, since they are unlikely to be ignorant of it, or consciously to swerve from it. Such a decision, therefore, creates a more than ordinary presumption in favour of its correctness. It cannot readily be supposed that the High Priests would sanction so irreligious an act, in the view of Mahomedans, as the sacrifice of a son's legitimate *status*, conferred by acknowledgment of a Father, to mere caprice, or to resentment working on the mind of the Father; and their decision does not seem to be open to the suspicion of a tendency in the members of the *Punchayet* unduly to augment a Father's power. Upon turning to the findings of the issues, they appear to furnish no ground for questioning the care, or learning, or impartiality of the *Punchayet*.

On the first issue, they find that the *Moottah* marriage took place after birth. Mr. *Fraser* says, that according to the stronger evidence impregnation took place during the service, and, therefore, *primâ facie* before the marriage. The second finding is as follows: "We do not find that deceased's acknowledgment that *Hyder Hossein* was born of his body has been proved according to the conditions of the law; therefore, the deed of repudiation is correct." This finding, if it were construed literally, and disconnected from the context, would seem to favour the belief, which Mr. *Campbell* seems to have entertained, that the *Punchayet* may have been proceeding on some stricter rules of evidence, under the Mahomedan law, than the procedure of the Courts at *Lucknow* authorized; but there is no proof that such was the case, and it cannot be presumed that any rules of the Mahomedan law of evidence were adopted by them which they could not legally adopt. The presumption should be in support of the regularity of their course.

The rules of evidence of the Mahomedan law were not generally in force there: it cannot be inferred without proof that they meant to be governed by rules of evidence foreign to the Tribunal. The whole sentence must be read together. Their conclusion, "therefore, the deed of repudiation is correct," is a conclusion from the former part of the sentence, and they are plainly referring to that species of "acknowledgment" which the second issue embodies, viz., one of legitimation, and not one simply constituting a piece of evidence. This is explained also by what follows in the statement of the Priests as to the law, constituting proof of sonship. They reply, "Had the *Nawab* distinctly stated Defendant to be his son, whether orally or in writing, that would have been conclusive." They say nothing here of any peculiarity of proof of such a statement as a necessary condition of its legitimating power. The conditions of law to which this passage probably refers, are those which are to be found in the 3rd Volume of the *Hedàya*, p. 168, title "Miscellaneous Cases," which treats of acknowledgment of parentage; and the terms "conditions of law" would refer on that supposition to "acknowledgment," and not to be the more immediate antecedent "proved." But supposing that the learned Commissioner was correct in his conclusion that the *Punchayet* had proceeded on some special rule of evidence under the Mahomedan law, applicable to acknowledgment of parentage, the rejection of their finding on that ground merely would not be reconcilable altogether with the opinion expressed by the Privy Council in their judgment, at p. 283, Privy Council Judgments, Vol. I., p. 318 of the 3rd Vol. of Moore's Indian Appeals, in the case of *Khwàh Hidayut Oollah* v. *Rai Jan Khanum*: "We apprehend," say their Lordships, "that in considering this question of Mahomedan law (that is, the question of legitimacy), we must, at least to a certain extent, be governed by the same principle of evidence which the Mussulman Lawyers themselves would apply to the consideration of such a question."

The general rules of evidence of the Mahomedan law did not prevail in the Courts in which that cause was heard, any more than they prevail in the Courts at *Lucknow*; but in relation to that particular subject, so intimately connected with family feelings and usages, that deference was recommended if not enjoined.

Taking the whole of this finding together, and viewing it with relation to the particular issue which it finds, it appears to do no more than say, "As sonship does not appear (that is as the Respondent is one of doubtful parentage,) the deed of repudiation is correct, whereas it would have been untenable after an established acknowledgment;" this reconciles the opinion here expressed with that of the Mahomedan High Priest, who says that a denial of a son either of a *Nikahee* or *Mootahee* wife, after an established acknowledgment, will, according to the Mahomedan law, be untenable.

On the third issue they find thus: "We do not find it proved that *Hyder Hossein* is a son begotten of the body of the deceased *Nawab*." The propriety of this finding with reference to the matter in dispute, viz., legitimacy, resolves itself into the question, whether, on the whole evidence in this cause, legitimacy ought to have been declared to be established. The consideration, therefore, of this part of the case is for the present postponed.

In the judgment of Mr. *Fraser*, he states, in the commencement of it, "that the *onus* of proof in this case was thrown on the Plaintiffs, for the Defendant had acquired the right of being regarded as one of the legitimate sons of the late *Nawab Ameenood Dowlah*, such being the summary judgment passed by the Commissioner." The reason assigned seems to admit the correctness of the general rule, and to assign to the Appellants the burthen of proving what is substantially a negative, to the inversion also, in this case, of the ordinary course of proceeding as to possession. The title of the Respondent, if established, was one in privity with the Appellants' title. The mere fact of possession of a portion of the disputed property by either party was not a matter of any importance to the decision of the question on whom the burthen of proof rested in

this cause; that depended on the nature of the issues.

Mr. *Leith* made this inversion of the usual order of proof a subject of complaint against the decision. In many cases, undoubtedly, an unauthorized transfer of possession would work serious injury and injustice to a Claimant; but in this particular case it does not appear that the mistake as to the transfer of possession, and as to that of the *onus probandi*, which, in the judgment of Mr. *Fraser*, it involved, worked any real injustice or imposed any difficulty on the Appellants from which they would otherwise have been free; and their Lordships' decision is unaffected by this objection.

This preliminary objection to the mode in which the case was dealt with below being removed, it becomes necessary to view the whole of the facts in proof in the cause; for the case really depends on a conflict of evidence, and the due application of presumptive proof. The facts on which the Commissioner grounded his decision he took from the judgment of Mr. *Fraser* in the Court below, but they require to be stated, with one not unimportant addition, the want of which was made, on the argument, a ground for questioning the correctness of his view of the facts.

It appears to have been a mere omission of statement; the fact does not appear to have escaped the attention of the Commissioner. The addition required is this—that the mother of the Respondent entered the *Vizier's* family as a servant in a menial capacity, and served in that capacity for some time, and after some period of service was taken behind the *Purdah*. The *Vizier*, it may be observed, was then simply a *Darogah*, not much elevated in position above the woman whom he hired and afterwards married. The facts, then, when stated more fully, should stand thus: that the mother of the Respondent entered the service of the *Darogah*, afterwards the *Vizier*, in a menial position, as Cook; that she was a widow; that the date of her husband's death was not proved; that she went out in the course of her service into the Bazaar to make purchases, and was taken subsequently behind the *Purdah*; that the date of the commencement of her cohabitation with the *Darogah* was not proved; that the dates of her pregnancy and of the birth were not proved; that the date of the *Moottah* marriage was not proved; and that it was not proved that any change in her position or treatment occurred before the date of her pregnancy. There is, therefore, a total failure of proof whether marriage preceded or followed pregnancy. Mr. *Fraser* said that pregnancy commenced during the service. Mr. *Campbell* removed the difficulty by a presumption of an antecedent marriage. Can the defect of the evidence in this case be supplied by a presumption placing that marriage itself at a time anterior to pregnancy? This is the main question in the cause.

It is to be observed, in considering the propriety of strengthening the weakness of the direct proof by this last presumption, that the mother was living at the time of the trial, and that the date of her marriage was a fact which she was competent to prove, as well as the time of the birth of her child. No explanation has been afforded by the Judges who have heard this cause why the evidence fails on these important points, or why that is to be worked out by a presumption from marriage which living testimony might support, especially in a case where the treatment has been interrupted, and an impediment of more or less weight interposed by the repudiation of the parentage by the reputed father. It would be an easy matter to legitimatize a child conceived before marriage by withholding proof of the time of marriage, and resting on an inference from the marriage itself. These or similar reasons may have been present to the minds of the *Punchayet* when they found on the first issue, that the birth preceded the *Moottah* marriage. It is important to consider the real nature of such a document. It has no effect whatever on the *Status* of a legitimate son, whether legitimate by birth or made legitimate by acknowledgment. The finding of the *Punchayet* does not contravene that position. Their finding on the issues as to acknowledgment and sonship leaves the Respondent in the position of a son of an unacknowledged father. On the *status* of such

a son the renunciation may be operative according to the Mahomedan law; but it is not conclusive, and may be contradicted and disproved, and does not seem to be more weighty in itself than a declaration by a deceased parent in a case of pedigree. The *Punchayet* say that the renunciation is correct, that is, that their law admits it to take effect; whereas in either of the other cases "the denial is untenable." It might be inferred from the proceedings of the *Punchayet* alone, that such an instrument is in use among the Mahomedans: a similar document was admitted in proof in a case which came before the Privy Council, *Jeswunt Sing-jee Ubby Sing-jee* v. *Jet Sing-jee Ubby Sing-jee* (1 P. C. J., p. 275; 3 Moore's Ind. App. Cases, p. 253.) Had this deed of renunciation been evidence on which reliance could be placed as to the denial of sonship which it contained, then it might have sufficed to displace a mere presumption of legitimacy, founded on treatment as a son of one in truth illegitimate. It might be designed and suffice to remove a growing repute. That document, however, cannot be relied on. It was executed under great resentment; it spoke the mind of one irritated by a grievous sense of wrong, and it would be dangerous to give effect to such a document, so prepared and executed, and to place it in the power of an irritated man to bastardize his offspring by an instrument executed under a sense of wrong, especially amongst a vindictive race. It is so difficult to credit the story that the *Vizier* adopted the Respondent, who on that supposition would be the bastard son of a woman of low degree by some unknown father, that the insertion of that statement in the deed detracts greatly from its credit; an untrue account of the origin of the *Vizier's* connection with the Respondent gives rise to some degree of suspicion that the disclosure of the real state of the case might aid the Respondent's claim to be deemed legitimate.

As it appears, then, that the *Punchayet* below, and the Court which adopted its finding, attached an undue importance to this deed of renunciation, and as this undue estimate of its weight may have greatly influenced their findings on the other issues, the learned Commissioner seems to be substantially correct in forming his own judgment independently of the findings, in which there had been a miscarriage. Whether he was correct in deciding the issues in favour of the Respondent, is a doubtful and difficult question. It would be desirable to know to what authorities, if particular cases were in his contemplation, Mr. *Campbell* refers.

Unfortunately he does not name any, but he refers to Mr. *Baillie's* Book on Inheritance as questioning the broad assumption that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimatize the offspring." This statement drops the important qualification "with acknowledgment."

The binding decisions on this subject must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption, or which, when rightly understood, is in conflict with the law, as stated by the Priests in this case.

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest

on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of *Mahomed Bauker Hoossain Khan* v. *Shurfoon Nissa Begum* (1 P. C. J., p. 733, 8 Moore's Ind. App., p. 159), affirms this principle.

Their Lordships said in that case, which was one of legitimacy under the Mahomedan law:—"In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof either of a marriage between the parents, or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference."

Their Lordships are not aware that these principles have ever been lost sight of in the Courts in *India*. They believe that they have been constantly observed by, and have guided the decisions of their Lordships in the Judicial Committee.

In the case in 1 P. C. J., p. 285, 3 Moore's Ind. App., p. 323, already cited (*Khajah Hidayut Oollah* v. *Rai Jan Khanum*), it is observed in the judgment:—"Without going into the question of the oral evidence, whether there was an express acknowledgment of the child by *Fyz Ali Khan*, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecutive course of treatment both of the mother and the child for a period of between seven and eight years, under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued except from the presumption of the cohabitation, and of the son being the issue of the loins of *Fyz Aly Khan*." The cohabitation alluded to in that judgment was continual; it was proved to have preceded conception, and to have been between a man and woman cohabiting together as man and wife, and having that repute before the conception commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. The presumption throughout the whole judgment is treated as one of fact.

It would be much to be regretted if any variance on this important matter arose between the dicisions of the Courts and the text of the Mahomedan law of legitimacy as understood and declared by the High Priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case, and the position contained in Mr. *Campbell's* judgment, that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This position, if established, would have sufficed to legalize the *status* of the Claimant in the case before referred to, *Mahomed Bauker Hoossain Khan* v. *Shurfoon Nissa Begum* (1 P. C. J., p. 733, 8 Moore's Ind. App., p. 159,) for in that case there was abundant evidence of continued cohabitation between the Father and the Mother of the Claimant; but as there was no proof in that case either of marriage or of acknowledgment, he was adjudged to be illegitimate.

This case, then, must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favour of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment, and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and whilst matters of the highest import are capable of being inferred and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation.

Mr. *Campbell's* conclusion that the Res-

pondent was the son of the late *Vizier* seems to their Lordships a just inference from the facts, nor does it seem to be at variance with the opinion of Mr. *Fraser*. Mr. *Campbell* treats this as the only question of fact in the case. But the issues distinguish properly between sonship and legitimate birth. Mr. *Fraser* keeps that distinction clearly before him in his judgment. Mr. *Campbell*, indeed, does not appear to have lost sight of it, but to have considered that he was entitled to presume the Respondent's legitimacy, if cohabitation of his parents, and his birth from them at any time, whether before or after the marriage, were established as facts.

Mr. *Campbell* does not question, in his judgment, the correctness of the opinion expressed by Mr. *Fraser*, that pregnancy commenced during the service. At that time cohabitation, in the sense of permanent intercourse such as takes place ordinarily between man and wife, is not proved to have existed between the late *Vizier* and the mother of the Respondent. The evidence forbids the presumption that that kind of cohabitation commenced with her service, for a change in the treatment of her ensues when she is taken behind the *Purdah*, and the antecedent relation, according to the evidence, was that of ordinary servitude. If pregnancy occurred, as Mr. *Fraser* is of opinion that it did, during that service, and when she was in the habit of going from the house freely into the *Bazaar*, sexual intercourse then in that state between her and her Master would not have the character of cohabitation of a permanent nature, such as under this head of law distinguishes concubinage from casual intercourse. If the subsequent marriage were adjudged to have relation back, by presumption of law, to the time of impregnation, then such a *præsumptio juris* would destroy altogether the difference between a law which admits to inheritance and a law which excludes from inheritance an antenuptial child. As a presumption of fact such a presumption is admissible, but then it must be subject to the application of the ordinary principles of evidence.

A subsequent marriage, so far from furnishing, as Mr. *Campbell* supposes, a ground for presuming a prior marriage, *primâ facie*, at least, excludes that presumption. Therefore, no ground exists for presuming a marriage antecedent to the *Moottah* marriage which at some period or other was established between the *Vizier* and the mother of the Defendant. Laying, then, this presumption aside, it appears to have been found in the Court below, on evidence which justified that finding, that pregnancy commenced during the time when the mother of the Respondent was in service, and before she had the acknowledged *status* of a *Moottah* wife. There was a marriage, but when it does not appear. It does not appear when the intercourse began which led to the birth, nor what was the nature of it, whether casual or of a more permanent character. It is obvious that the pregnancy might induce the desire to give the woman the reparation of marriage. No difficulty is suggested about rendering these dates certain, which are now left utterly uncertain.

The treatment of the Respondent by the *Vizier* appears for many years to have been that of a son by its father: this, however, is correctly treated by Mr. *Fraser* as inconclusive in itself, since a son conceived before marriage, and whom his father desired to recognize at some time as a legitimate son, would receive similar treatment. The treatment itself, therefore, does not suffice to dispel the darkness in which this case is left. The *onus* of proof lay on the Respondent, on the pleadings in this cause, to prove his mother's marriage, and his own legitimacy as a child of that marriage. There has been no continuing treatment up to the time of the father's death; there has, on the contrary, been an absolute denial of paternity by the reputed father; there is no proof of any acknowledgment, but there is proof of treatment strong enough to prove legitimacy in an ordinary case, but of treatment not inconsistent with the *status* of a son conceived before marriage. It is shown that the Respondent did not receive all the honours which his brother received. This circumstance is much pressed against him by the Appellants.

It may be, however, that the inferiority of his mother's condition, or his own later

birth, caused the difference; or, on the other hand, the father may have postponed a legitimating acknowledgment, being as yet undecided as to his future treatment of him, and he may have waited to see how the youth conducted himself at puberty. The circumstance of some inferiority of condition having been continued down to the time of final rupture, to some extent supports the case of the Appellants, that the Respondent was not legitimate. Their Lordships are, therefore, of opinion, that the decision of the Commissioner is founded upon presumptions not warranted by the facts of the case, and in some degree upon a misconception of the authorities, and ought not to be allowed to stand. They will, therefore, humbly advise Her Majesty to reverse that decision, and to affirm the judgment of the Court of First Instance. Considering, however, that the uncertainty as to the *stutus* of the Respondent has been mainly caused by the acts of the deceased *Vizier*, the residue of whose estate will, in consequence of this decision, fall to the Appellants, their Lordships are not disposed to subject the Respondent to the costs in the Commissioner's Court, or to those of this appeal.

11th, 12th and 13th December, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North West Provinces, Agra.

MUSSUMAT THAKOOR DEYHEE,* ... ... } *Appellant*,

versus

RAI BALUK RAM & others, *Respondents*.

Hindu widow—Mitacshara—Inheritance—Immovable and Movable property—Stridhun—Alienation—Collateral heirs of husband.

Held on a review of the authorities, that although according to the Hindu law of the Western schools the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of the *Bengal* school, she is by both laws restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband then living. There was no authority for making a distinction between ancestral and acquired property in this respect.

The devolution of *Stridhun* from a childless widow is regulated by the nature of the marriage; in case she had been married according to one of the four approved forms of marriage, her *Stridhun* would according to *Mitacshara*, chap. ii., sec. xi., art. xi., go to the collateral heirs of her husband and not to her own relations.

Held on the evidence that the Appellant had failed to prove the deed of gift from the deceased widow.

1st February, 1867.

THE consideration of the case was adjourned, and their Lordships' judgment was now delivered by

THE RIGHT HON. SIR JAMES W. COLVILE:

The question on this appeal is the right of succession to certain property of which one *Choteh Bebee*, a Hindoo widow, died possessed. She was the widow of one *Ramjee*, who died in 1824 without issue, and he was the only son and heir of *Benee Ram*, one of the five sons of *Rai Sahuj Ram*. The Respondents are all descended from the last-named ancestor through one or other of his four other sons, and are admitted to be the collateral male heirs of *Ramjee* living at the date of his widow's death. The Appellant is the niece of *Choteh Bebee*, her brother's daughter. She is said to have been from her infancy adopted by her aunt, and treated as a daughter. But the word "adopted" must here be taken in its popular, and not in its technical sense. It is not now contended that the adoption was of that kind which, according to Hindoo law, would create between *Choteh Bebee* and the Appellant the relation of parent and child for all religious and legal purposes, or give to the latter any right of inheritance. The question in this case is, whether the property in dispute on the death of *Choteh Bebee* descended to the Respondents as the collateral heirs of her husband then living, or passed, under a deed of gift alleged to have been

* 11, Moore's I. A., p. 139.

executed by her shortly before her death, to the Appellant. That property is partly movable, and partly immovable. The latter is situated in the Districts of *Tirhoot*, *Behar*, *Shahabad*, and *Benares*, and the deceased was domiciled at *Benares*. Therefore, the law by which the succession to the whole is governed is that of the Western schools.

The issues recorded in the cause were, whether *Mussumat Chotch Bebee* was competent to bestow the property in gift or not; and if she was, whether the deed of gift relied upon by the Defendant (now the Appellant) is valid or not. This appears from the Record. Between the date, however, at which the issues were recorded and that of the trial, a change took place in the constitution of the Court of the Principal *Sudder Ameen* of *Benares*, in which the cause was pending; and Mr. *Smith*, by whom it was tried, in his judgment, says: "The disposal of the case rests on two important issues; first, whether the property which was the subject of the gift to the Defendant was joint ancestral or not; second, whether the alleged deed of gift is or is not a *bonâ fide* instrument. The first of these questions, as will hereafter be shown, is by no means identical with the first recorded issue. Mr. *Smith*, however, having decided it in favour of the Appellant, appears to have considered that the necessary consequence from his finding was, that *Chotch Bebee* was legally competent to alien the property; and further found that she had duly executed the deed of gift. He, therefore, dismissed the Respondent's suit, with costs. There was an appeal to the *Sudder* Court of *Agra*, and that Court, confining its attention to the second of the recorded issues, and after taking further evidence as to the *factum* of the alleged deed of gift, came to the conclusion that the instrument was forged, and on that ground alone made a decree in favour of the Respondents. The present appeal is against that decree.

Their Lordships, reverting to the recorded issues, will consider them in their inverse order. They will first consider whether the evidence in the cause can be taken to have established that the alleged deed of gift was duly executed by *Chotch Bebee*.

The case set up by the Appellant is the following: In 1858, *Chotch Bebee* undertook a pilgrimage to *Juggernauth*. She was accompanied by the Appellant, the Appellant's brother, *Balkishen*, *Nathoo Ram*, a Priest, and *Bunsee*, a menial servant. On her return homewards from the Shrine, and a few days before she reached *Midnapore*, she was attacked with dysentery, and arrived at *Midnapore* very ill, and despairing of recovery. The instrument itself expresses that she had no hope of getting home alive. It was prepared by *Hurry Doss*, a Pleader in the Judge's Court of *Midnapore*, and by his nephew and Clerk, *Deenbundhoo Muttye*. It was written in *Bengalee*, a language foreign to the person by whom it purported to be executed—a language which it is admitted she did not understand. It was executed at the door of the *Cutcherry* of the Registrar of deeds, to which place both *Chotch Bebee* and the Appellant were taken in separate palanquins, and there registered. The Appellant says, "After the registry was effected we returned home, and left the station." *Balkishen* says that *Chotch Bebee* remained at *Midnapore* about two days after the deed was executed and registered. All the witnesses who speak to the fact seem to agree that she died about thirteen or fourteen days after the execution of the deed at a place called *Gobind Chuttee*, distant about seven days' march from *Midnapore*, and that her body was there burned.

We have now to consider the evidence given to prove this transaction more minutely; and first it may be well to see what evidence there really is that the person who put her hand to the instrument was *Chotch Bebee*.

The subscribing witnesses to it are *Balkishen*, *Nathoo Ram*, *Bunsee*, and four Bengalees, viz., *Tarachund Muduk*, *Modhoo*, a *Chowkeedar*, *Sree Chedum Surma* or *Chedum Sirdar*, and *Deenbundhoo*, who was concerned in the preparation of the deed. The first three of the Bengalee witnesses may be at once disposed of. Neither their subscriptions nor the testimony of such as have been examined can add anything to the credibility of the transaction. *Tarachund* almost admits

that he was called out of the crowd about the door of the *Cutcherry* to become a subscribing witness, without previous knowledge of the parties or of the transaction. He says that *Chedum Surma*, elsewhere called *Chedum Sirdar*, and *Modhoo* the watchman, were unable to write, and he does not know who signed for them; whilst *Balkishen* says, "Those witnesses who could write signed for themselves, and those who could not *Deenbundhoo* signed for them." *Chedum Sirdar* does not seem to have been examined, and *Modhoo* was probably a witness of the same class with *Tarachund;* for his statement that he, a village watchman, had been admitted into the presence of *Choteh Bebee*, or had been requested by her to sign the deed, is utterly incredible. Besides the evidence of the subscribing witnesses, we have that of *Hurry Doss* and *Shamchund Ghose*, who took upon themselves to identify *Choteh Bebee* to the Registrar. But it is obvious that they could only speak to her identity from information derived from those who travelled in her company, or from the person spoken of as the *Chowbey*. He was the only resident in *Midnapore* who it is pretended had ever seen or known *Choteh Bebee* before this transaction. He was a *Pundah*, a sort of Priest, who had migrated to *Midnapore* from the Upper Provinces, and there dealt in sweetmeats. His name is not given, and he appears to have been known only as the *Chowbey-Hulwai*, an appellation which expresses both his *status* as a Brahmin and his occupation as a Confectioner. What was the extent of his previous acquaintance with *Choteh Bebee* does not appear. *Balkishen* says, "She knew a *Chowbey* of *Muttra* at *Midnapore*. On going to *Juggernauth* she saw the *Chowbey*, who kept a shop, but did not halt at *Midnapore;* she halted further on." But whatever was the extent of his acquaintance, the *Chowbey* neither attested the deed nor appeared before the Registrar to identify her, nor gave evidence in the cause. When the examination of the additional witnesses took place at the instance of the *Sudder* Court, he had disappeared from *Midnapore* and could not be traced. There is, therefore, no evidence of the identity of the person who signed the deed with *Choteh Bebee* except that of the Appellant, her brother, their dependent the Priest, and a servant. This might have been corroborated by satisfactory evidence of the handwriting; but from the evidence on that point and a comparison of the *Nagree* signature on the deed with the admitted signature of *Choteh Bebee* upon other documents, the *Sudder* Court has come to the conclusion that the former is a forgery. The testimony, too, of the *Kobiraj*, or native doctor, if forthcoming, might have afforded some slight corroboration of the story. He could at least have proved that he was called in to attend a woman dangerously ill of dysentery, and have shown in what state of body or mind his patient was.

Again, there is no evidence, except that of the four persons above-mentioned, of the time and place of *Choteh Bebee's* death. Their testimony on that point might have been corroborated by that of the police authorities of the station where she is said to have died. But that corroboration is wanting.

We will next consider the evidence touching the preparation and execution of the deed. It seems clear that *Hurry Doss*, the Pleader, was called in on the night of the arrival of the party at *Midnapore*. He is the person called *Sreedhur Moonshee* by the Hindustani witnesses. There is a good deal of discrepancy in the evidence as to the manner of calling him in. He himself says, that *Balkishen* and *Nathoo Ram* called on him, and said he had been recommended to them by the *Chowbey*. *Shamchunder Doss*, who seems to have been hanging about the house where the Pilgrims put up, professes to have directed them to *Hurry Doss*. *Bunsee* says "the *Chowbey* sent for *Sreedhur Moonshee*." *Nathoo Ram's* evidence is to the same effect; and *Balkishen* says that he "and the *Chowbey* went to *Sreedhur Moonshee*, who sent for the writer" (*Deenbundhoo*.) These discrepancies, however, are not of much importance. It is clear that *Hurry Doss* went to the house where the woman alleged to be *Choteh Bebee* was, on the night of her arrival; and, though the evidence is not altogether consistent on that point, that he took *Deenbundhoo* with him.

Hurry Doss been the professional person responsible for the preparation of the document, it is to his evidence that we naturally look for a true account of that part of the transaction. His statement is to this effect: "I found *Choteh Bebee* lying down. She said, 'Are you a *Vakeel*?' I said, 'I am'. She said, 'All my property I wish to make over in gift to *Thakoor Deyhee*, my niece'—who was then sitting by her. I asked what estate (*Talooqua*,) and what property, that a rough copy might be prepared. She said, 'To-night I am not at all well, but to-morrow morning I will have it all written out." I then returned that night to my house. The next morning I sent *Deenbundhoo* to take a list, and ascertain what she wanted to have written. He went, and took down all particulars. I said the whole of the property was to be made over, and that she had no stamp paper. I then drew out a deed of gift in the Bengalee language, and I sent *Deenbundhoo* with it to *Choteh Bebee* to be read to her, and ascertain whether it was what she wanted. *Deenbundhoo* returned, and said she had agreed to what I wrote. The next day I had it all clearly written out on stamp paper, and brought it to the *Cutcherry*. *Choteh Bebee* and *Thakoor Deyhee* also came in *palkees* to the Court, and I then read out to *Choteh Bebee* the contents of the *Hibbenamah* and she signed it with her own hand. *Choteh Bebee* was then taken in a *palkee* before the Registrar, the door of the *palkee* was opened, and the *Nazir* questioned her by the Principal *Sudder Ameen's* orders, and she admitted that she had executed the deed. I received back the *Hibbenamah* after registry, and the next day took it to *Thakoor Deyhee* through *Balkishen*."

From this statement it is to be inferred that on the first evening nothing was expressed but a general intention to make a gift of the whole property; that on the following morning the Pleader obtained more particular instructions through *Deenbundhoo*; that he then, in his own house and with his own hand, drew up the draft deed, and sent it by *Deenbundhoo* to be explained to the woman; that on the following day he had the engrossment made on stamp paper in his own house, and took it thence to the Court-house, where he met the two women in their *palkees*; that he read over the fair copy to the woman said to be *Choteh Bebee* outside the Court, who executed it there; that she was then taken in her *palkee* before the Registrar, and to him or his *Nazir* acknowledged her signature. One would have expected that this account would have been confirmed, at least by the Clerk, *Deenbundhoo*, in all its material particulars. This, however, is not the case. His statement is that on the night when, according to *Hurry Doss*, *Choteh Bebee* was too ill to give full instructions, he remained behind and took down from her dictation what he calls a list containing the names of her husband and her father; that the rough copy of the deed was drawn out the next day, and was clearly written out and taken to her by him. In another part of his evidence he says that *Hurry Doss* prepared the rough copy of the deed in her house; that *Choteh Bebee* explained to him what she wanted done, and that he (the witness), at *Choteh Bebee's* request, wrote the copy out clearly on paper. (This probably means the copy on stamp paper.) He says that on the same day (being the day after the evening on which *Hurry Doss* was first called in) the two women came to the *Cutcherry*, and that the deed was then and there executed and registered. He does not state how, or by whom, the Bengalee instrument was explained to her. The testimony of the Hindustani witnesses, on the whole, tends to confirm the statement of *Deenbundhoo* rather than that of *Hurry Doss*. Both *Nathoo Ram* and *Balkishen* say that both the draft and the fair copy of the deed were written and explained by *Deenbundhoo* at *Choteh Bebee's* house. They do not speak to the fair copy having been explained to her by *Hurry Doss* at the *Cutcherry* when it was executed. They say that the deed was written and executed on the same day, viz., that following the evening of *Choteh Bebee's* arrival at *Midnapore*. *Bunsee*, however, states that the fair copy on stamp paper was written at the *Cutcherry*, and that the deed was written after remaining three days at *Midnapore*.

Here, then, their Lordships have to deal with an instrument avowedly taken *ex capite lecti* from a woman stricken with a mortal disease, and in expectation of death—that woman being one of a class which the law regards as in need of especial protection. Whatever strictness is required in the proof of a testamentary disposition, is, at least, equally required here. The document is written in a character and language which, if in the fullest possession of her faculties, she could neither read nor understand. The accounts given by the witnesses of its preparation and explanation are inconsistent and unsatisfactory. If it were even established that the person who put her hand to the paper were *Choteh Bebee*, the proof would still fall short of that which ought to be given to support such a transaction—proof that she really knew what she was about, and intended to make this disposition of her property.

Again, the circumstances of the execution are, in their Lordships' judgment, extremely suspicious. This sick and almost dying woman is said to have been carried down on the afternoon of an August day, and deposited at the door of the *Cutcherry*. Whilst lying there she has the instrument explained to her, for the first time, by the person chiefly responsible for its preparation, through the half-opened doors of her Palanquin. She executes it, and some of the witnesses of her act are picked up then and there out of the crowd. One witness says that the deed itself was fairly copied at this time and place; several—and that is far more credible—that an additional copy for registration was then made. After all this ceremony is gone through she is carried into Court, and questioned by the *Nazir*.

Now, she might certainly have executed the deed in the privacy of her own house. Nor does she seem to have been bound, by the Acts and Regulations touching registration, to appear personally before the Registrar, in order to have it registered. She might have sent it for that purpose by a duly authorized representative, with one or more of the witnesses, who could speak to her execution of it.

Appearance in a public Court, even under the protection of a Palanquin, is a thing repugnant to the feelings and habits of a Hindoo woman of *Choteh Bebee's* position, even when she is in perfect health. The same feeling might not operate on one who personated her, or on one who sought to profit by the fraud. And the extraordinary publicity resorted to on this occasion seems more likely to have been designed to give a colour to a false transaction than to have been an incident in a regular one.

Considering, then, the whole evidence and the startling improbabilities of the case set up, their Lordships are of opinion that the Appellant has failed to establish the validity of the deed of gift on which she relies. It is not necessary to say that on this evidence she and her witnesses must be taken to have been guilty of conspiracy, perjury, and forgery. It is sufficient to say that the proof falls very far short of what is required to support the affirmative of the issue, which she was bound to prove.

If the Appellant were suing to recover possession of the property from the Respondents by virtue of the deed of gift, the conclusion to which their Lordships have come would of course determine the cause. That, however, is not the nature of the suit; and the Respondents, being the Plaintiffs below, have to show a title to the relief which they claim. The object of their suit, as stated in the plaint, was to be confirmed in the possession of the various parcels of immovable property which are therein specified; to recover certain movable property which seems to have been under attachment; to have the deed of gift cancelled and set aside; and to avoid the title which the Appellant was then understood to claim by virtue of adoption. The first things to be determined are the *status* of the family and the nature of the property.

The Respondents alleged in their plaint that the family of the common ancestor, *Sahuj Ram*, including *Benee Ram* and *Ramjee*, had continued to be undivided. But the evidence, and above all the indisputable fact that *Choteh Bebee* was in possession of the greater part of the property in dispute, as heiress of her husband, for upwards of thirty years, seem to their

Lordships to support the finding of the Principal *Sudder Ameen*—that *Ramjee* was not a member of an undivided family, of which the Respondents, whatever be their *status, inter se*, are or represent the other co-parceners; *Benee Ram* having separated from his co-heirs, and taken as his share of the ancestral estate the villages in *Tirhoot*, which form the first parcel of the immovable property that is the subject of this suit. Their Lordships also accept as true the history which has been given by the learned Counsel for the Appellant of the acquisition of the other parcels of immovable property.

The state of the family and the nature of the property having been thus ascertained, the only question is, whether the Respondents became entitled to the possession of it on the death of *Choteh Bebee* as the next heirs of her husband. The Appellant's supposed title by adoption has been abandoned, and the validity of the deed of gift has already been disposed of. It is difficult, however, to deal with the remaining question without adverting to the arguments which have been addressed to their Lordships in support of *Choteh Beebee's* power to dispose of the property, since the right of the husband's collateral heirs depends in some degree on the nature of the widow's estate.

The learned Counsel for the Appellant; whilst they admitted that, by the law as it prevails in *Lower Bengal*, the estate of inheritance which a Hindoo widow takes in the property of her husband, dying without male issue, is limited in its enjoyment; that she cannot alien such property, whether movable or immovable, except for certain defined purposes, and subject to certain restrictions; and that it passes on her death to those who are then the next heirs of her husband—have nevertheless contended that this is not the law of the Western schools, and have attempted to show that at *Benares* and in the other Provinces governed by the *Mitacshara*, the widow's estate in her husband's property is absolute; that she has full power to dispose of it; and that, if she fails to do so, it is after her death subject to a different course of succession from that which obtains in *Bengal*.

The opinion of the Pundit* taken by the *Sudder* Court does not support this contention in its integrity. He admits the right of the widow to alien movable property, whether ancestral or not, and the immovable property acquired by her husband or herself, with the proceeds of the former's share in the ancestral estate; but

* On the 6th of August, 1861, the *Sudder Dewanny* Court put the following questions to the Hindoo Law Officer attached to that Court:—

Question 1.—*C.* and *D.* have inherited landed property from a common ancestor, *A.*, and have divided it between them. *C.* dies and leaves a son, *F.* *D.* dies and leaves a son, *G.* *G.* dies leaving no issue, but a widow, *H.* Query: Can the widow *H.* will away by Testament, to relations of her own blood, the share of the ancestral property which belonged to her husband, *G.*? or, after her death, will that share necessarily revert to her husband's cousins?

Answer.—If the share of the ancestral property which the woman's husband held separately by virtue of a partition, and to which she succeeded after his death, consisted of personal property, she could give it away to any one she choose; but, as it consists of real property, she cannot do so under any circumstances; for such (real) property must necessarily remain in the family of the person by whom it was originally acquired. The object in making a division of property is to preserve peace and to prevent disputes, but the parties take division mutually retain their rights in respect of the whole property. Hence *H.* shall, according to *Kattiayun* and others, have a right to enjoy the real property during her life, after which it shall revert to her husband's near of kin, viz., his cousins, &c.

Question 2.—Can the widow *H.* alienate, by sale, gift, or otherwise, during her life-time, the share of her husband, *G.*?

Answer.—The answer to the first question involves also the answer to the second; *i. e.* *H.* has not the power of alienating the real property by sale, gift, or otherwise, which she would have had in the case of personal property.

Question 3.—If the widow *H.* or her husband *G.* shall, during their life-time, have acquired any other real property with the proceeds of their share of the ancestral estate, can the widow *H.* alienate the real property so acquired by Will, by sale, by gift, or otherwise, or does it, on her death, revert to her deceased husband's cousins, in common with the other ancestral estate?

Answer.—The real property which *G.* or *H.* acquired during their life-time with the proceeds of the former's separate share is not hereditary, and the latter (because her husband died without issue) can give it away to any one she likes. Real property cannot be alienated in the event of the person who acquired it having issue of his own.—*Pundit, Heranund.*—11 *Moore's I. A., pp.* 148—50.

he denies her right to dispose of her husband's share in immovable ancestral property, and states that on her death it devolves on her husband's next of kin. He does not show that, if she does not exercise her alleged power of disposition over property of the two other classes, that does not also pass on her death to her husband's heirs.

The learned Counsel for the Appellant relied mainly on arguments drawn from the 1st and the 11th sections of the 2nd chapter of the *Mitacshara*, and on the supposed confirmation of them by Sir *Thomas Strange*. The first of these sections deals with the right of the widow to inherit the estate of one who leaves no male issue. It states the various conflicting authorities on the subject—some favourable, others adverse to the widow's right; it weighs and contrasts them, and comes ultimately to the conclusion embodied in the 39th Article, viz.: "Therefore, it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his coheirs, and not subsequently re-united with them, dies without male issue." It need hardly be observed that the rule thus stated merely affirms the widow's right of succession, with a qualification unknown to the law of *Bengal*—viz., that her husband was not at the time of his death a member of an undivided family. The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. It may also be conceded that nothing on these points is to be found in the rest of that portion of the *Mitacskara* which has been translated by Mr. *Colebrooke*, and published under the title of "The Law of Inheritance from the *Mitacshara*." It is not, however, a necessary consequence from these circumstances that the *Benares* school recognizes in the widow an absolute power of disposition over the estate which she has inherited from her husband, other absolute interest therein. We have not the whole *Mitacshara*. Mr. *Colebrooke*, in his preface, p. iv., states that his work includes only an extract from that celebrated Treatise, comprising so much of it as relates to inheritance. The widow's disabilities, which depend in a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex, may be dealt with in other parts of the work. It is certain that upon other subjects the *Mitacshara* cites with approbation *Menu*, *Catayana*, *Nareda*, and others, upon whose *dicta* the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends; and that these authorities are received by the Western schools as well as by that of *Bengal*. Accordingly Sir *Thomas Strange* (vol. i., p. 247) states clearly that such limitations are, with some slight variations, common to all the Schools.

A more plausible argument in favour of the Appellant's contention may be derived from the eleventh section of the 2nd chapter of the *Mitacshara*, if the words "also property which she may have acquired by inheritance," which occur in the 2nd article of this section, are taken (as they are taken by Sir *Thomas Strange* and others), to include property inherited from a husband. For it may be said that there can be no distinction between different portions of a woman's *Stridhun*, or separate property; if she can dispose of part of it she may dispose of the whole; and further, that the whole must pass on her death, according to the law which regulates the succession to *Stridhun*. Sir *William Macnaghten*, however, in his "Principles and Precedents of Hindu Law," vol. i. p. 38, lays down broadly that there is such a distinction. He says: "In the *Mitacshara*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*." And he then proceeds to show what is that *peculium* or *Stridhun* proper, according to *Menu*.

Certain it is, that whilst no decided case has been cited in support of the Appellant's contention, there are many to show that according to the *Benares* and other Western schools, the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs. The case of *Keerut Sing* v. *Koolahul Sing* (1 P.C. Judgments, p. 196;

2 Moore's Ind. Ap., p. 331,) where the property in dispute was situate in the District of *Benares*, is directly in point. To the same effect are the cases at pp. 32 and 189 of the second volume of *W. H. Macnaghten's* "Principles and Precedents of Hindu Law." Several of the cases set forth in the appendix to the tenth chapter of Sir *Thomas Strange's* work, with the remarks of Mr. *Colebrooke* and others thereon, also support this view. (See 2 *Strange's* "Hindu Law," pp. 402, 407, 408, 439.) The *Vivada Chintamani*, which has been recently translated by *Baboo Prossonno Coomar Tagore*, and is of high authority in the *Mithila* school, and in the District of *Tirhoot*, where some of the lands in dispute are situate, expressly shows that the widow has no power of disposition over the immovable property of her husband, and that his heirs take it on her death. (See pp. 261 to 263.) The doctrine has been assumed as incontestable in the more recent cases, like that of *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1 P. C. J., p. 755; 8 Moore's Ind. App., p. 528.) The result of the authorities seems to be, that although according to the law of the Western schools the widow may have a power of disposing of movable property inherited from her husband, which she has not under the law of *Bengal*, she is by the one law, as by the other, restricted from alienating any immovable property which she has so inherited; and that on her death the immovable property, and the movable, if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Pundit between ancestral and acquired property. In some of the cases cited the property was not ancestral.

Again, supposing that any of the property claimed in this suit were of the nature of *Stridhun*, and passed as such, the Respondents would seem to have a better title to it than the Appellant. The devolution of *Stridhun* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that *Choteh Bebee* was not married according to one of the four approved forms. In that case her *Stridhun* would, according to the *Mitacshara* (chap. ii. sec. xi., art. 11), go to the Respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 *Strange's* "Hindu Law," pp. 411 and 412, and the comments of Mr. *Colebrooke* and others thereon. Upon this record, however, it seems admitted that the whole of the property in dispute was either inherited from the husband, *Ramjee*, or the fruit of its accumulations.

Their Lordships, then, are of opinion that *Choteh Bebee* had no power of disposition over the immovable property inherited from her husband, whether ancestral or acquired. Whether she had any such power over his movable property it is unnecessary to determine; since it has been found that no valid disposition of either kind of property has in fact been made. And this being the case, their Lordships are of opinion that, as between the parties to this record, the right to the possession of the whole of the property in dispute, on the death of *Choteh Bebee*, passed to and became vested in the Respondents.

The decree impeached is, therefore, substantially right. Whether it is altogether right in point of form may be doubted. It contains an order that the Respondents should recover from the Appellant the possession of the immovable property, with mesne profits from the date of the institution of the suit; whereas the plaint seems to admit that the whole, or a large portion, of such property was at that date in the Respondents' possession, and made no demand for mesne profits. The error (if error there be) appears only in the formal decree—not in the judgment upon which it is founded. The recommendation which their Lordships will humbly make to Her Majesty is, that the decree of the *Sudder* Court be varied, and that it be thereby decreed that the Respondents (the Plaintiffs) be confirmed in the possession of so much of the immovable property in the plaint mentioned as was in their possession at the date of the institution of the suit; and be declared entitled to the movable property; and that they do recover from the Defendant (the Appellant) so

much (if any) of the said immovable property as was in her possession at the date of the institution of the suit, with the mesne profits of such last-mentioned property from the said date, together with the costs of suit in both Courts. Their Lordships, however, are of opinion that, notwithstanding the variation of this decree, the Appellant must pay the costs of this appeal.

13th December, 1866.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of the Province of Oude.

SHAH KOONDUN LALL and SHAH PHOONDUN LALL,* ... ... } *Appellants*,

versus

RAJAH AMEER HUSSUN KHAN, Minor, RAMDUTTA MULL, Curator, and the DEPUTY COMMISSIONER OF SEETAPORE, ... } *Respondents*.

Bond—Principal—Interest—Reopening accounts.

The Respondent's father being indebted to the Appellant's firm, did after examination of accounts accept the balance shewn therein to be correct and purchased the forbearance of the creditors by executing fresh bonds in their favor for such balance—and no fraud was established.

The firm having sued for the principal and interest on those Bonds, the Court below, with the assistance of experts, re-opened the accounts between the parties and gave a modified decree.

Held (reversing the decree of the Court below) that there was no ground for re-opening the accounts and reforming the contract of the Respondent's father.

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* 11, Moore's I. A., p. 120.

1st February, 1867.

THE case after argument stood over for consideration. Judgment was now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellants are *Shroffs* and money lenders, carrying on business at *Muttra*. The Respondents are the infant son and heir of the late *Nawab Ali Khan*, who was *Talookdar* of *Mahmudabad*, in the Province of *Oude;* the native Manager or Curator appointed by the Court of Wards, who, during the minority of the *Talookdar*, has the custody and management of his estate; and the Deputy Commissioner of *Seetapore*, who represents and exercises the functions of the Court of Wards in that District. The deceased *Nawab* died largely indebted to the Appellants; and the question on this appeal is, whether the decree which has been made in their favour by the Civil Court of *Lucknow*, and has been confirmed by the Judicial Commissioner of *Oude*, has awarded to them all that they had a right to claim.

The latest transaction between the Appellants and the *Nawab*, of which there is any evidence, was in May, 1856; when, as they allege, an account was settled between them and their debtor, and the securities on which they sue were taken from the foot of it. One of the Bonds is not forthcoming, but by the other the sum thereby secured, which was by far the larger portion of the debt, was made payable by instalments, of which the first fell due about September, 1857. At that time British rule had been interrupted, and all civil administration suspended, by the mutiny; and that state of things continued until after the *Nawab's* death in 1858. In April, 1859, when order had been restored, and the Court of Wards had assumed the management of the estate, the Appellants claimed the sum of Rs. 35,239 as then due to them for principal and interest. The suit, however, out of which this appeal has arisen was not actually commenced until January, 1862. Certain proceedings were had during the inter-

mediate period. But all these are beside the present question. They may have been material in the Court below in order to show the *bonâ fides* of the demand, to account for the delay in prosecuting it, and to meet the point, which was at one time raised, that the suit had not been commenced within the period of limitation of suits. This last objection has, however, been abandoned; and it must be taken to be a fact established, if not admitted, that something is recoverable upon the principal security on which the suit has been brought.

The particulars of the Appellants' demand were annexed to the plaint. They claimed as then due to them the principal sum of Rs. 22,188, of which Rs. 20,488 were stated to be due on a Bond of a date corresponding with the 15th of May, 1856, and Rs. 1,700, on another Bond of the same date. They further claimed a like sum of Rs. 22,188, as due for interest on the principal debt; a larger sum being, as they alleged, in fact so due, but the practice of the Courts of *India* forbidding the recovery under the head of interest of any amount in excess of the principal. And they also claimed a sum of Rs. 5,711. 5 as. 8 p., alleged to be the balance due in respect of an allowance agreed to be paid to the *Karindahs* or Agents of the Appellants. They gave credit for Rs. 100, admitted to have been received some time in the year 1857, and thus reduced the balance claimed to Rs. 49,987. 5 as. 3 p.

The Appellants filed in Court the Bond for the Rs. 20,488, which was marked Exhibit *A*. They did not produce the Bond for the Rs. 1,700, which they said had been lost, but they filed a note of hand or letter of the same date, Exhibit *B*, which is in these words:—"My dear *Shah Koondun Lall*,—As two Bonds have been executed through your Agents, viz., one for Rs. 20,488, and the other for Rs. 1,700, you may rest assured that payment will be made on account of the rights of your Agents at the rate of 8 as. *per* Rs. 100, *per* month." They seem to have relied on this document both as corroborative evidence of the execution of the second Bond, and as a voucher in support of the claim for the allowance to the Agents.

The issues settled in the cause, on which the parties went to trial, were:—First, is *A* the deed of *Nawab Ali Khan* deceased? Secondly, how much was repaid? Thirdly, is *B* under the seal of the deceased; and if so, is it a valid acknowledgment of debt, especially with reference to an alleged Bond for Rs. 1,700? Fourthly, up to what date, and at what rate, is interest claimable?

The decree which is under appeal reduced the principal sum recoverable by the Appellants in this suit to Rs. 18,145, and allowed interest on that sum at the rate of only 12 *per centum per annum*, from the 15th of May, 1856, to the date of suit, deducting from that period the ten months during the time of the rebellion. It rejected altogether the claim for the allowance to the Agents.

Their Lordships will consider the propriety of this decree; first, with reference to the principal money claimed under the Bonds; secondly, with reference to the interest; and lastly, with reference to the Agents' allowance.

It is obvious that as regards the Rs. 20,488, claimed to be due upon *A*, the only issue before the Court was, whether that document had been duly executed by the deceased. The third issue, as their Lordships understand it, involves the questions, whether *B* was under the seal of the deceased; and, if so, whether it can be taken to establish that he had executed the second Bond for Rs. 1,700, and to supply the want of that missing instrument. Upon these issues the Appellants were not bound to prove the consideration for the Bonds. But, inasmuch as no Court of Justice would in the circumstances have accepted the mere proof that the seals on *A* and *B* were true impressions of the deceased *Nawab's* seal, as sufficient proof of the due execution by him of either Bond, it became necessary to go fully into the history of the transaction of the 15th of May, 1856. Accordingly evidence was given to show that on that day there was a settlement of accounts between the *Nawab* and the servants of the Appellants who had come over to *Mahmudabad* to "dun" him for what was due from him to the Appellants' firm; that the result of that settlement was to strike a balance of

Rs. 22,188, as the amount then due for principal and interest; and to agree that, in consideration of the forbearance by which the larger portion of this sum was made payable by instalments, the interest then due should be turned into principal; and further, that the two Bonds were executed on the footing of that settled account, the paper *B* being also sealed at that time. This is the general effect of the evidence, which, notwithstanding certain discrepancies, and some confusion touching the Exhibit *C*, their Lordships are disposed to accept as substantially true, particularly as there is nothing to set against it, and it is confirmed by *Seetaram*, the witness examined at the instance of the Defendants.

If the case rested there, it would be difficult to see upon what ground the Respondents could resist a decree for the full amount secured by the Bonds, or at least that secured by Bond *A*. It appears, however, that the Appellants produced the accounts which resulted in the balance of Rs. 22,188. The record does not show why this was done. There is no Order of the Court requiring their production. It is possible that the production may have been voluntary, and that these accounts were put in in order to corroborate the evidence of *Datta Mull* as to the Bond for Rs. 1,700, which they do, as appears by the entry in the record. All that is clear on the record is, that the accounts were brought in between the 22nd of July and the 20th of August; that the Defendants (the Respondents) took no objections to them, except that "the interest was inserted in a single lump, and not in separate items, after two years' running accounts; so that it was impossible, without calculating interest throughout, to tell on what principle it was done." In consequence of this objection, the Judge referred the accounts first to the native Secretary of the Chamber of Commerce at *Lucknow*, and afterwards to other *Mahajuns* and Experts; and the final result of their investigation was, that, by recasting the account of interest, they reduced that portion of the balance due in May, 1856, which consisted of interest and expenses, from Rs. 13,580. 6 as. 9 p. to Rs. 9,547. 8 as. 9 p., making the whole amount due at that date Rs. 18,145. 2 as. instead of Rs. 22,188.

Their Lordships do not attempt to enter into the question whether the principle upon which the Appellants kept their account, or that upon which the account has been recast by the Experts, is the correct one; because they are of opinion that no case was made for reopening the account which was settled on the 15th of May, 1856. The evidence of *Seetaram*, the witness for the Respondents, shows that the *Nawab* examined the accounts; that he objected to the interest; but that he nevertheless finally submitted to the account rendered, accepted the balance shown as the sum due, and, in consideration of his creditors' forbearance, executed the Bonds by which payment of that balance was secured. He was no doubt very much at the mercy of his Creditors; his case was the ordinary one of a needy landholder purchasing the forbearance of those who had ministered to his necessities by submitting to very usurious terms. But, with his eyes open, he entered into a contract which is not forbidden by any law. No fraud, in the proper sense of the word, has been established; and their Lordships cannot agree with the Judicial Commissioner in thinking that, upon the facts proved, the *Nawab* would in his life-time have been entitled to reopen an account which he had advisedly settled. And if this could not have been done by him in his life-time, it cannot now be done by his representatives. Their Lordships, therefore, conceiving that there is sufficient proof that the missing Bond for Rs. 1,700, was duly executed as well as *A*, and that the two were given to secure the balance of Rs. 22,188, must hold that the Appellants have made out their right to recover that principal sum in this suit.

Their Lordships are unable to see upon what ground the Courts below have reduced the rate of interest on the sum which they awarded as due on the 15th of May, 1855, below the contract rate. Their course would perhaps be intelligible if they had set aside the securities altogether as fraudulent, and had treated the sums awarded as due on open account; no rate of interest being fixed by either positive

stipulation or the course of dealing between the parties. The facts, however, would not support such a view of the case; nor does Mr. *Fraser*, notwithstanding some loose and inaccurate expressions in his judgment, appear to have entertained it. The intention of the decree, as explained by his Judicial Commissioner, was simply to correct the account, and to allow *A* to stand as a security for the reduced balance. And if *A* were to stand as such security, the contract rate of interest would remain. It must *à fortiori* remain, if, as their Lordships think, there is no ground for re-opening the accounts, and reforming the contract of the deceased *Nawab*.

Some difficulty might arise in respect of interest from the absence of the missing Bond, and the imperfection of the evidence as to its details, if the whole amount of interest that has accrued was demandable in this suit. But inasmuch as the Appellants have been obliged to limit their demand for interest to a sum equal to the principal, and the interest due at the contract rate on Bond *A* alone considerably exceeds the sum of Rs. 22,188, the difficulty suggested does not arise in the present case. Again, it is not easy to see upon what principle of law, equity, or sound policy the period when the rebellion took place should be excluded from the time for which interest is computed. It is unnecessary, however, for their Lordships to amend the decree in this respect; because, even if that deduction be allowed, the interest which has accrued would still be in excess of the principal.

Their Lordships, then, are of opinion that the Appellants have established their right to recover the whole of both the principal money and interest claimed by them to be due on the Bonds.

But the claim of the further sum of Rs. 5,711. 5 as. 3 p. in respect of "allowance due to the *Karindahs* and Agents," under Exhibit *B*, was, in their Lordships' judgment, properly rejected by the Courts below. Whether that allowance was a contrivance for adding another half *per cent.* to the usurious interest already secured by the Bonds, or whether it was what it purports to be, a gratuity to the Appellants' servants, their Lordships do not pretend to say. It seems, in any point of view, to be something *dehors* the contract; and the evidence fails to show that there was any consideration to support the assurance or promise to make this payment, which is contained in Exhibit *B*. If this item be struck out of the particulars, it will reduce the Appellants' demand to Rs. 44,276, which sum, with interest at the ordinary Court rate from the date of the decree to the date of payment, they are, in their Lordships' judgment, entitled to recover in this suit.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the Order of the Judicial Commissioner of *Oude* of the 11th of May, 1863, and to declare that the Appellants were entitled to recover in this suit the sum of Rs. 44,276, in lieu of the sum of Rs. 28,645, awarded to them by the decree of the 24th November, 1862, and likewise the costs of the proceedings in both the Courts below, and that the cause be remitted to the Civil Court of *Lucknow*, in order that the last-mentioned decree may be amended accordingly.

The Appellants' costs of this appeal must be paid by the Respondents.

5th and 6th February, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir William Erle, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces.

MUSSUMAT JARIUT-OLL-BUTOOL, *alias* HOSEIN BUKSH,*... ... } *Appellant,*

versus

MUSSUMAT HOSEINEE BEGUM, ... } *Respondent.*

Practice—Reversal of concurrent decisions of Indian Courts on evidence alone—Mahomedan Law—Continual cohabitation with a concubine for a long time creates no presumption of marriage.

The Judicial Committee will not advise the reversal of concurrent decisions of the *Indian* Courts merely on the effect of evidence, or the credit due to witnesses, unless clear error is shewn.

Naragunty Lutchmeedavamah, (1 P. C. J., 827, 9 M. I. A., 87) cited and followed.

A woman, admittedly once a prostitute, cohabited for many years with a Mahomedan and lived in his house. After his death she claimed to be his wife and produced witnesses to prove an actual marriage — as also a Will in her favor.

Held that the evidence on both points had been rightly discredited by the Courts below.

A concubine cannot be converted by judicial presumption into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management vested in her. The ordinary legal presumption is that things remained in their original state and that consequently there was no marriage.

24th February, 1867.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This is an appeal from a decision of the late *Sudder Dewanny Adawlut* of the North-western Provinces of *India*, which affirmed a decision of the local Court of *Jounpoor* in favour of the Respondent, the Plaintiff in the suit. The Plaintiff sought to recover certain movable and immovable property specified in her plaint "by right of inheritance to *Mirza Abdoolla Begg*, her uncle and ancestor, and also to *Mirza Sumud Begg*, her husband." The plaint contained a detailed description of the property sought to be recovered. The principal Defendants were *Mussumat Hosein Buksh*, *Mussumat Ruzzee-ool-Nissa, alias Rujjee Khanum*, and *Mussumat Uzeezool-Nissa, alias Mussumat Imamum.*

The first and second-named female Defendants claimed each to be a widow of the deceased *Abdoolla*, but each denied that the other was ever married to *Abdoolla*, each alleging the other to have been his mistress and not his wife. The third female Defendant claimed to be the legitimate daughter of *Abdoolla* by his alleged wife, her mother, the second female Defendant. The first female Defendant, the present Appellant, also set up a Will alleged to have been made in her favour by *Abdoolla* the day before his death, by which he bequeathed to her, by the description of "my married wife, *Mussumat Jairut-ool-Butool, alias Bebee Hosein Buksh*," all his movable and immovable property, subject to certain provisions in favour of the Plaintiff, to which it is not necessary to allude further. The validity of this Will was disputed both by the Plaintiff and by the second and third Defendants. The Civil Court decided against the Will, and also against both the alleged marriages, and the alleged title of the third female Defendant. On appeal to the *Sudder Dewanny Adawlut* the decision was affirmed. The first female Defendant alone has appealed to Her Majesty, in Council from the decision of the *Sudder Dewanny Adawlut*. The second and third Defendants have not appealed, and, therefore, their interests are put out of the case entirely.

In the case of *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1 P. C. J., 827; 9 Moore's Ind. App. Cases, 87,) their Lordships said: "It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of *India* merely on

* 11, Moore's I. A., p. 194.

the effect of evidence, or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment."

Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the Appellants, are of opinion, that there is wanting in this case that clear indication of error in finding against the marriage and the Will which would be necessary to take this appeal out of the operation of the above salutary rule.

The *Sudder* Court thought the evidence as to the marriage of the Appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the Will untrustworthy. They say, "We concur with the Judge in discrediting the evidence in support of the Will. We consider the attendant circumstances as altogether improbable and unworthy of belief."

Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue? The claim to be declared the wife of the deceased would establish, on oral testimony, a heavy charge on the estate of a deceased person to the amount of Rs. 51,000, and the Will is one made *in articulo mortis*. Some of their Lordships can judge, by their experience of precedent cases before this Committee, of the dangers likely to ensue if the Courts of Justice in *India* did not require cogent proof in such cases.

If it were once conceded that a woman once a concubine could be converted by judicial presumptions into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise? The ordinary legal presumption is, that things remain in their original state. Were, then, the Courts below well founded in treating the original connection by the Appellant with the deceased *Abdoolla* as an illicit connection? The evidence was conflicting. She herself admits that she was once a prostitute. It is true that she alleges penitence and a change of life, and some of her witnesses say that she had relinquished the life of a prostitute before her intercourse with *Abdoolla* began; and one witness says that she had discontinued it five years before she came to live with *Abdoolla*. But no evidence is adduced to prove what was her intermediate employment, or what were her means of maintaining herself in the interim. She declares the deceased to have been a man entertaining one mistress whilst his wife was living. The Court had to determine amidst conflicting evidence, whether it was more likely that he should make a woman of that class his wife, and settle on her a very large dower, or that he should induce her to live with him as his mistress, displacing the former favourite? The evidence was conflicting, and the finding cannot be viewed as a decision against the weight of evidence. If, then, the Courts below were justified in finding that the original connection was illicit, where is the evidence of any change in its character? If length of time be invoked as a reason for considering the previous connection as lawful, the Appellant herself is found placing no reliance on mere length of intercourse with respect to the second Defendant's claim to be regarded as a wife: and if the subsequent removal to a different house of that lady be insisted on as an argument that she was not a wife, the answer seems to be that the mere removal into and maintenance in a separate house is not at all inconsistent with the *status* of a regularly married wife, superseded either by wife or concubine, but undivorced. The Appellant, indeed, is not content to rely on any presumption from length of time; she alleges and calls witnesses to prove an actual marriage ceremony, accompanied with some degree of publicity, the presence of witnesses, and the oral assignment of a large sum by way of dower.

The witness, *Iman Buksh*, the Physician, deposes to this effect, that only one year before the death of *Abdoolla*, the latter assured him that the Appellant was his wife; that the witness asked the question in consequence of the Appellant referring him to the deceased for information on the

point, asserting that she was a wife, and that the second Defendant was not, and that the *Mirza* would so inform him. Now, this witness describes himself as having attended both on the *Mirza* and on the Appellant, not as a mere stranger in the house. But what origin can seasonably be ascribed to this inquiry as to her *status*, unless some ambiguity existed in relation to it; and how is this ambiguity consistent with a marriage celebrated from the first before witnesses, with an outspoken assignment of a large dower in the husband's house? Can any ignorance or uncertainty about such a *status* exist at all in the house of the husband, with such an introduction of a new wife, and such an open celebration of a marriage? The evidence, therefore, does not cohere, and the Court might well distrust it; nor could their distrust be reasonably found fault with in a case where each alleged wife brought forward the same kind of evidence of an open celebration, and each treated as undeserving of credit the allegations and evidence of the other.

With respect to the Will, the improbabilities against it are strong, and the evidence in its favour weak. It is deposed that the second female Defendant was present during the time that the Will was being dictated, rough copied and clean copied; that a provision was made in the Will for her expenses in case she proceeded on a pilgrimage to *Mecca*, and that this was done on her request. She is, therefore, described as cognizant of the Will, and assenting to it in some degree by accepting a contingent benefit under it. Yet she was united with her daughter and son-in-law in interest, and throughout acted in conjunction with them. She claimed to be a wife, and sought to establish her daughter as an heir. Her assent to the Will is, therefore, most improbable, and the supposition is rendered more so by this, viz., that at this very time her son-in-law, *Usghur*, was making a public protest by way of petition addressed to a public Officer, claiming his interference and presence at the house of *Abdoolla*, to prevent a Will being executed in the name, as he alleges, of *Abdoolla*, then a senseless and dying man. Is the second alleged wife to be supposed acting at variance with herself without adequate motive, and in so short a period of time to return to opposition? It appears that she had two years before protested against a description of herself as "prostitute" on a public assessment, and had been described as wife on her own application on more than one public document. She was, therefore, claiming to be a wife. The reason for describing her as present and acquiescent at the time of the preparation of the Will is obvious. That a Mahomedan of high position and wealthy, a man of business besides, should, with a view to prevent disputes in his family, make such a Will, as likely to foment as to quell them, and omit to make that disposition which would, and her story been true, secure to the Appellant her dowry of Rs. 51,000 and her share as widow, is not a probable occurrence in itself. One would expect him to act with the advice and aid of his usual *Mooktah*, and not defer the settlement of disputes in the confused state of his family connections until his last hours, and then to put himself in the hands of people not previously employed by him; on the other hand, if a Will, whether from fraudulent or merely mistaken prudential motives, was to be put forth, though without his concurrence, as his, the preparation and execution would be delayed until his end was so near, his strength so reduced, and his mind so inert, that he would probably be found incapable of opposition to a proposition pressed upon him. Between these conflicting views of the subject the Courts below were called on to decide, and their conclusion does not appear to their Lordships unreasonable or against the weight of evidence.

Their Lordships think, therefore, on a careful view of the evidence, that the case is not taken out of the operation of the rule laid down in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1 P. C. J., p. 827; 9 Moore's Ind. App. Cases, p. 87), which has been frequently asserted and constantly acted on. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed, with costs.

8th February, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

JUGGOMOHUN BUKSHEE,* ... *Appellant*,

versus

ROY MOTHOORANATH CHOWDRY, ROY KISTONATH CHOWDRY, and ROY PREONATH CHOWDRY, } *Respondents.*

Construction—Beng. Reg. XI. of 1796, secs. 4 and 6—Government not authorised to confiscate the interest of all members of a joint Hindu family, for contumacy of one member, even the Registered proprietor—The share of the latter alone to be confiscated and sold—Sale under Reg. XI., 1796 not to cancel all sub-tenures or incumbrances.

Bengal Reg. XI. of 1796, secs. 4, 6 do not authorise Government to confiscate the entire interest of all the members of a joint Hindu family in a *Zemindary* or *Sudder* farm, for the contumacy of one absconding member, although he may be the registered proprietor in the Collector's Register.

As on the one hand the share of the absentee in joint family property may be confiscated and sold by Government even if he be not registered as proprietor, so on the other hand only his proper share in such property will be affected by his contumacy although his sole name appear in the Collector's Register.

A sale under this Regulation does not sweep away all sub-tenures or incumbrances created by the absconding proprietor or those through whom he claims.

28th February, 1867.

THEIR Lordships' judgment having been reserved, was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The lands which are the subject of this suit are described as three separate holdings forming part of the Government *Khas Mehals* in the twenty-four *Pergunnahs*. In 1855 they had been granted by the Government of *Bengal* to one *Roy Bykantnath Chowdry*, as the sole registered tenant thereof. His tenure is said to have been in the nature of a perpetual lease; but the instrument or instruments creating it are not before us. He may be taken, however, to have been what is termed in the Regulation, which will be afterwards considered, "a *Sudder* Farmer paying revenue directly to Government." Some time in 1855, being charged with an offence, he absconded in order to avoid the process of the Criminal Courts; whereupon his estate was confiscated, and these lands, as part of it, were ordered by Government to be sold under the provisions of *Ben.* Reg. XI. of 1796. They were put up for sale on the 27th of April, 1855, and were purchased by one *Thakoordoss Bannerjee*, who on the 7th of July, 1856, transferred the interest thereby acquired to the Appellant. Under this title the Appellant claims the entire interest in the tenure under Government of these lands.

The Respondents insist that *Roy Bykantnath Chowdry* was a member of a joint and undivided Hindoo family, of which they are the other members; that these tenures, though taken in the sole name of *Roy Bykantnath Chowdry*, as the managing member, were acquired with the funds and for the benefit of the joint family; and that accordingly it was not competent to Government to confiscate or sell more than the fractional share and interest of *Roy Bykantnath Chowdry*, in this portion of the family estate. They urged this objection ineffectually before the Collector some days before the sale took place; they afterwards repeated it before the Commissioner and *Sudder* Board of Revenue; but they are said to have made no representations to that department of Government from which, under the Regulation, the Order for the sale emanated. Certain it is that their objections were overruled, and that what was put up for sale and purchased by *Thakoordoss Bannerjee* was the whole interest in the lands under the tenures created in favour of *Roy Bykantnath Chowdry*. And

* 11, Moore's I. A., p. 223.

the Collector put, as he thought, the purchaser into possession.

Before, however, the assignment to the Appellant, a dispute touching the possession of the lands arose between *Thakoordoss Bannerjee*, and on *Gopeemohun Mitter*, who claimed to be tenant thereof under a lease granted to him by *Roy Bykantnath Chowdry* and the Respondents jointly. There was the usual appeal to the Magistrate under Act, No. IV. of 1840. He held that *Gopeemohun Mitter* was in fact in possession, and his order was confirmed on appeal by the *Zillah* Judge. The result was, that the Appellant, having acquired the title of *Thakoordoss Bannerjee*, was driven to assert his right to the possession of the lands in the regular civil suit out of which this appeal has arisen.

The suit was originally against *Gopeemohun Mitter* and *Thakoordoss Bannerjee*. By supplemental plaint the Respondents were made parties to it. The material issues settled by the Judge were, first, whether the lease set up by the Defendant, *Gopeemohun Mitter*, was a *bonâ fide* lease, or merely colourable and in fraud of law; and secondly, whether the estate being joint, the Plaintiff could have any claim over and above the particular share of *Roy Bykantnath Chowdry*.

The *Zillah* Judge, by whom the cause was tried in the first instance, held that the lease was merely colourable and fraudulent, and that the Appellant, as between him and the lessee, was entitled to the possession of the lands. He further held, that the question of title between the Appellant and the Respondents could not be properly tried in this suit; and that the proper course for the Respondents, if they had a good title, was to sue to set aside the sale to the extent of that title, making the Government a party to the suit.

Both the lessee and the Respondents appealed against this decision, but the former died pending his appeal, which, not having been revived, was struck off. The Respondents prosecuted their appeal, and the *Sudder* Court, overruling the objection that the suit had come to an end with the lessee's interest, on the ground that there was a distinct issue of title joined between the Appellant and the Respondents, made a decree in their favour, and reduced the interest of the Appellant in the lands to the fractional share of *Roy Bykantnath Chowdry*. The present appeal is against the last decree.

It has been candidly conceded by the learned Counsel for the Appellant that the evidence in the cause may be taken as sufficient to establish that, as between *Roy Bykantnath Chowdry* and the Respondents, the lands in question formed part of their joint estate.

This being so, we have only to determine whether the decree of the *Sudder* Court is erroneous, either because, upon the true construction of the Regulation and the admitted facts of the case, the sale by Order of Government has given to the Appellant a good title against the Respondents; or because that question cannot be properly litigated and determined in the present suit.

The Regulation is a highly penal one, and should be construed strictly. That portion of it which relates to the present case is contained in the 4th, 5th, and 6th sections. The 4th section provides that, after making certain specified proceedings, the Magistrate is to order the attachment of any land or other real property held by the absentee in his jurisdiction, by requiring the Collector, if the absentee be a proprietor of land or *Sudder* Farmer paying revenue immediately to Government, to hold the land or farm in attachment until further notice; and prescribes the measures to be taken by the Collector on receiving such a requisition. The 5th section provides for the removal of the attachment on the attendance of the party; and the 6th section enacts, "Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

In the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent. The

Regulation makes no express provision for the case of joint proprietors of land, or persons jointly holding a *Sudder* farm of land. Let it be assumed that such a joint proprietorship, or joint holding, is ostensible as well as real, and that it appears on the Collector's Books, can it be doubted that in such a case the words "land or other real property held by the absentee" would be limited to his undivided share in the actual lands of farm? Again, suppose that the absentee is one of a joint family possessed of a *Zemindary*, of which one member only is registered as owner. Their Lordships cannot think that upon the true construction of this Regulation the fact of such registration would either justify the confiscation of the whole *Zemindary*, if the absentee were the sole registered proprietor, or prevent the confiscation of the share of the absentee if he were not the registered proprietor. No analogy can be drawn from the doctrine of forfeiture in this country, where the doctrine is founded on tenure, and where there was a broad and marked distinctiou between law and equity, the Courts of Common Law taking no cognizance of equitable estates. And, if what is above stated be true of a *Zemindary* or other real property of which the absolute interest belongs to a joint family, it is difficult to see why it should not be true of a Farm enjoyed by a joint family as part of the joint estate, though taken in the name of one of its members. For the Regulation, at least in the part of it now under consideration, does not contemplate the forfeiture of the tenure, as between landlord and tenant. What it contemplates is the confiscation and sale of the tenure; and the course pursued in the particular case confirms this construction.

Again, there is no pretence for saying that a sale under this Regulation can carry with it the consequence of a sale for arrears of public revenue; that it sweeps away all sub-tenures or incumbrances created by the delinquent, or those through whom he claims. The tenure in question, so far as appears on these proceedings, was alienable. It was open, therefore, to *Roy Bykantnath Chowdry* to put his co-sharers in the estate into the full enjoyment of this Farm, and to execute jointly with them, if they were so minded, sub-leases of the lands. No actual conveyance would, under the Hindoo law, be required for the former purpose. Their Lordships, therefore, are unable to affirm the broad proposition, that under the Regulation it was competent to Government to confiscate and sell this Farm, so as to give to the purchaser a good title against the Respondents. The *Zillah* Judge, though he declined to deal with the question in this suit, has not so decided. The *Sudder* Court has decided the contrary.

It remains to be considered whether the *Sudder* Court was right in determining the question of title between the Appellant and the Respondents in this suit. The Appellant had by supplemental plaint made the Respondents parties to the suit, though under a kind of protest that it was unnecessary to do so; and this issue of title had been raised and joined between them. The only difficulty in the case is, that the lease of *Gopeemohun Mitter*, who was put forward as the tenant in possession, has been pronounced by the *Zillah* Judge to be simply colourable, and that the *Sudder* Court has not dealt with his finding on that point. Considering, however, that as between *Gopeemohun Mitter* and the Respondents the lease constituted the relation of landlords and tenant, and that the intervention of the landlords to defend rested on privity of title; and, further, that the effect of the proceedings in the *Foujdary* Court of the 31st of December, 1855, and the 29th of March, 1856, was to determine that the Appellant was out of possession, and to cast upon him the burden of recovering possession by proof of a good title, and that he has failed to do so except to the extent admitted by the *Sudder* Court, their Lordships think that the decree under appeal is correct. They must, therefore, humbly recommend Her Majesty to dismiss this appeal.

8th and 9th February, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

J. P. WISE and JUGGUNATH ROY CHOWDRY,* } *Appellants*,

versus

SUNDULOONISSA CHOWDRANEE and others, ... } *Respondents*.

Practice—Courts not to act on probabilities and inferences from the conduct of parties alone, in the presence of credible testimony, positive and unimpeached—True case on a false basis and supported in part by false evidence, not uncommon in India, and cannot always be safely concluded false from such falsities.

The marriage of the Plaintiff and the legitimacy of her child having been established by the *Sudder Ameen*, the *Sudder Dewanny Adawlut* on appeal, proceeding merely on probabilities reversed the findings of the *Sudder Ameen*.

Held by the Judicial Committee, (reversing the appellate Court's judgment) that although in a question of disputed fact regarding the credibility of witnesses, irrespective of the probabilities of the case, the second appellate Court is reluctant to compare the conflicting decisions of the two lower Courts, and decide the case on a conflict of evenly balanced testimony by a preponderance of probabilities: yet if there be credible testimony, positive and unimpeached, it would be improper to put all the evidence aside and act alone on the probabilities of the stories and on inferences from the conduct of the parties.

It is not uncommon in *India* to find a true case placed on a false foundation and supported in part by false evidence under the evil advice of wicked and foolish managers thereof. It is not always safe to conclude a case to be false and dishonest in which such falsities are found.

25th February, 1867.

JUDGMENT was delivered by

THE RIGHT HON. SIR RICHARD T. KINDERSLEY:

This case comes before their Lordships as an *ex parte* appeal, brought by Mr. *J. P. Wise* and *Juggunath Roy Chowdry*, two only of the original Plaintiffs, from a decree of the late *Sudder Dewanny Adawlut* at *Calcutta*, which reversed a decree of the Civil Court of *Dacca* in favour of the Plaintiffs.

The original Plaintiffs in the suit were *Denomoney*, suing in her own right as a widow of a Mahomedan *Zemindar* named *Akhlakoollah Chowdry*, and as Mother, and guardian of her minor son, *Fyzoollah Chowdry*, to establish their respective rights, as such, to the succession of *Akhlakoollah* and the Appellants. *Denomoney* died pending the suit, which was continued, on behalf of *Fyzoollah*, by one *Mamtazooder Chowdry*, as his guardian. The Appellant, *Wise*, claims to be the Assignee of the whole of *Denomoney's* share, and of a portion of her son's share, under conveyances from her; and the other Appellant claims to be Assignee of a portion of *Denomoney's* share, under a conveyance from *Wise*, and of a further portion of the minor's share under a conveyance from *Denomoney*.

The Defendants were *Sunduloonissa Chowdranee*, widow of *Akhlakoollah Chowdry*, *Olioollah Chowdry*, his son, and *Meer Saadut Ally*, the husband of a deceased daughter of *Akhlakoollah*, who survived him, and was entitled to share in his estate.

The object of the suit was to establish the marriage of *Denomoney* with *Akhlakoollah*, and the parentage and legitimacy of her son, *Fyzoollah*, as a son and heir of *Akhlakoollah*; and consequently the titles of both to succeed to *Akhlakoollah*, the widow to her share, and her son as a residuary legatee and heir of *Akhlakoollah*.

The suit could have no operation in any question which might hereafter arise as to the effect of *Denomoney's* conveyance of part of her son's property between him and both, or either of the co-Plaintiffs, *Wise* and *Juggunath*.

The cause was decided by the Judge of the Civil Court at *Dacca*, a Mahomedan, in favour of the marriage of *Denomoney*, and of the legitimacy of *Fyzoollah*; but this decision was reversed by the *Sudder* Court on appeal, and from that last decree the two Plaintiffs, *Wise* and *Juggunath*, alone appeal, *Denomoney* having died pre-

* 11, Moore's I. A., p. 177.

viously to the institution of the appeal. *Fyzoollah* not joining in the appeal, is named by the Appellants as a Respondent.

Their Lordships in this, as in other *ex parte* cases from *India*, are placed in a position of embarrassment and difficulty. It is not explained why *Sunduloonissa*, who is in possession of the estate, which is large, does not appear to support the decree in her favour. It is possible that had the case of the Respondents been argued before their Lordships, some view of it, amidst the conflict of evidence and the opposing presumptions which arise from the evidence, might have been offered to their Lordships' attention which has escaped their own careful and anxious consideration of the evidence and judgments. The Counsel for the Appellants, Sir *Roundell Palmer* and Mr. *Leith*, have argued the case with great candour and completeness. The whole evidence on both sides has been fully presented by them to the attention of their Lordships; but still in such a case there is room for much anxiety and hesitation. The Appellants ought not, however, to suffer by reason of this natural hesitation in a Tribunal about the correctness of its judgment, induced by an omission of the opposite party, nor ought the absence of the latter from the arena to weaken the presumption in favour of a judgment which is given on their side. The *onus* must still lie on the Appellants to show manifest error in the decree appealed from.

The pleadings in this case require attention. The plaint assigns a date to the marriage, and treats the marriage as having taken place at the time when *Denomoney's* intercourse commenced, or a few days after; but in a subsequent portion of the plaint *Denomoney* states the celebration of the seventh month of her pregnancy, and the celebration of the birth of *Fyzoollah*, circumstances which, if truly alleged and proved, would suffice to prove her marriage and the legitimacy of her son. Consequently, on the plaint as framed, the Plaintiffs would be entitled to recover if this latter portion of the plaint were credited by the Court, and the allegations as to the ceremony and its time disbelieved. The plaint alleges, by anticipation, that *Sunduloonissa* caused a Will to be forged after her husband's death, and enters into arguments to prove that it was forged. The answer of *Sunduloonissa* sets up that Will, and asserts it to be genuine, and relies upon it. In that Will are contained a reference to and acknowledgment by the Testator, *Akhlakoollah*, of a *Kabin*, executed by him on his marriage with *Sunduloonissa*, which, if it were established, would show a prior title in her to the *Zemindary* by conveyance, on good consideration at her marriage, and so overrule entirely the claim of a second wife and her son; whereas a Will simply would be inoperative, even as to a third, without their assent. *Sunduloonissa* in her answer relies also on a *Kabooleat* executed to her by *Denomoney*, for a certain part of the estate, which is, if genuine, an acknowledgment of *Sunduloonissa's* title by *Denomoney*.

These documents are alleged by *Denomoney* to be forgeries.

The issues embrace all these questions; the marriage of *Denomoney*, the parentage of her son, *Fyzoollah*, his legitimation, and the genuineness of the Will.

The pleadings in this case, as it has been observed, state the case of each party fully. Nothing comes out in the evidence on the main points in the cause of which some mention is not made in the respective pleadings of the parties.

The case alleged by *Denomoney* is, that she was married by a *nicka* marriage to *Akhlakoollah* at the time of her first consorting with him. She gives the date of the marriage in her plaint. Her case, therefore, as stated by her, excludes the supposition that *Akhlakoollah* raised her to the *status* of wife subsequently on her proving pregnant with a son which he acknowledged to be his. Still the case may be, that she was acknowledged directly or by implication as a *nicka* wife at some subsequent period of the cohabitation. In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it, by fabrication of evidence and subor-

nation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. The subsequent allegations in the plaint as to the celebration of the seventh month of her pregnancy, and the celebration of the birth of her son, suffice to let in this proof of marriage also.

The plaint does not disclose the history of *Denomoney* previously to her introduction into the house of *Akhlakoollah*. But the answer of *Sunduloonissa* supplies that omission. The evidence on each side supports the general account about *Denomoney*, which the answer of *Sunduloonissa* contains in the sixth paragraph, viz., that she was a singing girl, and that she attracted the fancy of *Akhlakoollah*, who brought her to and maintained her in his house. It is said, in the answer of *Sunduloonissa*, that *Denomoney* was brought there whilst still very young. There is no evidence that her life had before then been licentious. The imputation then on her character at this time, which is found in the answer, seems to be founded on her profession of a public native songstress; and though this is not a profession in *India* which is followed by women of character, it is by no means a reasonable presumption that a very young girl, a member of such a company, should be in her early years grossly profligate. This, however, is what the answer of *Sunduloonissa* insinuates as to *Denomoney*, even at this early age, for she says of her that "instead of leaving off her former vicious habits, she continued to indulge her vicious passions;" and then she imputes to her four paramours in succession, to one of whom, *Shumfutoollal Sirdar*, she ascribes the parentage of *Fyzoollah*.

In viewing the evidence given in this case, it will be important to bear in mind that many of the witnesses for the Defendants support these allegations in the answer by evidence as inconsistent as the answer itself, by imputing to *Denomoney* the utmost continuing profligacy of conduct in this respect, so little likely to be condoned by a man of a race prone to jealousy and to the seclusion of their women, and yet not accounting for her continued abode in the *Zenana*. Thus she is represented as very profligate at a very early age, as continuing to be very profligate during her whole cohabitation in the *Zenana* of *Akhlakoollah*, intriguing with various men openly, without disguise, and to the knowledge of a hostile wife; and yet as continuing in the *Zenana*, preserving her *status* there unimpaired, whatever it was, and treated with outward demonstrations of respect. And what is not a little singular in the alleged life of this woman, to whom such early, such long-continued profligacy is imputed, is, that after the death of *Akhlakoollah* there is no evidence of any profligate life whatever, and she is found to be for a time received as an inmate in the house of a respectable Mussulman on the footing which she ascribes to herself of widow. All this story, therefore, of her previous and continuing profligacy is found on an examination of it inconsistent and incoherent; it does not cohere, and it is not consistent with any of the ordinary presumptions which would be formed on such an intercourse with the Master of a native house in that rank of life.

Some of the witnesses describe her as being in the *Zenana* not for the ordinary purpose of such an introduction, but simply to divert *Akhlakoollah* with her songs; others say that she was there for the ordinary purpose; *Sunduloonissa* says she was there as a slave girl, of which there is no proof or likelihood. She does not expressly deny the existence at one time of sexual intercourse between *Akhlakoollah* and *Denomoney;* but her answer puts forth that subsequent case of alleged impotency in *Akhlakoollah* to which many of the witnesses, including two native Doctors, depose.

The testimony of these Doctors, on examination of it, proves to be utterly worthless and inconclusive in a medical point of view, even supposing that any dependence could be placed on its truth.

For what purpose is this worthless evidence produced? Is to prove that *Akhlakoollah* could not possibly be the father of *Fyzoollah?* but it proves also that he could not possibly suppose himself to be the father of the boy.

If the story were true which the answer

sets up on this point, it is inconceivable that *Akhlakoollah* should believe himself to be the father of this child; for the story is, that he had become, some years before his birth, incurably unable, to his own knowledge, of having any sexual intercourse; that the knowledge of his complaint and its consequences was general in the house: and yet this very man, in this state, who had a legitimate son and daughter, is supposed to be keeping in his *Zenana* a woman who was conducting herself with open profligacy with menial servants, discovered and yet not dismissed. What reason does the answer of *Sundulloonissa* give for such a toleration of offences, generally so little likely to be pardoned by a Mussulman? She says, the truth is, that for her bad character he ordered her to be put out of the house, but kept her there at the request of other parties. No other explanation is given; that given is of so startling an improbability, by reason of its generality, and the entire absence of evidence to support it, as to be unworthy of any credit. Consequently the attempt has been made, and has wholly failed, to render this marriage improbable by reason of the turpitude of the alleged wife. The improbability is reduced to this: that he married a female by a *nicka* marriage whom he might probably have obtained on easier terms as an inmate of his *Zenana*. The failure of this attempt and of this evidence to blast the character of the rival Claimant as wife certainly tends to strengthen the case that she sets up.

There is no other intrinsic improbability, then, in this story of his having married, by a *nicka* marriage, a girl of this profession, than that which attaches to it as a disreputable connection with one who probably would have made no difficulty about entering his *Zenana* on easier terms.

This is an improbability not of a light character, and the evidence to support it ought to be evidence probable in itself and free from suspicion. The burthen of the proof was of course on the Plaintiffs. It is impossible for their Lordships to form any opinion on the credit due to witnesses by reason of their *status* and apparent claims to be trusted, which is at all worthy to be compared to that which is formed by a Judge fit for his office, who sees them, hears them, and probably knows something of their antecedents. This cause between Mahomedans was tried before a Mahomedan Judge. Of the probability of the acts imputed to a Mahomedan *Zemindar* he is a more competent judge than either the European Judges of the *Sudder* Court or their Lordships can be. His judgment seems to have been carefully formed, and his observations upon the witnesses are entitled to a respectful consideration. Had their Lordships found that his observations upon the witnesses themselves were opposed to the opinion of the *Sudder* Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided, in a conflict of testimony nearly balanced, by the preponderance of probabilities. But if there be found, even in a Native case, positive credible testimony unimpeached, and credited by a Judge competent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of Native testimony, to say, despite of this positive testimony, we will put all evidence aside, and act alone on the probabilities of the stories and the inference from the conduct of the parties.

When the cause came by appeal before the Judges of the *Sudder* Court, they, unfortunately, instead of reviewing the whole case and expressing their opinion upon all the points on which the Court below had based its conclusions, which were conclusions of fact, narrowed their inquiry to the simple question whether the Plaintiff, *Denomoney*, had proved her marriage. Now, the Judge below, in dealing with that question, had brought, and properly brought, to the consideration of it certain inferences from the conduct of *Sundulloonissa*, which he judged corroborative to some extent of the truth of the Plaintiff's story. These were inferences which he drew from the fabrication of documents set up by the Defendants, and which the Plaintiffs alleged to be forged, viz., an alleged Will, a *Kabooleat*, and

certain receipts, which they (the Plaintiffs) alleged to have been fabricated to defeat a claim which the Defendants dreaded. The argument for the Plaintiffs was this: "Unless *Denomoney's* claims and that of her son were judged to be formidable, why this fabrication of documents?" The answer given below was, the documents are genuine. The Judge below found that they were forged. Their bearing on the issue as to the marriage was direct and important. Yet the Court of Error dismissed entirely from their consideration the question of the genuineness of those documents.

Again, the Judge below had believed the witnesses for the Plaintiffs who deposed to the marriage of *Denomoney* and the legitimacy of her son, *Fyzoollah*. The *Sudder* Court did not examine at all into his reasons for believing the evidence. So far from saying that the evidence for the Defendants was more weighty, they attached but little weight to it; but they decided against and reversed the finding of the Judge below, merely on inferences from the conduct of *Akhlakoollah* and from that of *Denomoney* herself. Though they appear to have been mistaken in calling *Denomoney* a Hindoo, who, according even to some evidence of the Defendants, had conformed to Mahomedan usages, they say, and say truly, that the marriage was an improbable occurrence; but though improbable, it was certainly capable of being proved by direct and credible testimony, as to the value of which they forebore from inquiring. What were the inferences on which they acted? The first is that *Akhlakoollah* took no steps in his life-time to make a public official declaration of any kind of his *nicka* marriage, and of the legitimation of his child. This child was little more than three years old when *Akhlakoollah* died. He died suddenly, of a suddenly contracted disease, cholera; and no inference against the marriage can reasonably be drawn from such light data. With respect to *Denomoney's* own conduct, her non-opposition to the mutation of names on the production of the Will is mainly relied on. But it is to be observed that a few months only elapsed between the death of *Akhlakoollah* and this act; that knowledge of it is not brought home to *Denomoney;* and that it would be too much to presume her, a native Lady whose very *status* was disputed, and without means, armed at all points with means of knowledge, and pecuniary means, and friends able to assist her then. There is the less reason for making this presumption in the present case, that it plainly appears that Mr. *Mackillup*, the Magistrate who inquired into the circumstances and heard the evidence as to the alleged imprisonment of her, and the duress practised on her, did believe the story, and attributed the withdrawal of her charge to some influence exercised upon her. His view of the case gives an air of probability to her version of her conduct on this occasion. These presumptions, then, seem to their Lordships too feeble to overpower or materially to weaken the evidence in proof of her marriage and legitimacy on which the Judge below acted; and as the *Sudder* Court went not at all into the consideration of the evidence for the marriage and legitimation, and opposed only insufficient inferences to it, the weight of the opinion of the Judge below on these facts stands really unshaken.

The answer, it has been shown, sets up a Will; it also alleged that *Denomoney* accepted a *Pottah* of certain land, and gave a *Kabooleat* to the Defendant, and took certain receipts. These were all found by the Judge below to be fabricated documents. The *Sudder* Court expressed no opinion about them; and it remains for their Lordships now to do, unaided by any judgment of the *Sudder* Court, that which they would have been able to do if assisted by such judgment, viz., to examine the grounds which the Court below had for such conclusion. Their Lordships conceive that if in this case the Defendants are found fabricating documents, and getting up false testimony to meet the case alleged, the reasonable conclusion is that it must have appeared at least a formidable case. But if it were, *primâ facie*, a formidable case, then a considerable part of the oral proof of the Defendants must be false; for where would be the risk of meeting in a Court of Justice a claim of this nature, raised by a profligate woman,

living an abandoned life in the house of her keeper, intriguing with his menial servants to his knowledge, and threatened by him for it with expulsion; bearing a child to one of his menial servants, and confessing to several her shame and the real paternity; never married, nor so reputed to be, and her child never even reputed to be the son of her Master, notoriously and by his own confession impotent at the time of its conception, before, and continually after? If such a woman should have had the strange audacity to prefer so desperate a case before a Court of Justice, who would be found to espouse it?

The fabrication of the documents, then, supposes a formidable case at least, and a great part of the oral evidence presents one hopeless and desperate. A Native, even with an honest case, or his advisers, may fabricate evidence to meet a case which they fear, though they know it to be groundless; and if this woman and her child stood in an ambiguous relation to the deceased, and the real heir feared that a Court would draw in favour of marriage and legitimacy really groundless conclusions, from a plausible appearance of marriage and legitimization, the fabrication might, however wicked, not be fatal to a defence; but in this case the Defendant's oral evidence presents a desperate and hopeless case as the real case of the claimants. If, then, the fabrication be established, proof of that fabrication supports the Plaintiff's case to some extent; for it lays a foundation for and supports the evidence of those apparently respectable witnesses for the Plaintiff, who say that the deceased treated *Denomoney* as his *nicka* wife, so called her, and treated her child, *Fyzoollah*, as his own; and these acts would suffice to prove both marriage and legitimacy, even if the Court refused to believe, or hesitated to believe, the direct testimony as to the ceremony.

Their Lordships have, therefore, directed their attention, in the first instance, to that part of the judgment in the Court below which treats these documents as fabricated. Their Lordships regret to say that they have no hesitation on this part of the case; that they agree entirely in opinion with the Judge below, who pronounced them forgeries. The *Kabooleat*, when it is viewed in conjunction with the evidence which accounts for its being given, destroys itself. *Denomoney* is described on the face of it as the widow of *Rajub*, the man to whom she is said to have been contracted, and for whose dwelling-place she was about to build a house on the ground included in the lease. The recitals of course fall with it. The full recitals in all three of the title of the Defendant explains the motives for their fabrication, and the date of them shows the most incredible degree of inconsistency in the conduct of *Denomoney*, admitting and opposing about the same time the title of her Opponents. The Will also is surrounded with suspicion, which its internal evidence tends to confirm. It sets up a *Kabin*, never produced, and the non-existence of which, if it ever existed, is wholly unaccounted for. This Will is not likely to have been executed by the deceased in favour of his wife, with whom he had been at variance. The extract from the Criminal register shows that such was the case. If her claim under the *Kabin* had been real, it would most probably have been produced as a check upon her husband during their active warfare: she represents her husband as merely her *Surberakar*; and if that were so, he must have been acting fraudulently in mortgaging her property. His management is not interfered with, even after he had, in his life-time, suffered her trust property to be taken in execution for a debt of his own. This appears from the judgment of the Court in the mortgage suit. Taking all these circumstances together, the Court rightly judged the Will to be fabricated; and the observations of the Judge on the *factum* are most weighty. Turning, then, with this assistance to the examination of the positive testimony, this portion of it, at least, may be trusted, which shows the woman and her child to be the woman cohabited with, at least, and the child of the woman acknowledged and declared to be the legitimate child of the father; and this acknowledgment made in words which import a precedent *nicka* marriage. There appears to their Lordships to be no ground

for distrusting the evidence, on which the Judge below relies, of the witnesses, *Surenloollah* and *Juggonath Gooho*, who, though they were not present at the *nicka*, nevertheless both speak to acknowledgment of parentage and acknowledgment of *nicka*. Without going the length of saying that the acknowledgment of a son as legitimate who might be a legitimate son of his acknowledger necessarily in all cases raises its mother to the *status* of a wife —a point which it is not necessary to discuss—it is clear that such an acknowledgment as the present, which acknowledges the mother as wife, involves that consequence. Their Lordships, therefore, cannot find, on a careful consideration of the evidence, and of the reasons given by the Judge in the Civil Court, in his finding on the facts, any sufficient reason for reversing his decision. His judgment seems to be founded on facts fairly inferrible from the evidence, and sufficient under Mahomedan law to confer on the child the *status* of legitimate son, and on its mother, to whom the declaration extends, that of a lawful wife. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decision appealed from, and to confirm the decision of the Principal *Sudder Ameen*, with the costs of the appeal in the *Sudder* Court. The Respondents must also pay the costs of this appeal.

9th February, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature in Bengal.

MEETHUN BEBEE,* ... *Appellant*,

versus

BUSHEER KHAN for self, and as guardian of ZUBBUT BEBEE, minor, and heir of MONEER KHAN, deceased, and BUKHT BANOO, ... } *Respondents.*

Issue of fact—Concurrent Judgments.

The Judicial Committee will not disturb the concurrent judgments of the *Indian* Courts on an issue of fact unless clear error was established.

8th March, 1867.

JUDGMENT was reserved, and delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant is the widow of *Agha Jan Khan*, a native of *Cabool*, who died domiciled at *Cuttack* in July, 1857. Her father was one *Burkhordar Khan*, also probably a *Pathan* by origin, who, after carrying on some kind of business at *Cuttack*, is said to have gone into the *Dekhan* with Elephants, horses, and other merchandise, and to have died there in the early part of the present century. He left a widow, *Fatima*; the Appellant, his only daughter; and a son named *Hossein Khan*. The Appellant married first an Afghan named *Omar Khan*, who died some time in the year 1824; and very shortly after his death she married his near relation, *Agha Jan Khan*. By *Omar Khan* she had a son, *Timour Khan*, who died

* 11, Moore's I. A., p. 213.

in 1829. In the year 1831 there appeared at *Cuttack* one *Ismail Khan*, who claimed to be the brother of *Omar Khan*, and, as such, entitled to share in that portion of his estate which had descended to his son *Timour Khan*. *Agha Jan Khan* and the Appellant compromised this claim for a sum of Rs. 300, and the release of a debt of Rs. 721. After that transaction *Agha Jan Khan* carried on business at *Cuttack*, became the registered and ostensible proprietor of the *Zemindary Talook*, which is the principal subject of dispute in this cause, and the apparent owner of the other property which the Courts below have found to have belonged to him at the time of his death.

The Respondents claim to be the co-sharers and residuaries, who, according to the Mahomedan law, are entitled to divide the estate of *Agha Jan Khan* with his widow. They contend that *Koolee Khan*, the common ancestor, had two sons, of whom *Morad Khan* was the father of *Agha Jan Khan*, and of the female Respondent, *Bukht Banoo;* and the other, *Nidda Khan*, was the father of the before-mentioned *Omar Khan* and *Ismaïl Khan;* and that *Ismail Khan* was the father of the Respondents, *Busheer Khan* and *Moneer Khan*, and of one *Goolmer Khan*, who is dead. Claiming under this title, they instituted the present suit for the recovery of their respective shares of the *Zemindary* and other property alleged to have belonged to *Agha Jan Khan* at the time of his death from his widow, who was in possession of it.

The Appellant has contested their title to sue; she has claimed the sum of Rs. 20,000 as due to her from the estate of *Agha Jan Khan* as the stipulated amount of her *Dain mohr*, and, on the grounds which will be hereafter considered, has denied that any part of the property claimed belonged to her late husband. The first two questions may be very shortly disposed of.

Their Lordships, in the course of the argument, intimated that they considered the title of the Respondents to be established.

It has been affirmed by the concurrent judgment of the two Courts below, which, the issue being one of fact, their Lordships, according to the ordinary course of this Committee, would not disturb unless they were satisfied that it was wrong. They believe, however, that it was right. It was, no doubt, difficult for the Appellant to disprove the pedigree of a family whose domicile was in Afghanistan; and the omission of *Ismail Khan* to mention in the petition, which is in evidence, his relationship to *Agha Jan Khan*, may be a circumstance of suspicion. But it was not necessary for him to state that relationship in order to make out the title, which he was then asserting, as co-heir of *Omar Khan's* son; and on the other hand, we have indisputable evidence that *Agha Jan Khan* received into his family, and recognized as kinsmen, first, *Goolmer Khan*, and afterwards the Respondent, *Moneer Khan*. The identity of that *Goolmer Khan* with the *Goolmer Khan* of the pedigree might be disputed; but there can be no doubt as to the identity of *Moneer Khan*. The persons, therefore, who are entitled to share the estate of *Agha Jan Khan* have been correctly ascertained. Again, both the Courts below have held that the Appellant has failed to establish her claim to the *Dain mohr;* and nothing has been urged on the present appeal which induces their Lordships to doubt the correctness of that conclusion. Therefore the only substantial question in this appeal is, to what extent, if any, is the property which is the subject of the decrees in the Courts below to be treated as the estate of *Agha Jan Khan*.

The Respondents, relying mainly on the ostensible ownership, insist that the whole of it is to be so treated. The case of the Appellant is, that no part of it, in fact, belonged to her husband; that it was acquired from the proceeds of a business carried on with funds left by her father, *Burkhordar Khan;* that those funds and that business belonged to herself, her mother, and her brother, as the co-heirs of *Burkhordar Khan;* and that her late husband, though the "*gerent*" of the business, and the ostensible purchaser and registered holder of the *Talook*, was a mere Manager and Trustee for her and her family.

Of the issues recorded in the suit by the Court of First Instance, the second and the fourth both related to this question of title to the property. Under the first of these, the Respondents had to prove that "the whole of the disputed property was the own property of *Agha Jan Khan*." Under the other, the Appellant had to establish that "the *Zemindary* and other property claimed had been inherited by her from her father's, mother's, and brother's estate, and belonged to her; and that *Agha Jan Khan* had no right thereto."

Both the Courts below have held, and in their Lordships' opinion properly held, that the Appellant has failed to prove this last issue, and to substantiate the case set up by her. She relied mainly on the oral testimony of witnesses whom both Courts have pronounced to be untrustworthy. Of their evidence, some part was directed to prove the wealth of *Burkhordar Khan* and of his family, and the poverty of both the husbands of the Appellant and of their family; other parts went to show that the *Zemindary* was purchased with funds supplied by *Fatima*, and even that she was recognized as *Zemindar*, and received the rents. There is a failure of proof that the property of *Burkhordar Khan* (and it is very uncertain what was the amount of it) furnished the capital on which *Agha Jan Khan* traded; there is no proof that the business carried on by *Burkhordar Khan* was an established, continuing business. His dealing in horses and elephants seems to have been something distinct and of a different nature from the money-lending business, in which, as some of the witnesses state, his widow engaged after his death. And, lastly, the case set up by the Appellant, and sought to be established by her witnesses, is inconsistent with her acts and conduct. For, though *Fatima* predeceased *Agha Jan Khan*, *Hossein Khan* is stated by some of the Appellant's witnesses to have survived him, and appears, by the Appellant's written statement, to have left a daughter. Yet, on the death of her husband, the Appellant claimed to be entitled to the whole of the property; and procured, by petition to the Collector, the registration of the *Talook* in her sole name. No suggestion that either *Hossein Khan* or his daughter had any interest in the property was then made.

It may be said, on the other hand, and probably with truth, that the oral testimony adduced by the Respondents is hardly more trustworthy than that on the part of the Appellant. Such as it is, it is directed to prove the poverty of *Fatima* and her family; and that *Agha Jan Khan*, at the date of his marriage, had some, though not very ample, means. The Respondents are, however, entitled to rely on the presumption resulting from his ostensible ownership of the property, until that is satisfactorily rebutted. There is documentary evidence in the cause which shows that other real property was bought and sold by him. Some of the proceedings which are in evidence, and the fact of his taking into the house first one cousin and then another, tend to the conclusion that he was the master of his family, and head of his own house. It is not likely that he, who was obviously the active man of business of the family, would have submitted to occupy for thirty years the dependent position which the Appellant's case assigns to him. Nor is there any strong antecedent improbability in the hypothesis that by means of successful traffic during that period he had been able to realize, from however small beginnings, the property of which he died ostensibly possessed. Therefore, of the two cases set up by the parties, the weight of evidence seems to be in favour of that of the Respondents.

But between these two cases lies the theory adopted by the Principal *Sudder Ameen*. That intermediate theory is that the property was acquired from the proceeds of a trade carried on by the Appellant and her husband in partnership, the original capital of the Appellant being derived, not from her own family, but from the estate of her first husband, *Omar Khan*; and that the shares of the parties in this joint concern, being undisclosed, must be assumed to have been equal.

If this case had been established by satisfactory evidence, the Principal *Sudder Ameen*, in dealing with the second issue, might properly have adopted and acted upon it. It appears, however, to their

Lordships, as it appeared to the High Court of *Calcutta*, not to be so established. The theory of a partnership, properly so called, between the Appellant and her husband, is not only inconsistent with her case as first launched, but has been indignantly repudiated by her throughout the proceedings in the suit, and particularly by her petition of appeal to the High Court. None of the witnesses attempt to prove it. There is, no doubt, some evidence of partnership dealings between *Omar Khan* and *Agha Jan Khan*. But that evidence points rather to some joint adventures, than to a regular partnership in a continuing and established business. Again, there is evidence that *Omar Khan* died worth some few thousand rupees. The sum at which the residue of his estate is estimated in the petitions of *Ismail Khan* is less than Rs. 4,000. But, as Mr. *Pontifex* argued, there is no proof that this sum, or any other property of the Appellant, entered into the capital on which *Agha Jan Khan* traded. Had that been her case, she might have proved it by the Books of the business, which are presumably in her power and custody, the evidence of *Gomashtahs*, or the like. If the Principal *Sudder Ameen* thought that his hypothesis was according to the truth of the case, and the real rights of the parties, he should have established it by pursuing the inquiry, and by calling for the production of proper proof. *Meer Dowlut's* testimony falls very far short of such proof. And the conclusion of the Principal *Sudder Ameen* as to the partnership seems to rest principally on his own knowledge and belief, or public rumour—grounds upon which no Judge is justified in acting.

Their Lordships are, therefore, of opinion, that upon the facts alleged and proved in this case the judgment of the High Court, which, varying the decree of the Principal *Sudder Ameen*, dealt with the property in dispute as wholly that of *Agha Jan Khan*, is right. They feel, however, considerable doubt whether that judgment, partly owing to the nature of the suit, and partly to the very unsatisfactory manner in which it has been conducted, has not failed to do complete justice between the parties. The suit is not an administration suit, in which the assets of the deceased, and the charges and incumbrances thereon in the shape of debts or otherwise, are ascertained by proper inquiry. It is a suit for the recovery of certain shares in specified property assumed to have belonged to the deceased. Again, the excessive claim of the Appellant may have prevented her from getting that to which she is really entitled. Her own property may have been mixed up with her husband's. Their Lordships do not feel at liberty to re-open the litigation in this suit. But whilst they humbly recommend Her Majesty to dismiss this appeal with costs, they will add a recommendation that the Order be without prejudice to any proceedings on the part of the Appellant to establish any debt, other than her claim for *Dain mohr*, against her husband's estate, or any lien, in respect of such debt, upon that estate.

12th, 13th, 14th, 15th and 16th February, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

MOONSHEE BUZLOOR RUHEEM,* ... ... } *Appellant,*

versus

SHUMSOONNISSA BEGUM, *Respondent;*

(Three appeals)

and

JODONATH BOSE, ... *Appellant,*

versus

SHUMSOONNISSA BEGUM, ... *Respondent.*

Husband and Wife—Conveyance—Bonâ fides—Onus—Admission by Purdanisheen.

Suit against non-fiduciaries—Onus—Benamee—Presumption.

Act VIII. of 1859, sec. 7—Accidental omission—Identity of cause of action.

Mahomedan Husband—Restitution of conjugal rights—Cruelty—Remand.

In a suit by a *purdanisheen* Mahomedan lady, *S.*, to recover Government securities indorsed over to her husband *B. R.*, by her, *held* that the burden of proving the reality and *bonâ fides* of the purchases pleaded by him, lay upon *B. R.* and that the burden had not been discharged.

An admission in a petition by a *purdanisheen* woman is of little importance unless it be shewn, how or by whom the proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts.

The omission of *S.*, to support her claim by her own testimony might weaken, but could not destroy, her case and was quite insufficient to affect the conclusions in her favor which arose from the other facts and circumstances in the case.

In a suit by *S.*, seeking to be relieved from the effect of conveyances admittedly executed by herself, against one who never stood in a fiduciary relation to her, *held* that the *onus* lay upon the Plaintiff, *S.*, to establish her right to the relief prayed for.

Held further on the evidence, that *S.*, had failed to prove that the conveyances were taken from her through fraud or coercion.

The habit of holding land *benamee* is inveterate in *India;* but that would not justify the Court in making every presumption against apparent ownership.

Sec. 7, Act VIII. of 1859 is a bar to a subsequent suit for the omitted portion of the claim, although the omission had been involuntary or accidental.

The clear and positive words of a law cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges suppose to have been the reasons for enacting it.

The correct test for the application of sec. 7, is, whether the claim in the new suit is founded on a cause of action distinct from what was the foundation of the former suit.

In a suit by *B. R.*, for restitution of conjugal rights against *S.*, *held*, that such a suit by a Mahomedan husband did lie in the Civil Court.

If the law gives a right, and that right be denied —the denial is a wrong; and unless the contrary be shewn it must be presumed that there is a remedy for the wrong in a Court of justice.

By the Mahomedan Law such a suit is in the nature of a suit for specific performance, being founded on marriage, which is regarded by that law as a civil contract; and the Court will enforce all the obligations which flow from such a contract.

If however there be cruelty rendering it unsafe for the wife to return to her husband's dominion, the Court will refuse to send her back to his house; so also, if there be a gross failure by the husband on his part of the marriage contract.

From the frame of the pleadings and issues, the question of cruelty not having been entered into, case remanded for a new trial with liberty to frame issues and take evidence as to the specific acts of cruelty.

4th July, 1867.

THEIR Lordships' judgment in these appeals having been postponed, was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant, in three of the four appeals of which their Lordships have now to dispose, is *Moonshee Buzloor Ruheem*, a Bengal *Zemindar*. The Respondent, in all four appeals, is his Wife, *Shumsoonnissa Begum*. Her Father, *Moonshee Hossain Ali*, died in the year 1837, possessed of considerable wealth. His co-

* 11, Moore's I. A., p. 551.

heirs, according to Mahomedan law, were his three Widows, *Ashruffnissa*, *Oomdatunnissa*, and the Respondent's Mother, *Komerunnissa;* two Daughters, viz., the Respondent and a posthumous child, named *Nujmunnissa*, and his Nephew, *Booali*. His estate was divisible amongst these persons, in twenty-four parts or shares, of which the Respondent and her Sister each took eight. The settlement of his affairs, however, occasioned a good deal of litigation, and the Respondent did not obtain full possession of her share until November, 1847.

She had previously, and in the month of April or May of that year, being then a Widow, with five children by her first Husband, become the Wife of the Appellant, *Moonshee Buzloor Ruhim*. By him she has had one Daughter. In July, 1853, in consequence of the death of her Sister, *Nujmunnissa*, which took place in August, 1849, and of the compromise of a suit with that Lady's Husband, she received a large accession of fortune. Her cohabitation with the *Moonshee* continued until the 28th of December, 1855; when, on a complaint by her of ill-usage on his part, she was allowed by the Magistrate of the Twenty-four *Pergunnahs* to leave his house. They have since lived separately, and the present litigation dates from that time.

On the 8th of April, 1856, she instituted against her husband a suit for the recovery of her property, which, she alleged, he had detained or made away with. On the same day he commenced against her and one of her sons-in-law a suit, of which the object was, to enforce his marital rights, by compelling her to return to his house and control. These suits, in the argument before us, were called, respectively, the "Property suit" and the "Restitution suit"—a nomenclature which it may be convenient to adopt.

The property suit was originally brought against the Husband alone. By his answer it appeared that certain portions of the landed property claimed by her had got into the possession of two persons, named *Jodonath Bose* and *Mirtunjoy Bose*. They were accordingly brought before the Court by supplemental plaint, on an allegation that they were the dependants of the principal Defendant the *Moonshee*, and held *Benamee* for him. The suit was tried before the Civil Judge of the Twenty-four *Pergunnahs*. His decree, which bore date the 25th of July, 1859, awarded to the Respondent Company's paper, to the amount of Rs. 2,34,800, and cash to the amount of Rs. 20,511, dismissing the suit as to the other moveable property claimed by her. It also decreed the restitution to her of the immoveable property held by *Jodonath Bose*, with mesne profits, to be paid by the *Moonshee*, but dismissed the suit as against *Mirtunjoy Bose* without costs. All the Defendants appealed against this decree, the appeal of *Mirtunjoy Bose* being for his costs. The High Court of *Calcutta*, by its decree, dated the 29th of November, 1862, confirmed, with some slight variations, the decree as to the Company's paper, directing the *Moonshee* to restore the papers, to the amount of Rs. 82,000, which remained in his hands; and to replace the others by the purchase of Company's papers, to an amount equal to that of the missing papers, but reversed the Judge's decree as to the Rs. 20,511 cash. It confirmed, however, the decree as to the property held by the Appellant, *Jadonath Bose*, making him also responsible for the mesne profits. And it further decreed the conveyance to the Respondent, by *Mirtunjoy Bose*, of the immoveable property held by him. Against this decree the Appellants, *Moonshee Buzloor Ruheem* and *Jodonath Bose*, have severally appealed to Her Majesty. No appeal has been preferred by *Mirtunjoy Bose*.

The restitution suit was tried by the Principal *Sudder Ameen* of the Twenty-four *Pergunnahs*, who, by his decree, dated the 28th of December, 1860, dismissed it with costs. On appeal, the High Court of *Calcutta* confirmed that decision by its decree of the 25th of July, 1863. The *Moonshee* has appealed against both these decrees.

His remaining appeal is against a decree of the High Court, made on the 13th of February, 1863, in another suit instituted against him by his Wife. The object of that suit was to recover from him a Company's paper for Rs. 10,000, for which, as

she alleged, she had inadvertently omitted to sue in the property suit. Objections, which will be hereafter considered, were taken to the maintenance of this fresh suit, and were allowed by the *Zillah* Judge. But the High Court reversed his decision, and remanded the cause for trial on the merits.

Having thus stated the general history and scope of this unfortunate and complex litigation, their Lordships will proceed to deal first with the appeals in the property suit. The Respondent having preferred no appeal against the decree of the High Court, her claims, in respect of the moveable property, must be taken to be now reduced to one for the Government securities, to the amount of Rs. 2,34,800, which the *Moonshee* has been ordered to restore or replace. And their Lordships will begin by considering, whether the decrees under appeal can be supported against him in that respect.

That all these securities came to her hands whilst she was an inmate of his *Zenanah;* that they all passed from her to him; that some of them remain in his possession; and that others have been traced to his Creditors,—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between Husband and Wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to the rights and interests of the Wife. Her case is, that the securities were entrusted to him for a particular purpose, viz., that of receiving the interest on them for her, and that though they may have been indorsed, she never meant to transfer the property in them. His case is, that he purchased them from her on several occasions, and that on their indorsement and delivery he paid her the full value for them. The principle of the judgments of the Courts below seems to be, that although the Wife may have failed to establish affirmatively the precise case alleged by her, her Husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion, that this is a sound principle, and in accordance with the long-established practice of the Courts in *India*. The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Mahomedan and a Hindoo woman; nay, that in all that concerns her power over her property, the former is by law more independent than an English woman of her Husband. It is no doubt true that a Mussulman woman, when married, retains dominion over her own property, and is free from the control of her Husband in its disposition; but the Hindoo law is equally indulgent in that respect to the Hindoo Wife. It may also be granted that in other respects the Mahomedan law is more favourable than the Hindoo law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a Law, which, with the religion on which it is chiefly founded, is spread over a large portion of the Globe, any inference as to the capacity for business of a woman of a particular race or country. In *India* the Mussulman woman of rank, like the Hindoo, is shut up in the *Zenanah*, and has no communication, except from behind the *Purdah*, or screen, with any male persons, save a few privileged relatives or dependants; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a Husband may be presumed to be likely to exercise over a Wife living in a such a state of seclusion. Their Lordships must, therefore, hold that this Lady is entitled to the protection which, according to the authorities, the law gives to a *Purdah-nusheen*, and that the burden of proving the reality and *bonâ fides* of the purchases pleaded by her Husband was

properly thrown on him. They will proceed to consider whether the Courts below were right in holding that he has failed to prove his case.

The transactions are five in number, three of them being in the year 1848. On the 20th of May in that year, she is said to have sold to her Husband the two papers for Rs. 9,500 and Rs. 7,000, which she received on a compromise of a suit with her step-mother, *Ashruffnissa*. On the 27th of the same month she is said to have sold to him all the papers specified at the foot of his answer, which make up the sum of Rs. 1,03,800, except a paper for Rs. 11,300, which is said to have been sold on the 12th of the following month. These exhaust all the papers claimed, which formed part of her original share of her Father's estate. The papers for Rs. 1,14,500, which she received in 1853 from the estate of her Sister, are said to have been sold on two occasions in 1855, viz. papers for Rs. 32,500, on the 2nd of March, and papers for Rs. 82,000, on the 2nd of July in that year.

These several transactions are sworn to by various witnesses, of whom most, if not all, are or have been dependants of the Appellant. There may be slight discrepancies in their testimony, but its general effect is, that on each occasion money, being the full value of the papers purchased, passed in cash or notes from the Appellant to the Respondent. The Appellant has himself deposed to the same effect, and has produced certain *Khatta* Books in corroboration of his testimony. The evidence, if believed, is sufficient to establish his case.

Both the Courts below have, however, disbelieved these witnesses, and have cast discredit on the Books, as being unlike those, which were likely to be kept in order to record the transactions of a person in the Appellant's position. The *Zillah* Judge, obviously a Gentleman of experience and ability, appears to have tried the cause very carefully; and their Lordships cannot but feel the difficulty of holding against his judgment,—confirmed, as it is, by that of the High Court,—that either the witnesses or the Books, considered by themselves, are trustworthy. In what degree, then, do the other facts and proceedings proved in the cause tend to confirm or to cast doubt upon their testimony?

The earliest in date are the applications for a Certificate under Act, No. 20 of 1841. It appears that a difficulty had arisen in the way of drawing the interest on the two Company's papers for Rs. 9,500 and Rs. 7,000, which stood in the name of *Moonshee Hossein Ali*, the Respondent's Father. The Respondent applied for a Certificate, which is in the nature of letters of administration to his estate, on the 5th of May, 1848. Her application was refused, but the grounds of the refusal do not appear. The transfer of these papers to the Appellant took place on the 20th of May; and on the 2nd of July the Appellant presented to the *Sudder Dewanny Adawlut* his petition, supported by a petition from the Respondent, complaining of the Judge's order of the 5th of May, and praying that a Certificate might be granted to him in her stead. The only bearing of these documents upon the present suit is, that in his petition the Appellant describes himself as the purchaser, and the Respondent as the seller of these papers, and that the Respondent in her petition says, "Owing to my having sold to *Buzloor Ruheem*, by an indorsement, the abovementioned papers, etc." The importance of this as an admission is obviously very slight. We do not know,—and this is an observation which applies to all the other evidence of this kind,—how or by whom the proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts in these Courts. And taking the admission at its highest, it would show only that for some cause or another, possibly only in order to facilitate the receipt of interest, the apparent ownership of the notes had been transferred from her to her Husband as upon a sale and purchase,—the only way, in truth, in which it could be done, since the Treasury in *Calcutta* takes no notice of trusts. This proceeding throws little (if any) light upon the nature of the actual transactions between the Appellant and his Wife.

The proceedings next in order of date that are relied upon are those in the execu-

tion suit, which began in September, 1848, and was finally disposed of in May, 1850. These relate more to part of the lands now held in the name of the Appellant, *Jodonath Bose*, the title to which will be hereafter considered, than to the Company's paper. It may, however, be well to state their nature here. *Oomdatunnissa* having, in the course of the protracted litigation of this family, obtained a decree against the Respondent for the small sum of Rs. 671 : 13 : 1, took out execution against her share in one parcel of the lands inherited from her Father. The Appellant, the *Moonshee*, intervened as stating that the lands seized, as well as the other Objector, lands belonging to the Respondent, and these Company's papers, had been, before the execution, sold and transferred to him; and that the Respondent, the judgment debtor, had no interest therein. His objection was overruled by the Judge on the 12th of January, 1849. He brought a regular suit to impeach that decision, to set aside the execution, and recover the property sold under it. That suit was dismissed on the 21st of May, 1850, on the ground that the alleged transfer of the Respondent's properties to the Appellant was collusive, and in fraud of her judgment Creditor. The chief bearing which these proceedings have upon the title to the Company's papers is that, in the answer filed by the Respondent in the regular suit, she stated that, after her marriage with the Appellant, fearing lest her properties should be wasted by her Agents, she disposed of the same to her Husband, and deposited the value thereof for the benefit of her children. Now, as that answer was filed long before any disagreement had arisen between the Appellant and Respondent, it can hardly be doubted that, if not actually prepared under his direction, it was at least filed with his concurrence. And it is to be observed that this statement is by no means consistent with the case now made by him of sales out and out to him, in order to raise money to meet the Respondent's debts and other necessary expenses. It suggests a different motive for the sales, and treats the proceeds as remaining in the hands of somebody or another for the benefit of her family. The sales, too, having been found to be collusive and unreal transactions, are quite consistent with the supposition that the Lady was persuaded into making them upon the suggestion that she would thereby defeat her Creditor, and that they were merely colourable, and made for that purpose. These proceedings tend more to discredit than to support the case now made by the Appellant of absolute sales of these securities to him, and of the actual payment by him, out of his own funds, to the Respondent of the purchase money at the dates of the several purchases.

That case suggests the questions so much insisted upon in the Courts below, *viz.* first, why should the Appellant wish to purchase these large amounts of Company's paper, and how was he able to pay for them? and secondly, why should the Respondent wish to sell her Company's paper, and how has she disposed of the proceeds of it? What answer does the evidence give to these questions?

The Appellant is no doubt shown to be a *Zemindar* possessed of considerable estates. But the evidence tends to show that, at the time of his marriage, and at the date of the earlier, at least, of these transactions, he was, like many landed proprietors, an embarrassed man. He and his Brother owed large sums to one *Ramchand Mookerjee*, and to *Ashotosh Day* and *Promothonauth Day*. These were secured by Bond and by judgments confessed, probably on warrant of attorney, in the Supreme Court, of which one bore date the 27th of March, 1845, and was for C. Rs. 1,48,000, and the other, dated the 30th of June, 1846, was for C. Rs. 1,00,000. The precise amounts due on these judgment debts are not shown, but it is pretty clear that neither judgment, at the time of the earlier transfers of the Respondent's papers, was satisfied. It is admitted by the Appellant that most of the Company's paper, which, he says, he purchased on the 27th of May and 12th of June, 1848, were, on the 6th of July, transferred by him to *Ashotosh Dey*, in payment of one of these debts. He and his brother were also, at this time, bound, under an Order of the Supreme Court of the 12th of April, 1848, to pay into Court the sum of Rs. 62,000.

It is not credible that a person under these liabilities should be purchasing Government securities, bearing a rate of interest considerably lower than that at which his debts were running on,—securities which, if the necessity for selling them existed, might have been sold through a Broker in the market.

Again, the Appellant's case is, that the Respondent, when she married him, was herself in debt; that she afterwards required large sums for the marriages of her children and other family ceremonies; that she sold her Government securities in order to meet these necessities, and applied the proceeds in meeting them. He is driven to this allegation, because, as it is clear that she carried nothing with her out of his house, it would be still more difficult to support a theory that the money remained with her in some other form of investment. It is to be observed, however, that some of his own witnesses assign a different motive for the sale. Some of them say that she sold in order to get rid of difficulties caused by the Company's papers standing in the name of a *Purdah-nusheen*. Others say, as she says herself in her answer in the execution suit, that she was afraid of being cheated by her Agents. That the Respondent, during her seven or eight years of cohabitation with the Appellant, must have incurred considerable expenses in respect of her children by the first marriage, and for other family purposes, is pretty certain; but that she should have expended upwards of two *lacs* of rupees, the proceeds of these Company's papers, over and above the other property, which, at one time, she unquestionably possessed, is not very credible. It is to be remembered also that, on the assumption of the Courts below, she had the interest of these Company's papers wherewith to meet her necessary expenses. It is inconceivable that if these very large sums had been expended in the payment of debts, and for the other purposes alleged, the Appellant should not have been able to give better proof of the fact. It may suit his present purpose to profess that he had little personal connection with the management of her affairs; but the evidence, and in particular his petitions of the 27th of October, 1854, and the 4th of December, 1855, are strong to show that this was not the case. He there represents himself as active in the management of her property and interests.

The first of these documents is, in various particulars, strangely inconsistent with the case which the Appellant now sets up. He is there defending himself from a charge, made before the Magistrate, of having confined his Wife, and having refused to give up to her not merely the Company's papers derived from *Nujmunnissa*, which, according to his case, would then be still in her possession, put also Company's papers to the amount of Rs. 80,000 or 90,000, which, according to his present case, he had long before 1854 purchased from her; yet he does not say a word of this purchase. He covers the whole charge with the general answer, "The entire property of *Shumsoonnissa Begum* being her own property, and my entire property being mine, what ground could there exist between her and me that I should confine her?"

We have hitherto considered the evidence with reference to the alleged sales of the Government securities generally. Some parts of it, however, suggest considerations which apply exclusively to the alleged transactions of 1855 and the transfer of the papers for Rs. 1,14,300. It may be, that the means of the Appellant to make these alleged purchases had then been further diminished by the litigation in which he appears to have been engaged with his first Wife, and by the decree which she obtained against him. On the other hand, he may have been in more prosperous circumstances than he was in 1848. But if he, so late as the months of March and July, 1855, paid to the Respondent the value of these papers, it is almost incredible that he should not be able to give some better explanation how she disbursed those large sums between those dates and the following December, when she left his house destitute. Again, his petition of June, 1854, discloses a state of things which is far more consistent with the Respondent's case, that she made over to him these Company's papers

in 1853, as soon as she received them, than with his, that they were not transferred to him until 1855. It shows that in June, 1854, a petition had been presented to the Magistrate, complaining of his ill-treatment of his Wife. He, no doubt, denied the charge, and treated it as emanating, not from his Wife, but from discharged servants; and the Magistrate then considered that the charge was unfounded. But when light is thrown upon this transaction by what subsequently happened, by his ill-usage of the Respondent, which is proved, and by her release from the house by the Magistrate, on the subsequent petition of 1855, it is difficult to resist the conclusion, that the quarrel between the Husband and Wife had begun in 1854 (the date to which her plaint assigns its commencement), or, at all events, that in July, 1855, there must have been a state of feeling between them which would make a voluntary sale of her property to him a most improbable transaction. If he did, so shortly before their final separation, obtain a transfer of those securities to himself, the burden of showing that he did so righteously is assuredly made heavier.

Again, the evidence of ill-usage which has been given in this suit seems to have a further bearing upon the issue between the parties which is now under consideration. We have not now to consider, whether what he did was within, or in excess of, the marital powers of a Mussulman Husband. It is sufficient to say that very harsh treatment, and a restraint from which the Magistrate saw fit to release her, are proved, and that she left the house in circumstances to which no native woman of her rank, who was not suffering under a sense of intolerable wrong, would have exposed herself. Now, what was the cause of this grave quarrel? Her account of it is more probable than his, if indeed he has given any. It seems more likely that he should have attempted by harsh measures to frighten her out of a just demand, than that he should have met, in that way, one which was without foundation. Her conduct, too, if the quarrel had begun in 1854, has ever since been consistent; his, as has been shown above, has been inconsistent.

It would, doubtless, have been more satisfactory if the Respondent had thought fit to support her claim by her own testimony. Her abstaining from so doing certainly affords an objection to her case deserving of serious consideration; and their Lordships do not think that it is altogether removed by the suggestion of the strong repugnance felt by native females in the Respondent's position to taking such a step. But the objection, though it may weaken, does not destroy the case made by the Respondent; and their Lordships are of opinion, that, whatever weight may be due to it, it is quite insufficient to affect the conclusions in her favour to be drawn from the facts and circumstances of the case, which have been already adverted to.

The admission of the Tutor, a witness produced on the part of the Respondent, to the effect that on the transfer to which he speaks he saw money pass, is also a circumstance in the Appellant's favour. But, if the witness has spoken the truth about the money, it is to be remembered that the transaction to which he speaks was that of the 27th of May, 1848, when it may have been desired to make a colourable sale for the purpose of defeating the execution in the manner shortly afterwards attempted.

Their Lordships, then, after carefully weighing the evidence and considering the able arguments addressed to them, have come to the conclusion, that the burden of proving *bonâ fide* purchases of these Company's papers was properly thrown on the Appellant; that he has failed to do so, and that no ground has been shown for disturbing the concurrent judgments of both the Courts below on this part of the case.

The next question for consideration is that raised by the appeal of *Jodonath Bose*, as well as by that of the *Moonshee*, viz. whether that portion of the decree under appeal, which directs the reconveyance to the Respondent of the immoveable property held by *Jodonath*, and the payment to her of the mesne profits by both the Appellants, can be supported.

The property in question consists of certain shares in two gardens, of which the entirety formed part of the estate of *Moonshee Hossein Ali*. They are known

as the *Dum-Dum* garden and the *Narain Mundul* gardens, and, like the rest of the estate, were divided amongst the coheirs in twenty-fourth shares. Of the first, the decree gives to the Respondent sixteen shares, or two-thirds of the whole, comprising both her original share and the share which she inherited from her Sister. Of the other, it gives her only the eight shares inherited from her Sister, her original share having passed, under an execution sale, into the hands of the stranger to the suit.

The history of the *Dum-Dum* garden, after the death of *Moonshee Hossein Ali*, and its division amongst his heirs, is this:—As early as 1843, *Boalli* sold his five shares, and *Ashruffnissa Begum* sold her one share to one *Dilrus Begum* for Rs. 3,000. These six shares were conveyed by one Bill of sale, dated the 29th *Bysack*, 1250. On the 22nd of May, 1848, the Respondent executed a Bill of sale, by which she purported to convey her original eight shares of this garden to her Husband, in consideration of C. Rs. 2,000. On the 15th of August, 1848, he, by an Indenture in the English form, conveyed these eight shares to *Dilrus Begum*, in consideration of C. Rs. 4,000. On the 20th of July, 1853, *Dilrus Begum*, by a Bill of sale, conveyed both the sixth shares which she had acquired from *Boalli* and *Ashruffnissa Begum*, and the eight shares which she had acquired from the Appellant, the *Moonshee*, to one *Jeegree Khanum*, for Rs. 6,000; and on the 27th of September, 1853, *Jeegree Khanum* conveyed all these fourteen shares to the Appellant, *Jodonath Bose*, for Rs. 4,000. On the 9th of January, 1854, the Respondent executed a Bill of sale, purporting to convey the one-third part of this garden, which she had inherited from her Sister, to *Jodonath Bose*, for Rs. 2,000. The Appellant, *Jodonath Bose*, therefore holds twenty-two shares of this garden,—eight under a direct conveyance from the Respondent; eight under a title, founded on her conveyance to her Husband, but strengthened by the mesne conveyances; and six under a title, dating from 1843, and unimpeached, at least in this suit.

In May, 1848, the Respondent conveyed her original eight shares of the *Narain Mundul* gardens to her Husband; this property was the subject of the seizure which gave rise to the execution suit; and the sale having been declared fraudulent as against the judgment Creditor, these shares were purchased by the judgment Creditor, and cannot now be followed.

On the 12th of May, 1855, the Respondent executed a Bill of sale, purporting to convey to the Appellant, *Jodonath Bose*, in consideration of Rs. 1,500, the eight shares of this garden, which she had inherited from her Sister. That transaction is impeached. He had previously acquired part of the share of *Boalli* in this garden, having inherited it from his Brother, *Koylas*, who, in 1850, purchased it at an execution sale. His title to this portion is not impeached.

The substantial issue on this part of the case is one between the Respondent and *Jodonath Bose*. It is obvious, therefore, that the principle upon which, on the trial of the issue already considered, the burden of proof was shifted from the Plaintiff to the Defendant, is not necessarily applicable to the trial of this issue. The Respondent comes into Court seeking to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her; and it lies upon her to establish her right to that relief. Has she done so?

She has proved that *Jodonath Bose* is the servant of her Husband. She has produced three witnesses, *Gholam Arub*, *Gholam Ruhman*, and *Sheik Takee*, to prove that her Husband is the person who is really in the possession, or in the receipt of the rents and profits of the property. But nothing can be less satisfactory than the testimony of these witnesses, of whom the first is her Manager; the second, a Tailor; and the third, a menial servant; none of them having any connection with the lands.

The evidence of possession given on the other side, by *Ryots* and others, may not be altogether trustworthy; but, such as it is, it outweighs the loose statements of these three witnesses. Some of the in-

ferences to be drawn from the conveyances from her to her Husband are also favourable to the Respondent's case; but these apply only to that portion of the property claimed, which consists of her original share in the *Dum-Dum* garden.

It may be conceded that the conveyances from her to her Husband in 1848, considered with the light reflected on them from other parts of this case, and in particular from the proceedings in the execution suit, could not stand. It may also be conceded that if the question were between her and her Husband, he ought not to be permitted to say that she is bound by her fraudulent conveyance, since she may be presumed to have executed it under his influence or pressure. And if the property had passed directly from him to his dependant, the presumption that the latter is a mere Trustee for him might be stronger than it is.

But what are the facts proved? This portion of the property in dispute passed apparently by sale from *Moonshee Buzloor Ruheem* to *Dilrus Begum*. It remained with her for nearly five years; was sold, ostensibly at least, by her to *Jeegree Khanum*, from whom two months later it passed to *Jodonath Bose*. These intermediate conveyances are treated in the Courts below, and in the argument before their Lordships, as mere "circuity of fraud:" and it has been argued that we have no proof who *Dilrus Begum* and *Jeegree Khanum* are, or, indeed, that there ever were such persons. But what proof, on the part of the Respondent, is there to support these arguments? On the other side, there are witnesses who state, that *Dilrus Begum* was the Wife of the *Nawab* of *Chitpore*, a well-known person, and that *Jeegree Khanum* was a Wife or concubine of apparently the same person. The conveyance to *Dilrus Begum* was by English deed, prepared and executed in the office of a respectable English Attorney, acting apparently for the purchaser. That circumstance afforded the means of investigating that transaction. But no attempt has been made to do so. Again, that *Dilrus Begum* was a real personage, not necessarily connected with the Appellant, the *Moonshee*, is placed almost beyond a doubt by the undisputed fact that in 1843, several years before the second marriage of the Respondent, the six shares of this garden had been conveyed to her by *Boalli* and *Ashruffnissa*. What, again, was the motive for this "circuity of fraud?" If *Dilrus Begum* held five years' *Benamee* from the *Moonshee*, why raise suspicion by transferring the property from her to his known dependant, *Jodonath Bose?* Sir *Roundell Palmer* insisted strongly on the fluctuations in the amounts of the purchase-money for which the different instruments purported to convey the same property, as a badge of fraud. The first transaction, which we may admit to have been fictitious, expresses a consideration which, on a comparison with the price for which the six shares were sold in 1843, seems to be below the real value of the property. Tried by that test, the sum of Rs. 4,000, for which it was conveyed to *Dilrus Begum*, would be about the true value. This fact, taken by itself, tends to support the reality of the sales to *Dilrus Begum*. Again, if she sold for Rs. 6,000, property which had cost her Rs. 7,000, the difference is not greater than might be accounted for by the necessities of the Vendor, or by a diminution in the value of the property in the period during which it remained in her hands. The further reduction of the price to Rs. 4,000, in the sale to *Jodonath Bose*, is certainly a more suspicious circumstance. It is not, however, one which seems to go very far to supply any defect of proof on the part of the Respondent. It is not impossible that *Jeegree Khanum* may have found that she had made a bad bargain, or that *Jodonath Bose* may have made an extremely good one. On the other hand, if the transactions were fictitious, and the price cost the professed purchaser nothing, it is not easy to see why an adequate consideration was not expressed in the conveyance. There seems to have been no inquiry or cross-examination on this point in the Courts below.

Again, what is the case proved in respect of the conveyances from the Respondent herself to *Jodonath Bose?* She is proved to have executed these conveyances. She has not met this fact fairly in her

pleadings. In the original plaint there is no mention of *Jodonath Bose's* title; and on the face of the supplemental plaint it is not very clear whether she treats the conveyances as forgeries, or admits the execution and impeaches their effect. She has certainly not stated on what grounds she impeaches them, nor has she come forward as a witness to explain her execution of them. It lay upon her to do so; to show by her own or other testimony under what circumstances they were procured from her, and to rebut the evidence that the consideration money passed to her. Again, the purchase of these parcels of land by *Jodonath Bose* is not wholly improbable. The purchases are not beyond the means of a person in that rank of life. He already held portions of both gardens by titles not deduced from the Respondent, and unimpeached. The first conveyance from the Respondent was executed in January, 1854, when the *Moonshee* was absent from home and at *Singapore*. The *Zillah* Judge treats the circumstance of his absence as indicative of fraudulent forethought and contrivance. His presence probably would have afforded the inference of pressure and undue influence. The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in *India* are perhaps somewhat too apt to see fraud everywhere. The second conveyance was in May, 1855. At that time the quarrel with her Husband had, according to the Respondent's case, begun. She is not likely to have executed this instrument voluntarily at his instigation. She has not shown that she was forced to do it. And, on the other hand, it is not improbable that in the circumstances in which she thus stood, she may have been glad to raise the comparatively inconsiderable sum which is stated to have been the price of the property.

On the whole, then, their Lordships are of opinion, that the Respondent has failed to show a sufficient title to recover any of the shares in these gardens from the Appellant, *Jodonath Bose*. The habit of holding land *Benamee* is inveterate in *India;* but that does not justify the Courts in making every presumption against apparent ownership. This principle was enforced by this Committee in a recent case (*a*). Their Lordships do not deny that in this particular case the connection of *Jodonath Bose* with the other Appellant, the proved conduct of the latter towards his Wife, and other circumstances, threw some cloud of suspicion over the title to these parcels of land. But such suspicions are not proof. Their Lordships think that the Judges of both Courts below have given too much weight to them; that they have not sufficiently considered in what degree the burden of proof lay upon the Respondent; and that when the proofs which she ought to have given and might have given were defective, they have allowed the deficiency to be supplied by presumptions and inferences which the facts do not altogether warrant. Their Lordships cannot, therefore, recommend Her Majesty to confirm this portion of the decrees in the "Property suit."

As the third suit also concerns property, and the point raised by the appeal in it is very short, their Lordships think it will be convenient to dispose of it before they proceed to consider the appeal in the "Restitution suit." Two objections were taken to the maintenance of this suit. It was pleaded, first, that the Respondent's claim was barred by the law of limitation; and, secondly, that she was precluded from suing to enforce it by the 7th section of Act, No. VIII. of 1859, which provides that "if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." From the plaint it appears that the Company's paper for Rs. 10,000, which is the subject of the suit, was specified in the petitions for a Certificate under Act, No XX. of 1841, already referred to, together with the papers for Rs. 9,500 and Rs. 7,000, which are included in the Respondent's demand in the "Property suit," and that her claim respecting it is precisely the same as her claim for the other two papers. The only reason she assigns for not suing for it in the former suit is, that "as she

(*a*) Sreemanchunder Dey *v.* Gopalchunder Chuckerbutty, *ante* p. 215, 11 Moore's I. A., p. 28.

was a *Purdah-nusheen* and unacquainted with reading and writing, she could not ascertain anything about the aforesaid Government paper and the interest of the same." She says she discovered her mistake in July, 1859, and insists that her cause of action arose at that time. The *Zillah* Judge held that the second objection was fatal to the suit, which he accordingly dismissed on that ground.

The High Court has reversed this decision, for the following reasons:—They hold with him that the omission to include this item in the first suit was an oversight; that she knew of the existence of this paper before she brought her first suit, and might have included it therein; and that the real question to be decided was, whether that omission, neglect, or oversight was sufficient to bar her present claims under the law fairly applied. This question they decide in the negative, on the ground that it was clear she was not actuated by any fraudulent or dishonest motive; that the stamp paid on the first suit would have covered also this paper; that she cannot have omitted this claim in order to bring the case within the cognizance of a particular Court; and that although it may be desirable for the ends of justice that the various items claimed by a Plaintiff should form the subject of one single action, yet there was nothing in the law to make it imperative upon her to include every item of such a claim as hers in a single suit.

To these reasons their Lordships cannot assent. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The words of this law are,—"If a Plaintiff relinquish or omit to sue for any portion of his claims." It plainly includes accidental or involuntary omissions as well as acts of deliberate relinquishment. In their Lordships' opinion, the only ground on which (if at all) the judgment of the High Court could be supported, is that which is somewhat doubtingly expressed by the Judges in the following sentence:—"Nor do we think that, under the circumstances of the case, the Plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the Defendant on a particular date." Their Lordships think that the correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the Respondent seems to them to be the refusal by the Husband to restore, or his misappropriation of, the Wife's property, which she says she intrusted to him. There is nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it, for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular Company's paper for Rs.10,000, she would have been equally justified in making each one of the Company's papers which are comprised in the "Property suit" successively the subject of an independent suit. Their Lordships are of opinion, that the ruling of the *Zillah* Judge on this point was correct, and that the suit was properly dismissed. This being their view, it is unnecessary to say anything on the question of limitation. They are disposed, however, to think that the claim being founded on an alleged breach of trust, was not, as pleaded, subject to limitation, either under the old law or under Act, No. XIV. of 1859, which, the suit having been commenced in December, 1861, seems to be the law applicable to it. If the Plaintiff had failed to prove a breach of trust, but had established some other title to relief, the question of limitation might have arisen. But this could only happen upon a trial of the suit on its merits.

Their Lordships will now address themselves to the novel and difficult questions raised by the appeal in the "Restitution suit."

The first is, that which has been strenuously argued at the Bar, though it does not appear to have been raised in the Courts below, or even in the Respondent's case, viz., whether any suit by a Mussulman Husband will lie in the Civil Courts of *India* to enforce his marital rights under the Mahomedan law, by compelling his Wife, against her will (she being a free agent, and not detained by others), to return to cohabitation with him. If the law which regulates the relations of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice. Of authority negativing the jurisdiction there is none. It has been argued that the proper remedy, if there be one, is the denial of maintenance to the rebellious Wife, or, at most, a suit for damages; because a suit to compel the Wife to return to her Husband, though obviously a more complete remedy than either of them, is in the nature of a suit for specific performance; and being founded on the contract of marriage, which the Mahomedan law regards as a civil contract, the Court entertaining the suit must be prepared to enforce all the obligations, however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them. And referring to the definition of some of those obligations, as given with somewhat prurient particularity in certain Mahomedan Treatises, the learned Counsel argued that it was impossible for Courts constituted like those of British *India* to exercise such a jurisdiction. It may be admitted that the Courts of *India* would properly decline to entertain such questions; although amongst the *Wahabees* of Central Arabia, or other communities in which the Mahomedan law is observed in its utmost strictness, the Magistrate might perhaps take cognizance of them. But this admission is not decisive of the question. The Canonists lay down many things concerning the relative duties of Man and Wife which the Courts, Christian, at least of our Country, feel compelled to leave as duties of imperfect obligation. They do not, therefore, refuse to enforce the broad duty of cohabitation. In the words of Lord *Stowell*, quoted by Mr. Attorney-General, "They are content to take the Wife to the Husband's door and to leave her there."

But how does this question stand upon the authorities? In the case of *Ardaseer Cursetjee* v. *Perozeboye** (6 Moore's Ind. App. Cases, 390), in which it was here decided, that a suit for restitution of conjugal rights between *Parsees*, and *à fortiori*, one between Hindoos and Mahomedans, did not lie on the Ecclesiastical side of the Presidency Courts, Dr. *Lushington*, in delivering the judgment of the Committee, says, "The Civil Courts in *India* can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos; but the Ecclesiastical law has no such flexibility." And after ruling that the Court below had not the jurisdiction which it claimed, he adds, "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the *Parsees*). We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between the *Parsees*, nor what remedies may exist for the violation of them; but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this descriptions." And he afterwards observes, "Such remedies (the remedies afforded by their own usages) we conceive that the Supreme Court on the civil side might administer; or at least remedies as nearly approaching to them as circumstances would allow." It may be said that those *dictal*, though proceeding from so high an authority, are extrajudicial, and merely indicate an opinion that suits of this kind might possibly be entertained by the Civil Courts of *India*. The Attorney-General, however, has cited positive authorities which support the juris-

* 1 P. C. Judgments, p. 548.

diction, and shows the principles upon which it ought to be exercised. There are the cases of *Maulvi Abdul Wahab* v. *Mussumaut Hingu*, decided in 1832, and reported in 5 *Ben.* Sud. Dew. Ad. Rep. p. 200; of *Mussumaut Ameena* v. *Kuttoo Khan*, decided in 1841 and reported 7 *Ben.* Sud. Dew. Ad. Rep. p. 27; and the case of *Kulleemooddeen* v. *Sona Chand Bibi*, decided in 1848 and reported in the Reports of the Bengal *Sudder* Court for that year, at p. 795. In the last of these cases the suit was dismissed on the ground that the marriage was not proved, but the jurisdiction was not questioned. The second case may be distinguishable from the present on the ground that the Wife was of tender years, and under the control of the co-Defendants in the suit. But in the first case the Wife was clearly of full age, and a free agent. The co-Defendant in the suit, though charged with harbouring her, had little more control over her than the co-Defendant in the present case had over the Respondent. The suit, which went through three Courts, was resisted by the Wife on grounds personal to herself; and it was finally decided that, according to the Mahomedan law, by which the question was to be decided, the Plaintiff had a right to the possession of his Wife, and she was compelled to return to him. It does not very clearly appear by what process the judgment in this case, or in that of *Mussumaut Ameena* v. *Kuttoo Khan* was to be enforced. From some passages it might be inferred that in the event of disobedience the Wife was to be given bodily into her Husband's hands. Whether this could be done under the new Act of Procedure, which now regulates the Civil Courts of *India*, may well be doubted. Disobedience to the Order of a Court directing the Wife to return to cohabitation would seem to fall within the 200th section of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

Upon authority, then, as well as principle, their Lordships have no doubt that the Mussulman Husband may institute a suit in the Civil Courts of *India*, for a declaration of his right to the possession of his Wife, and for a sentence that she return to cohabitation; and that that suit must be determined according to the principles of the Mahomedan law. The latter proposition follows not merely from the imperative words of *Ben.* Reg. IV. of 1793, sec. 15, but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities; so, especially in *India*, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties.

The matrimonial law of the Mahomedans, like that of every ancient community, favours the stronger sex. The Husband can dissolve the tie at his will, subject to the condition of paying the Wife her dower and other allowances; but she cannot separate herself from him except under the arrangement called *Kolah*, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the Wife by the Husband (*a*). It cannot, we think, be doubted that, whilst the tie subsists, his power over her is considerable. The cases already cited are to the effect that he may compel her to return to his House, if she has left it. We do not find this expressed in the *Hedáya*, which speaks only of her forfeiting her right to maintenance if she be disobedient or refractory, or go abroad without her Husband's consent, until she return and make submission (Vol. I. Book IV. ch. xv. p. 394); but it seems implied throughout, that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent. In fact, the principle of keeping a man's *hareem* in seclusion and under his control, is so essential a part of the framework of Oriental society, that it is naturally assumed and taken for granted by the Mussulman expounder of the law.

On the other hand, the law assures to the Wife considerable rights as against her Husband. She may insist on maintenance according to her rank and his ability; and if he fails to give it, she may enforce that

(*a*) See Moonshee Buzul-ul Raheem v. Lutoefutoon-Nissa, 8 Moore's Ind. App. Cases, 379, 1 P. C. J., p. 901.

right before the *Kazee* (*Hedáya*, Vol. I. Book IV. chap xv. sec. 1. pp. 393, 394.) If he has power to keep her within the *Zenanah*, and to present access to her, subject to certain qualifications, he is bound to provide her with a separate apartment, exclusively appropriated to her use (*ib.* p. 402.) As to personal violence, there are certainly passages in the *Hedáya* which, founded on a text in the *Koran*, imply that the Husband may use it for correction; but this right of corporal chastisement is expressly said to "be restricted to the condition of safety;" and it may be questioned whether these authorities go the full length of the *Futwa* at p. 14 of the record (see *Hedáya*, Vol. II. Book VII. ch. 6, pp. 75—81). The Mahomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—"There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it." "The Court," as Lord *Stowell* said, in *Evans* v. *Evans* (*a*,) "has never been driven off this ground."

If, however, it be granted that, according to Mahomedan law, the Husband may sue to enforce his right to the custody of his Wife's person; and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows, that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights. The marriage tie amongst Mahomedans is not so indissoluble as it is amongst Christians. The Mahomedan Wife, as has been shown above, has rights which the Christian—or at least the English—Wife has not against her Husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the Husband altogether, or grant it only upon terms of his securing the Wife in the enjoyment of her personal safety, and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the *Kazee* by the *Futwa* (if the law, indeed, warrants such a jurisdiction), of selecting a proper place of residence for the Wife, other than her Husband's house.

Enough has been said to show that, in their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Mahomedan law, as well as strict proof of the facts to which it is to be applied. Has the present case been so tried and determined in the Courts below? Their Lordships are constrained to say, that this has not been the case. In the first place, they think that the *ratio decidendi* adopted by the Judges of both Courts is erroneous. The Principal *Sudder Ameen* held, that oppression had been proved (the correctness of his conclusion will be hereafter considered). He did not then proceed to consider, whether the oppression was so far beyond the bounds of material authority, under the Mahomedan law, as to constitute an answer to the suit. He seemed to think that, oppression once proved, the case was taken out of the Mahomedan law, and was to be decided on what the Court, upon general principles, might deem to be expedient for the security of the Wife's person. He then proceeded to argue, apparently without the slightest foundation of proof, that the Wife, having been ill-treated, had probably been unfaithful, and that if she were restored to her Husband, he was not unlikely to revenge himself by taking her life. He afterwards argued, with more reason, upon the danger of restoring her to one who had been decreed liable to pay her a very large sum of money.

The facts upon which the Judges of the High Court proceeded were, that the Magistrate had seen fit to release the Respondent from her Husband's house, and that a decree had passed against him for having made away with her property for a large sum, of which they overstated the amount. They appear to have considered that, according to the Mahomedan law, these facts were not an answer to the suit; and they then say, "This being so, are we required to decide this case in conformity with the principles of the Mahomedan law? Are we to compel the Defendant to return to

(*a*) 1 Hagg. Con. Rep. 37, *et seq.*

her Husband, convinced as we are that she should not be forced to return? If, under the Mahomedan law, no Wife can separate herself from her Husband under any circumstances whatsoever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mahomedan law giving no relief to a woman, be the conduct of the Husband ever so bad; it is a case to be disposed of by equity and good conscience. And on these principles we have no hesitation in saying, that the grounds upon which the Defendant has separated from her Husband justify her in that step."

The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan law, but according to what is termed, "equity and good conscience," *i. e.*, according to that which the Judge may think the principles of natural justice require to be done in the particular case.

Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British *India*, and particularly to the enactment already referred to (Reg. IV. of 1793, sec. 15,) which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Mahomedan law was in plain conflict with the general Municipal law, or with the requirements of a more advanced and civilized society,—as, for instance, if a Mussulman had insisted on the right to slay his Wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own sense of what is just and fair, without reference to positive law, would let the Wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her Husband.

In what they have just said their Lordships must be taken to object only to the general supersession of the Mahomedan law as the *ratio decidendi* in cases of this description, which seems to them to be implied in the judgments under review.

They do not mean to lay down that it was sufficient for the decision of the case to show that, according to the Mahomedan law, the Husband has a right to the custody of his Wife, or that there was no answer to his suit unless it could be shown that the Wife had been separated from him either by *Talâk* or *Kolah*, either of which would dissolve the *vinculum*. This assumption, which seems to have been made by the Judges of the High Court, is, their Lordships think, erroneous. It seems to them clear, that if cruelty in a degree rendering it unsafe for the Wife to return to her Husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the Husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the Wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the Husband. But all these are questions to be carefully considered, and considered with some reference to Mahomedan law.

Before, however, any of these principles can be applied, the facts to which they are to be applied must be established by legal proof; and this, their Lordships are of opinion, has not been done in the present case. Besides the evidence on the futile and now abandoned issue about Freemasonry, there is little evidence in the cause.

The *Zillah* Judge's judgment in the "Property suit" was put in evidence. The fact, therefore, that the Appellant had been decreed liable to make good a large

sum of money to the Respondent in respect of the property which he had misappropriated was established; but the proof of personal cruelty rests almost entirely on the proceeding of the Magistrate. That proceeding is neither one *inter partes* nor even a conviction of the Appellant upon a criminal charge. It was treated by the *Nizamut Adawlut* as being the record of an act done by a Police Officer, and not the judicial proceeding of a Magistrate. It is, therefore, difficult to see how, in strictness, it can be evidence at all against the Appellant; but at most it proves only that the Magistrate set the Lady free from what he considered improper restraint.

To establish a case of cruelty as a defence to the suit, the Respondent might have called the Magistrate, if then still in *India*, to speak to the state in which he found her when he set her free. She might also have given such evidence of her treatment as she adduced in the "Property suit," but which, whatever were her reasons for it, she did not adduce in this suit. And, lastly, she might have given her own testimony, which it is most desirable to have on such an issue. She has failed to do any of these things; and it is impossible to say that the Courts below had before them in proof, the facts from which any Court could infer that a defence on the ground of cruelty had been established.

From what has been said, it must be obvious, that their Lordships are not prepared to affirm the decrees under appeal in this suit. They do not, however, feel themselves in a condition to make a final decree, which would put an end to this painful litigation. They will not visit upon the Respondent the mismanagement of her cause by sending her back at once to her Husband. Enough has been shown to render it doubtful, whether she can be restored to his *zenanah* with safety, at least whilst the relation of Debtor and Creditor continues to subsist between them, unless proper security for her protection is taken. It may ultimately turn out that she ought not to be sent back at all. Their Lordships must, therefore, unwillingly recommend that this cause be remitted to the High Court, with directions to put the same in a course of re-trial, and with power, if necessary, to amend the issues or frame new ones. If cruelty be relied upon as a defence, there should be distinct issue as to the fact of cruelty.

Their Lordships, however, cannot help suggesting, for the consideration of the parties, that it is for the interest, the happiness, and the respectability of both to settle the questions still open between them by amicable arrangement rather than by further litigation. They have surely friends who might effect such an arrangement between them.

Their Lordships have now only to recapitulate the several recommendations which they will humbly make to Her Majesty on these appeals. These are—

First; that the appeal of the Appellant, *Munshee Buzloor Ruheem*, in the "Property suit," be dismissed, except so far as it relates to his liability to pay the mesne profits of the shares in the *Dum Dum* and *Narain Mundul* gardens jointly with the Appellant, *Jodonath Bose;* that the appeal of the last-named Appellant in the same suit be allowed; and that the decree of the High Court be amended, by omitting so much thereof as relates to the shares in those gardens, and by directing, in lieu thereof, that that portion of the Respondent's claim be dismissed with costs, and that the said decree be in all other respects confirmed.

Secondly; that in suit, No. 256 of 1862, the decree of the High Court be reversed, and that, in lieu thereof, the decree of the *Zillah* Judge dismissing the Respondent's suit, with costs, be affirmed, with the costs of the appeal in the High Court.

Thirdly; that in the "Restitution suit" the decrees of the High Court and of the Principal *Sudder Ameen* be reversed, and the cause be remitted to the High Court, with directions to have the same re-tried on fresh evidence, and with power to amend the issues, or to frame new issues, if they shall see fit to do so.

Lastly; that the Respondent should pay the costs of the appeals in suit, No. 256 of 1862, and in the "Restitution suit." That she should also pay the costs of the appeal of *Jodonath Bose* in the "Property suit." And that the Appellant, *Moonshee*

Buzloor Ruheem, should pay the costs of his appeal in that suit.(*a*)

(*a*) The following authorities cited for the Appellants:—

Beng. Reg. IV. of 1793, sec. 15, Hedaya, vol. I. Book IV. ch. 1, 201; Moulvee Abdul Wahab *v.* Mussamut Hingu, 5 Sel. Rep. 200, new ed., 238; Musst. Ameena *v.* Kuttoo Khan, 7 Ibid, 27, new ed. 32; Mt. Dooeen Beebee *v.* Shaik Mennoo, Sel. Rep. 103; Macn. Mahom Law, 282; Queen *v.* Shapurji Bezonji, Perry's Oriental Cases, 91; Ardaseer Cursetjee *v.* Perozeboye, 1 P. C. Judgments, 548, 6 Moore's I. A., 348; Buchaboye *v.* Merwanjee Nassarwanjee, Perry's Oriental Cases, 73; Baillie's Dig. of Mahom Law, 13; Rex. *v.* Cockrane, 8 Dowling's P. C., 63; Sec. 7 of Act VIII. of 1859.

The following authorities cited for the Respondent:—

Cooke *v.* Lamotte, 15 Beav. 234; Smith *v.* Kay, 7 H. L. Cases, 750; Rich *v.* Cockell, 9 Ves., 369—375; Darkin *v.* Darkin, 17 Beav. 581; Childers *v.* Childers, 1 De. G. and J., 482; Curtis *v.* Perry, 6 Ves., 739; 1 Strange's H. L 26—30; Latchem Umma *v.* Lewcock, 1 Str. Mad. Rep. 30; Chellummal *v.* Garrow, 2 Str. Mad Rep. 159; Narsummal *v.* Lutchmana Naie, 7 H. L. Cases, 750; Smith *v.* Kay, 2 Str. Mad. Rep. 14; Musadee Mahomed Cazeem Sherazee *v.* Mirza Ally Mahomed Khan, 8 Moore's P. C. Cases, 91; Peere Williams, 2 P. Will. 75; Blankard *v.* Galdy Salk, 411; Campbell *v.* Hall, Cowp. 204; S. C. Loft., 655; Spragge *v.* Stone, referred to in Brady *v.* Cubit, Doug. 35; Rex. *v.* Brooke, 2 Burr. 1991; Musst. Dosun Bebee *v.* Shaik Munoo, 9th May, 1832, Sel. Rep 103; Morley's Dig tit.

Casheenath Mookerjee *v.* Prankishen Mookerjee, 7 Sel. Rep. 131, new ed. 152; Radha Benode Misr *v* Shaik Musheetoolah, Ib. 350; Rae Huree Kishen *v.* Rajah Putnee Mul, Ib 287; Kutbi Begum *v.* Kalab Ali, 5 Sel. Rep. 123, new ed. 146; Mohamud Reazodeen *v.* Akbur Ali Khan, 1 Sel. Rep. 238.

19th February, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

NUGENDERCHUNDER GHOSE and another,* } *Appellants*,

versus

SREEMUTTY KAMINEE DOSSEE and others, ... } *Respondents*.

Mortgage—Construction of sec. 9, Act I. of 1845—Widow's interest—Sale for arrears of Revenue—Reversioners.

H. mortgaged a *Taluk*, and left a childless widow *K.* his heir, by whom default being made in the payment of Government Revenue, the mortgagee, *G.*, paid it (by borrowing from the Appellant's father) in order to save her own interest.

Held, that *G.*, could either (1) sue on the mortgage and tack thereto the amount of Revenue so paid by her, or (2) sue under sec. 9 of Act I. of 1845. Probably both objects might be united in one plaint.

G., however, only sued *K.*, under sec. 9, without impleading the reversioners and without asking for the *Taluk's* sale, and obtained a general decree against *K.*, but none against the land. *G.*, then assigned her rights under that decree to the Appellants, who attempted to sell the *Taluk* in execution of the decree. The Respondents, reversioners, then intervened and successfully objected to the *Taluk* being sold for *K's* personal debt. The Appellants then brought the present suit against *K.*, and her reversioners.

Held, on a construction of the plaint, that it did not seek the advance for arrears of Revenue to be declared a charge upon the *Taluk*, but sought only to recover the amount of the previous decree, and to have the property sold for that purpose;—

That the decree in the first suit (which was based on sec. 9) was effective only against the person and the limited interest of *K.*, and that an equity which the Appellant possessed, enforcible against the reversioners also, could not be enforced against them in a suit brought to extend and enforce the personal decree against *K.*;—

A mortgagee saving the mortgaged property in the possession of a Hindu widow from default of Government Revenue ought to sue her and the reversioners to have an additional charge declared in his favor to the extent of the Revenue so advanced; subject to redemption; and only in default thereof seek a sale;—

If the widow seek to destroy the estate by wilful

* 11, Moore's I. A., p. 241.

default of Revenue, the reversioners would be entitled to recoup out of her life-profits the money paid by them to the actual salvors.

17th July, 1867.

The consideration of their Lordships' judgment was postponed, and now delivered by

The Right Hon. Lord Romilly:

The question, in this case, is whether, under the circumstances set forth in these papers, the Appellants are entitled to have a lien upon the *Talook* described as *Turuff Kalikapore*, recorded as No. 109, as against the Respondents, who are interested in that *Talook*, in respect of the arrears of revenue due from that *Talook*, which have been paid by the party the Appellants represent.

The Respondents do not appear, and it is, therefore, incumbent on the Court to examine closely whether the Appellants have made out their case and have established their right to have the *Talook* sold to discharge that amount.

The facts are shortly as follows: *Hurrololl Mitter* had become the owner of this *Talook* by purchase previously to the year 1842. In May, 1842, he executed a mortgage in due form to *Nobokisto Sing* to secure Rs. 43,340 with interest at twelve per cent. per annum.

Hurrololl Mitter, the mortgagor, died, leaving *Sreemutty Kaminee Dossee*, his widow, surviving him. She had no child, and after his death continued in possession of the *Talook* as his widow.

Hurrololl Mitter, however, had a daughter by a previous marriage, the Respondent, *Mussumat Sreemutty Dossee*, who is the mother of two infant sons, the grandsons of the mortgagor, *Hurrololl Mitter*. *Nobinkisto Sing*, the mortgagee, died shortly afterwards, and left *Sreemutty Gourmonee Dossee*, his widow, who in that character became entitled to all the rights of her husband as mortgagee of this *Talook*.

The revenue due to the Government for this *Talook* was not paid by the widow of *Hurrololl Mitter*, the mortgagor, and in December, 1849, Rs. 10,317 were due in respect of such revenue.

In consequence of the non-payment of this arrear, the *Talook* would have been put up for sale by the Government Collector, and would have been sold according to Act, No. 1 of 1845, discharged from the mortgage and from all other incumbrances. In order to save the mortgage and the *Talook*, *Sreemutty Gourmonee Dossee* borrowed from *Anundonarain Ghose*, on the last day for payment of the revenue, which was the 28th of December, 1849, the amount necessary to discharge the revenue, viz., Rs. 10,317, and he deposited that amount with the Collector just before sunset on that day.

The Appellants are two of the sons and heirs of *Anundonarain Ghose*, who is dead, claiming under a transfer made to one of them by *Sreemutty Gourmonee Dossee* of her rights to and interests in the *Talook*, under her decree against *Sreemutty Kaminee Dossee* of the 29th of March, 1853, which will be afterwards mentioned; and accordingly they have the same rights and powers which she possessed as regards this *Talook* under that decree, and not further. The question there was the same which is raised on this appeal, viz., whether the Appellants were entitled to a charge on this *Talook*, and to have it sold in its entirety to pay the amount of the money so paid to the Government Collector in December, 1849.

For the purpose of determining this question, it is desirable to consider what, after such payments, the rights of *Sreemutty Gourmonee Dossee* were against *Sreemutty Kaminee Dossee* and the *Talook* itself, and the course she adopted.

Considering that the payment of the revenue by the mortgagee will prevent the *Talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *Talook* as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the *Talook* as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion, that this is not the form in which the question comes before them, and that

what they have to decide, is not whether such a charge originally existed, or whether it does now subsist, but whether the Appellants can enforce such a charge in the present suit. For this purpose it is necessary to refer to the steps taken by *Gourmonee Dossee* to obtain payment. There were two courses open to her: she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate, and to have the estate sold to pay that amount; or she might proceed under the ninth section of Act, No. 1 of 1845. She might probably have united both these objects in one plaint; but the course which she did adopt was to sue the widow, *Kaminee Dossee*, alone, under the ninth section of the Act, No. 1 of 1845, not making the persons interested in the reversion after her decease party-Defendants to that suit, and not praying that the *Talook* in its entirety might be sold to pay the amount due to her.

The plaint does not raise any claim against the estate itself; the claim is against the widow, *Kaminee Dossee*, personally. It states, first, that the female Defendant, for the purpose of doing away with the mortgage loan, threw the *Talook* into arrears, and was endeavouring to have it sold; secondly, that the female Plaintiff, for the purpose of protecting her rights, and preserving the *Talook* from sale, borrowed the money from the father of the present Appellants, and caused the payments to be made. The words of the plaint which follow are these:—"The female Plaintiff has paid the money which the female Defendant ought to have repaid. The Plaintiff has frequently called upon her for it, but no payment at all is made up to this time;" and, after stating the amount, the plaint proceeds thus: "for the recovery of which amount this suit is instituted against the female Defendant, and Plaintiff prays that the amount claimed, together with the interest thereof, due to the date of liquidation, be paid to her." The answer to the plaint merely contests the debt. It contends that no money was due on the mortgage, and that this would appear to be the case in a suit which had been instituted by the Defendant against the Plaintiff, seeking for an account against the Plaintiff as the Executrix of the husband of the Defendant. It is solely an answer directed to meet a personal claim, and accordingly the reply is to the same point, and relies on the ninth section of Act No. 1 of year 1845. [His Lordship read the section, 11, Moore's I. A., p. 244.]

This section clearly authorizes the personal action, but it gives no remedy against the land, which it leaves to the then existing law.

The decree which was made in this suit is, as might be expected, no decree against the land, but it is a general decree against the Defendant, *Kaminee Dossee*. It is in these words:—"Let the female Plaintiff get the money claimed and interest due from date of suit to day of payment, and costs, together with interest, according to practice, from the female Defendant. Costs on the part of the female Defendant are charged to her."

This decision was appealed from, and affirmed; but the only point which seems to have been argued and decided in that suit, either on the original hearing or on the appeal, was whether, while the other suit already mentioned was pending, for an account between the same parties, and in which *Kaminee Dossee*, the Defendant in this suit, claimed a large balance to be due to her from *Gourmonee Dossee*, the Plaintiff in the suit, which is the foundation of the present proceedings, the Plaintiff, as mortgagee, before the fact that anything was due to her had been ascertained, had such an interest in the *Talook* as entitled her to pay the arrears of the revenue. If she had, it followed as of course that under the ninth section of the Act, No. 1 of 1845, already mentioned, she could recover the amount in the suit in question.

Shortly after this, *Gourmonee Dossee* assigned the decree and all right under it to *Girenderchunder Ghose*, the son of *Anundonarain Ghose*, in consideration of the money lent to discharge the arrears, in whose place subsequently the Appellants, the sons of *Anundonarain Ghose*, were substituted, and who have all the rights that *Gourmonee Dossee* possessed.

When execution was sought to be en-

forced against *Kaminee Dossee*, by a sale of the whole *Talook*, the Respondent, *Sreemutty Dossee*, the daughter of *Hurrololl Mitter*, and the mother of his two grandsons, intervened to prevent the sale of the entirety, insisting that as *Kaminee Dossee* was a childless widow, the son of *Sreemutty Dossee*, who was then a minor, had a reversionary interest in the *Talook*, which could not be sold to pay a personal debt of *Kaminee Dossee*. When the intervention took place, it appears that then, for the first time, the holder of the decree raised the claim that as the *Talook* in its entirety had been saved from sale by the payment of the arrears of the revenue, the *Talook* in its entirety was liable to be sold in order to obtain repayment of that amount.

This question was brought before the Principal *Sudder Ameen* in March, 1856. He was of opinion that, under that decree, the claim could not be maintained. He refers to a case, in the *Sudder Dewanny Adawlut*, a decision of the 16th of May, 1841, *Rajah Hurrendronarain Roy*, p. 8, which determines that a decree against a Hindoo widow cannot be executed against the estate of her deceased husband, except when it is clearly specified in the decree that the estate is liable for it. The case, when referred to, fully bears out this construction. The words of the judgment are these:—"The decree is against *B* for herself—not against *B* as guardian of *C*, then a minor. *B* had only a life estate as widow, and the family property is not liable to sale for the personal debts. Whether this was originally a personal debt has not been judicially determined. But the decree as it stands is against *B* personally, and can issue only against her and her heirs. *C* is not her heir, and the family property is not her property, nor can that property be held liable till a decree be given for it."

The result of this decision was, that the application to make the *Talook* generally liable to pay the debt was refused, on the ground that the question could not be taken into consideration in an execution case, but that the question ought to be determined in a civil action. This Order was affirmed on appeal. Shortly after this the present Appellants were substituted for *Girenderchunder Ghose*; and thereupon in August, 1859, the suit was instituted out of which the present appeal has arisen. It was instituted by *George Smoult Fagan*, who had been intermediately appointed Receiver of the estate of *Anundonarain Ghose*, deceased. The plaint in this suit is in the following terms:—

"The particulars of the case are these:—The Defendant, *Gourmonee Dossee*, borrowed a sum of money from the estate of *Anundonarain Ghose*, deceased, to pay the rent of *Talook*, No. 109, *Turuff Kalikapore* and others, as per the *touzee* of the Collectorate of this *Zillah*, the annual *Sudder jumma* of which is Rs. 25,730. 3¼, for the protection of her interest as mortgagee of the *Talook*. For the recovery of the said sum of money, she obtained a decree from this Court in suit No. 97 of 1851, against the Defendant, *Kaminee Dossee*, which decree the decree-holder, *Gourmonee Dossee*, transferred to *Govind Chunder Ghose*, the then Receiver to the estate of *Anundonarain Ghose*, under a deed of conveyance executed on the 17th of February, 1855, in lieu of the money due from her to the said estate. When, consequent on the execution of the decree by the said Receiver, a proclamation for the sale of the *Talook* was issued, objections were raised by *Sreemutty Dossee* and the fictitious *Putneedars*, Defendants, whereupon, by a summary Order passed on the 18th of March, 1856, the sale of the *Talook* was stayed. Hence has arisen the cause of this suit. I, as the present Receiver to the estate of *Anundonarain Ghose*, bring this suit to recover the amount of the said decree, together with interest and costs according to the scale below furnished."

But this plaint does not seek to obtain a determination that the money paid for the arrears of the revenue constituted a charge upon the *Talook*: all that it does is to constitute a suit to recover the amount of the decree, with interest and costs, and to have the *Talook* sold for that purpose. The manner in which this is put by the Judge of the Civil Court is, that the suit is, by the agreement of all parties, wholly contingent on the decree obtained in the

first suit. He states that the decree "was not one in restriction of the remedies open to the Plaintiff, so as to confine the decree-holder to remedies personal to *Sreemutty Kaminee Dossee;* she was in possession of the estate. The action was brought against her in that character and capacity, and the law makes the proprietary interest responsible for any sums advanced to protect an interest in the estate. The decree being passed upon the recitals in the plaint, that cannot now be impeached upon statements that no mortgage existed; we must take the fact as found, the case having gone to decree against *Kaminee Dossee*, as the party in possession of the estate."

The Judge then proceeds, after showing that the action was one not merely personal against *Kaminee Dossee*, but that it also bound her, in her character as possessor, to answer all the issues in favour of the Plaintiff with costs, as between the Plaintiff and *Kaminee Dossee* and *Sreemutty Dossee*. From this decree an appeal was preferred to the High Court of Judicature, when, on the 13th of December, 1862, a decree was pronounced reversing the decision of the Court below. It is important to observe that in the opinion of the Judges of the High Court they had not to decide the question whether, by payment of the revenue in arrear, the person who had such an interest in the *Talook* as to entitle her to pay the arrear, and who thereby saved the *Talook* from being sold, did not thereby acquire a lien or charge on the *Talook* to the extent of the money so paid and interest thereon, but that the question they had to decide was simply and merely whether that equity could be enforced in a suit brought under the provisions of section 9 of Act No. 1 of 1845, which was confined to the object authorized by that section, and which did not proceed against the persons who had an interest in the property in succession after the death of the widow in possession. This will appear plain by the passage in the judgment, which is to this effect, viz., "the only point which we have to determine in this appeal is, whether as the decree in the suit brought against *Kaminee Dossee* by *Gourmonee Dossee* for the recovery of a sum of money paid to protect her own interests as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against *Kaminee Dossee*, does or does not, under section 9, Act, No. 1 of 1845, give, to use the Judge's terms, 'to the decree-holder a statutory lien on the estate.' Where the case one of first impression, we should even then have little hesitation, looking to the plain terms of the law, which simply gives a right of action against the proprietors of the estate, in declaring that the decree in a suit brought under the section of the Act above cited is only a personal one, and gives no equitable lien on the estate to the decree-holder, so that the property itself, in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed."

They then proceed to point out a distinction between the case cited by the Respondents in that appeal and the present case, and they decide that the decree against *Kaminee Dossee* was a personal one against her, and that consequently the action of the Court in execution must be confined to her interest in her husband's interest in the estate, and that the rights of *Kaminee Dossee's* husband in the estate, or the portion of the estate upon which an equitable lien was acquired, cannot be brought to sale. They, therefore, reverse the decision of the Court below, and allow the appeal of *Sreemutty Dossee* with costs. Upon the fullest consideration that their Lordships have been able to give to this case, they are of opinion the Judges of the High Court came to a correct conclusion as to the construction of section 9 of Act, No. 1 of 1845, and that the decision of the High Court was correct, and ought to be affirmed.

They repeat that it is not, in their opinion, the question whether the person who pays the arrear of the revenue does not acquire thereby a charge on the *Talook* which he saves from sale, but whether, if he seek to enforce that right, he must not do so in a suit properly framed for that purpose, and not merely in a suit which is confined to a personal remedy against the person in possession of the *Talook*. If the person who so pays the arrears of re-

venue seek repayment only under the 9th section of Act, No. 1 of 1845, as against the person in possession of the *Talook*, who has but a limited interest therein, and confines his suit to that object, their Lordships concur with the opinion of the High Court that the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as she had in the *Talook*.

That this was the character of the suit in this case originally is shown by the pleadings in the case, and by the observation of the *Zillah* Judge in the passage already cited.

That the present suit, in which this appeal is presented, was only one supplemental to the original suit, and brought to enforce and extend the decree so obtained, is also shown by the consideration of the plaint itself, and observations already cited of the *Zillah* Judge in pronouncing his decree, which fact is confirmed by the observation of the Judges in the High Court. Their Lordships think that it is impossible for them, in a case where the Respondents do not appear, to upset a decision of the High Court, which, in substance, only affirms that an action brought under section 9 of Act, No. 1 1845, is only a personal action, and that in an action which was personal against *Kaminee Dossee*, as the possessor of the *Talook*, only her property and her interest in the *Talook* can be affected, and that an equity which the Plaintiff possessed, and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal decree obtained against the possessor of the limited interest.

Their Lordships wish it to be understood that they leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindoo widow is the proprietress, she will, as Defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. In the present case she is charged by the Plaintiffs with having sought to destroy the estate by causing it to be sold for arrears of revenue. If such a charge be true, the reversioners are entitled to recoup out of her life profits, the money which is advanced to avert a sale, if they redeem, as they are entitled to do, the actual salvors; and it would be obviously inequitable for a person with such knowledge of the dealings of the proprietress, determining to salve the estate, to seek indirectly its destruction by a sale of the whole estate under an ordinary execution, without giving the reversioners the means of protecting their interests, by making them parties to a suit the object of which, by a mortgagee who advances to save the estate, should properly be to have an additional charge declared in his favour on it, subject to redemption, and in default only of redemption seeking a sale.

Their Lordships, therefore, will humbly advise Her Majesty that the appeal ought to be dismissed. (*a*)

(*a*) The following authorities cited for the Appellants:—

Manickmalla Chowdrian *v.* Parbutty Chowdrian, Cal. S. Dec. 1856, p. 867; Gobindpersaud Pundit *v.* Mt. Soondree Koonwar Dabea, Ib. 1859, pp. 516, 521; Hunoomanpersaud Panday *v.* Mt. Babooee Munraj Koonweree, 1 P. C. J., p. 552, 6 Moore's I. A., 393; Lalla Bunseedhur *v.* Koonwar Bindeseree Dutt Sing, *Ante*, p. 167, 10 Moore's I. A., 454; Gopee Mohun Thakoor *v.* Rajah Radhanat, 1 P. C. J. p. 42, 2 Knapp's Rep. 228; Preaj Narain *v.* Ajoodheapersad, 7 Sel. Rep. 513, new ed. 602; Sheegobindpersad Sing *v.* Ramchund Doobe, 10 S. Dec., N. W. P., p. 133; Delaram *v.* Roopchund Sahoo, 3 Sel. Rep. 24.

19th and 20th February, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

SEETUL PERSHAD,* ... *Appellant*,

versus

MUSSUMAT DOOLHIN BADAM KONWUR & others, } *Respondents.*

Purdanisheen—Mukhtarnama—Proof.

A Plaintiff relying on an alleged *Mukhtarnama* executed by a *purdanisheen* widow, should establish the instrument by strict legal proof of its execution.

The absence of such proof is not compensated by any legitimate conclusions to be drawn from other facts in the case.

17th July, 1867.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. LORD ROMILLY:

This is an appeal from a decree of the High Court of Judicature at *Calcutta*, which reversed the decision of the Civil Court of *Shahabad*. The question to be decided in this case is the validity or invalidity of a *Mookternamah*, appearing to have been executed by the Respondent in favour of *Hazaree Lall*. The case, as stated by the Appellant, is to this effect:—

Five brothers, of the name of *Pershad Singh*, had been owners of a *Talook* in the *Zillah* of *Shahabad*, called *Talook*, *Rooppoor*. One of them, *Kalee Pershad Singh*, died, leaving surviving him the Respondent, *Mussumat Doolhin Badam Konwur*, his widow.

Kishen Pershad Singh, one of the surviving brothers, was the manager.

The *Rajah* of *Doomrao*, who was connected with the family, the Respondent being his sister-in-law, obtained a decree against the co-sharers in the *Talook* for money borrowed from him by *Kishen Pershad Singh* to pay the revenue in arrear. This decree bore date the 23rd of December, 1852. Before 1860 the Appellant, *Seetul Pershad*, had obtained a decree in like manner against the co-sharers of the *Talook*, and another creditor, named *Ram Pertab Singh*, had obtained a third decree. No steps were taken to enforce these decrees until 1860. In the early part of that year the *Rajah* of *Doomrao* obtained an order for the sale of the *Talook* to satisfy his decree; but prior to the sale he purchased the two other decrees obtained against the co-sharers of the *Talook*.

The *Talook* was sold on the 2nd of July, 1860, and the *Rajah* of *Doomrao* was the purchaser, at the sum of Rs. 64,000. Thereupon the Appellant alleges that an agreement took place between the Respondent, *Badam Konwur*, and the *Rajah* of *Doomrao*, by which she was to be put into possession of the *Talook* in the following manner, viz.:—That the Respondent, *Badam Konwur*, was to execute the *Mookternamah* in question, appointing *Hazaree Lall*, who was a servant of hers, her *Mookter*, to borrow Rs. 180,000 from the Appellant, to be paid to the *Rajah* of *Doomrao*; that thereupon the *Rajah* was to execute an *Utlanamah* of the *Talook* in favour of the Respondent; that then *Hazaree Lall* was to execute a *Kistbundy*, or instalment Bond, on the part of the Respondent, and to deliver this to *Seetul Pershad*, the Appellant; and, finally, that a farming *Pottah*, on the part of the Respondent, was to be executed in favour of *Mussumat Doolhin Champa Konwur*, at a rent of Rs. 19,000 per annum for forty-six years, of which rent Rs. 14,725 were to be applied in payment of the Government revenue, and Rs. 4,000 for the liquidation of the principal amount of the instalment debt. The total amount of this is Rs. 18,725, which would leave a balance of Rs. 275 for the Respondent.

The Appellant further alleges, that upon this arrangement being come to, and for the purpose of carrying it into execution, the three instruments were executed, viz., the gift of the *Talook* to the Respondent,

*11, Moore's I. A., p. 268.

the widow; the lease to the Respondent, *Champa Konwur;* and the *Kistbundy*, or instalment Bond, in favour of the Appellant; and that the amount of Rs. 180,000 was paid to the *Rajah* of *Doomrao*, or the amount was accounted for to him, by *Seetul Pershad*, who acted as a general Banker, and was also the Treasurer of the *Rajah* of *Doomrao*.

The Appellant further alleges, that *Champa Konwur*, the lessee, entered into possession of the *Talook*, paid the first monthly instalment to the Appellant, but paid nothing more; thereupon the Appellant paid the Government revenue, and instituted this suit to recover against the Respondent the sum of Rs. 198,000 for principal and interest on the debt due to him, and also the amount paid by him for Government revenue, with interest. Such is the account of the transaction given by the Appellant, and sought to be established by the evidence produced. The Respondent denied that she ever granted or executed any *Mookternamah* to *Hazaree Lall*, or to any other person. Whether she had or had not executed this *Mookternamah* was the first and, indeed, the only material issue settled for adjudication in this case.

In support of the Appellant's case, the instrument itself was produced, purporting to be signed by the Respondent, and to be attested by three witnesses, *Bhojawun Singh*, *Rooghoonath Singh*, and *Baboo Hurrechurchurn Singh*, and to be signed, sealed, and registered by the *Kazi* of *Chainpoor*. The Appellant called, as a witness, the *Kazi* himself, from whose deposition it appears that the instrument was brought to him by *Hurrechurchurn Singh*, ready executed, and attested by *Bhojawun Singh* and *Rooghoonath Singh*, both of whom accompanied him on that occasion. The *Kazi* deposes that *Hurrechurchurn Singh* told him the reasons why the instrument had been executed by the Respondent; but he does not state that *Hurrechurchurn Singh*, or either of the two witnesses who had then attested it, represented that he had been present at the execution of it. The *Kazi* further deposes that he knew *Hurrechurchurn Singh* of old, and, therefore, he caused his attestation on the *Mookternamah* to be made in his (the *Kazi's*) presence. *Hurrechurchurn Singh*, on whose representation the *Kazi* seems to have relied in registering the instrument, was not produced as a witness in the cause. The Appellant alleged that he was kept out of the way intentionally to defeat his (the Appellant's) claim, but no evidence was adduced in support of that allegation. *Bhojawun Singh*, one of the witnesses to the instrument, was summoned as a witness by the Appellant; and a person answering to that name appeared before the Civil Court; but he declared that he was unable to read or write, and that he knew nothing about the *Mookternamah*. This person having been confronted with the *Kazi*, the *Kazi* declared that he was not the witness who had appeared before him. The real witness, *Bhojawun Singh*, was not produced.

The remaining witness, *Rooghoonath Singh*, stated that he could not read or write, and denied that he had attested any *Mookternamah*. Steps were taken to confront the *Kazi* with this witness, for the purpose of identifying him, but without success. The Appellant says that the witness had absconded to avoid identification. Neither the Appellant nor the Respondent produced or examined *Hazaree Lall*, the supposed *Mookter*. The Appellant states that he made every effort to do so, but ineffectually, and he suggests that *Hazaree Lall* was kept out of the way by the Respondent, whose servant he was. It is stated in the judgment in the High Court of Judicature, that he was forthcoming after the decision of the case in the Civil Court, but no attempt was made on either side to produce him for examination when the case was heard on appeal.

In the circumstances above stated, the Judge in the Civil Court disregarded the absence of legal proof of the execution of the *Mookternamah* by the Respondent, and considering that the rest of the evidence afforded the strongest presumption of its genuineness, gave a decree in full to the Appellant. On appeal to the High Court of Judicature this judgment was reversed, the Court finding that the execution of the *Mookternamah* was not proved, and that the absence of legal proof was

not compensated by any legitimate inference arising out of, or by any facts disclosed by, the other parts of the case.

With this opinion their Lordships concur. They agree with the learned Judges of the High Court in considering the whole of the transactions relative to the sale and subsequent gift of the *Talook*, in respect of which the loan was incurred, as transactions of a very questionable character.

The claim is made for 2 lacks and Rs. 9,978; this amount includes the payments of the Government revenue, yet the property was sold by auction for Rs. 64,000. The Judge in the Civil Court considered the discrepancy in value between Rs. 64,000, the amount of sale, and the Rs. 1,80,000, the amount of the loan, as evidence that the sale was collusive; but their Lordships see no reason to assume that one sum more than the other represents the real value of the *Talook*. The Judges of the High Court considered all this a mere paper transaction, without any real transfer of property. The following circumstances in the case may be referred to as confirming this view. The decree of the Civil Judge in favour of *Seetul Pershad* includes the payment of the Government revenue, but the receipts produced are given in the name of *Kishen Pershad Singh*, the Manager of the co-sharers. It appears that no change of name has taken place in the Collector's Books, and that *Kishen Pershad Singh* remains now, as he has heretofore been, the person liable to pay the Government revenue, and to whom the receipts for payment are given. This circumstance affects seriously the argument on which the Appellant mainly relied, viz., the fact that the Respondent is in the possession of the estate, and that this is not disputed by her; but if this possession is merely nominal, it is consistent with the view taken by the High Court, that the whole matter is nothing more than a paper transaction, while the actual *bonâ fide* possession of the Respondent is inconsistent with the absence of any change of name in the Books of the Collector, and with the Government revenue being still paid by *Kishen Pershad Singh*.

In addition to this, the decree taken by consent in 1852; the purchase of the other decrees, one from the Appellant and the other from a stranger; the delay in enforcing them; the circumstance that *Hazaree Lall* was the *Mookter* of *Kishen Pershad Singh*, and of all the co-sharers; that the Respondent, as well as *Champa Konwur*, the person to whom the lease of the *Talook* is granted, are ladies secluded in the *Zenana*, and never appearing in public,—all are circumstances which cast a grave suspicion on the case, and tend to support the suggestion of the learned Counsel for the Respondent, which also seems to have been adopted by the Judges of the High Court, viz.: that the whole transaction was a scheme concocted between the *Rajah* of *Doomrao* and *Kishen Pershad Singh*, to whom he was allied by marriage, to make it appear that the estate had been bought by the *Rajah*, and that it did not belong to the *Pershad Singh* family, while the real ownership and possession were to remain unaltered.

The *Mooktarnamah* itself is taken to be registered by the *Kazi* and not by the English Resident at *Agra*, as the other deeds were. The witnesses to the instrument itself are three; two of them are unable to sign their own names, and, therefore, their attestation is worth next to nothing; the third, *Baboo Hurrechurchurn Singh*, only signed the instrument at the request of the *Kazi*, and does not pretend to have been present when the Respondent signed. In truth, there is no attempt whatever to prove the signature of the Respondent herself by any one present at the time of such signature.

On the review of all the circumstances of the case, their Lordships concur in the opinion expressed by the Judges of the High Court of Judicature, that there is no legal proof of the execution of the *Mooktarnamah*, and that the absence of such proof is not compensated by any legitimate inferences to be drawn from the other facts disclosed in this case. Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, with costs.

22nd, 25th, and 26th February, and 4th March, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

GUNGA GOBIND MUNDUL and others,* ... } *Appellants*,

versus

THE COLLECTOR OF THE TWENTY-FOUR PERGUNNAHS and others,... } *Respondents*.

Limitation—Evidence—Act VIII. of 1859, sec. 355.

A claim to possession of lands barred by the ordinary limitation of twelve years will not be revived by reason of the claimant's making common cause with Government in an ejectment suit brought by the Collector to resume and assess alleged *lakhiraj* lands, during the continuance of a lease for the said lands from the Collector to the claimant.

It is of the utmost consequence in *India* that the security which long possession affords should not be weakened.

The law having laid down a limitation of twelve years as between private owners, the claim to possession of particular lands must be governed by that rule. The Government may have sixty years to enforce a right to demand *jumma* on those lands, but they have no right to intervene in a boundary dispute between private proprietors.

The provisions of Act VIII. of 1859, sec. 355, requiring the appellate Court to record its reasons for admitting fresh evidence, though not a condition precedent to the reception of such evidence, ought yet to be strictly complied with.

Gardiner v. *Fell* (1 Jac. and Wal. 22) and *Freeman* v. *Fairlie* (1 M. I. A., 299 and 305; 1 P. C. J., 120 and 123) cited and followed.

THEIR Lordships, without calling for a reply, delivered judgment by

THE RIGHT HON. LORD ROMILLY:

This is an appeal from a decree of the High Court of Judicature, at *Calcutta*, which reversed a decision of the Civil Court of the Twenty-four *Pergunnahs* in favour of the Appellants. The suit, the decision in which gives rise to the present appeal, was brought by the Collector of the Twenty-four *Pergunnahs* on behalf of the Government of *India*, against *Gunga Gobind Mundul*, and *Sree Mutty Rumonee Dossee*, described as Defendants, and Prince *Gholam Mahomed* and certain other persons, members of the *Mundul* family, named in the plaint, and described as the occupiers of five *Cottahs* of the disputed land, who, together with the Prince, are also described as *pro formâ* Defendants.

The Prince, though called a *pro formâ* Defendant, is really one of the persons principally interested in the subject in dispute. His title is adverse to that of the *Munduls*, and he is making common cause with the Collector. On what ground he is inserted as a Defendant, it is not easy to discover.

The Prince had instituted three suits for the recovery of the property which is the subject of this suit, against the Appellants. He divided his claim into three suits, in conformity to the rules of procedure established in the Courts of the country, in consequence of the separate interests of different members of the *Mundul* family, in portions of his property, of which his claim embraced the whole. The suits of the Prince, numbered 43, 44, and 45 of 1857, raise precisely the same question as that which is raised in the suit of the Collector before-mentioned, viz. whether the lands sought to be recovered formed part of holding No. 1, and were part of that portion of Colonel *Green's* estate, which, as the Prince contends, has passed to him by title. In all the four suits, the decision was against the Plaintiffs in the Civil Court. In the judgment of the High Court it is stated, "It has been admitted by the Counsel on both sides, that in the Court below all parties agreed that this appeal (that is, the appeal in the Collector's suit) and appeals Nos. 122, 123, and 124 (that is, in the Prince's suits) should be heard together and treated as one consolidated case, and that all the evidence should be taken as in one cause.

In the Collector's suit alone is there any

* 11, Moore's I. A., p. 345.

appeal. That suit, though it asks "a declaration overruling the plea of a rent-free tenure," which is not properly the subject of that jurisdiction, is properly treated in the Civil Court as an ejectment suit, and it was admitted by Mr. *Forsyth*, who appears for the Collector, to be a suit in the nature of an ejectment suit. For such a suit, which supposes that the Plaintiff was put out of possession, it is necessary for him to allege and prove his title to the possession. The Collector sues for the Government, being entitled to sue to enforce their claim to the possession. It appears, however, in this suit, that both the Prince *Gholam* and the first and second *Munduls* claim derivatively from the same person, *Johnson;* the judgment of the High Court finds, as a fact, that "the property was originally the property of *Johnson*." By this word "property" here, is evidently meant absolute ownership; though it may be by a grant from the East India Company, as the *Zemindars* of the Twenty-four *Pergunnahs*. The well-known cases of *Gardiner* v. *Fell*, and *Freeman* v. *Fairlie** (1 Moore's Ind. App. Cases, pp. 299 and 305), and the observations of Lord *Lyndhurst* in the latter case on the subject of *Pottahs*, exclude any supposition that such absolute ownership of lands by private persons could not exist at that time in that part of *India*, as against any claim of the Government to possession of the lands. In the latter case, his Lordship terms "the rent" "a *jumma* or tribute," and says "the *Pottah*, therefore, proves no part of the title, it is the conveyance that gives parties a right to claim the *Pottah*." The *Pottah* is evidence of title. If there were anything in the nature of the title of the Government to lands in the Twenty-four *Pergunnahs*, or any usage or custom in force there, which gave a less permanent interest to the possessors of proprietary right, some authority for, or some evidence of such a variation from, and limitation of the general law, should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take these titles out of the operation of the principles established by the cases above referred to; consequently, upon the evidence in this suit, it appears that the Government had not, at the time of *Johnson's* possession of block No. 1, any title to the possession of these lands. If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply to the rent, the nature of which was that of a *jumma* or tribute; and if the holders of these lands asserted then, or subsequently, a groundless claim to hold them free of rent, as *La-khiraj*, that claim would not destroy their proprietary right in the lands themselves, but simply subject their owners to liability to be sued in a resumption suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure, involving the measurement and assessment of the lands, and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed. If, at any period during *Johnson's* possession of these lands, or subsequently, a title to the possession of the lands themselves had accrued to the Government, by any act or omission on the part of the owners of the lands working a forfeiture, that title should have been alleged and proved. But so far from this being attempted to be established, the Collector treated the lands as belonging, by title, to the holding of the Prince, and the Prince as fulfilling the ordinary obligations of the owner of the land, to pay the rent or *jumma* of them. The title of *Richard Johnson* existed in 1783, and from that time downwards there is no proof of any act entitling the Government to take possession of the lands; there is no evidence, on which any reliance can be placed, that the title of the *Munduls*, be it what it may, commenced by violence; but assuming that such proof existed, in what way can a dispute between two private owners, whether as to boundaries or lands, divest the title of either to possession in favour of the Government, if the latter have merely a rent or *jumma?* The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he

* 1 P. C. J., pp. 120, 123.

suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see Sel. Rep., vol. vi., p. 139, cited in *Macpherson*, Civil Procedure, p. 81 (3rd ed.) Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred; and the effect of that bar must operate in favour of the party in possession.

The title, then, of the Prince to recover these lands as against the *Munduls* is extinguished; then how can the extinction of the proprietary owner's right in favour of the party in possession, confer any right to possession simply on another person not having a title in remainder, if he had not a title to possession whilst the right and remedy remained? Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to that. The interest of the person in possession is not a limited but an absolute interest; the title to the lands is one inheritance, the title to the *khiraj* or rent is another. Though these lands are treated as part of the *khas mehals*, yet there is no proof in this case of any relation of landlord and tenant ever existing between *Johnson* and the Government; *Johnson* appears to have been the absolute owner, and no reversion to have existed in the Government. It is not the case of a lease at all, still less of a lease of temporary duration; it is the case of an absolute ownership of the lands; and the title of the Government rather resembles a seignory than that of a lessor with a reversion.

In the Civil Court, the title of the Collector to sue was put upon the ground of the relation of landlord and tenant; and of the right of the landlord to sue in order to protect his tenant, and to assert his title as landlord. But such is not the real relation between the parties which the evidence discloses. Prince *Gholam* took, by conveyance, from *Brown*; he states his title to have been derivative from *Johnson*, who conveyed to *Green*, who conveyed to *Brown*, who conveyed to the Prince a title to the absolute ownership never interrupted.

There is no relation of Landlord and tenant in such a case between the Government and the owner of the lands, who is the landlord, and not a *Ryot*. The Government has a title to the rent or *jumma*. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture, or extinction of the ownership.

It is of the utmost consequence in *India* that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands,—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is, the legal right of the Government is to its rent; the lands are owned by others: as between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of *jumma* is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to *jumma* is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the law of limitation.

Their Lordships are, therefore, of opinion, that this dispute as to the identity of the lands, which is substantially the cause of action of the Prince alone, cannot be kept alive longer than the legal pe-

riod of limitation of twelve years, by the expedient of inducing the Collector to make common cause with him. The judgment appealed against says, "if the Government recover against the Defendants, the Prince substantially recovers also." But the Prince has never surrendered or intended to surrender his estate to the Government. He has simply taken a new *Pottah;* that *Pottah* is not the title, but the evidence of title. If the title of the Prince to possession was inconsistent with a title in the Government to the possession, and the law of limitation has extinguished that title of the Prince in favour of the *Munduls*, the Defendants, their Lordships are entirely at a loss to see in the arrangement between the Collector and the Prince, any ground in law or equity for making a decree which substantially restores him to what he has lost by laches, supposing the title under which he claims to have been originally good.

If, however, it were considered that the Collector could sue for the possession of the lands upon the title shown to be in the Prince, or that the Prince, by reason of the suit being in the Collector's name, could get the benefit of the sixty years' limitations, the question whether the Respondents have proved a title sufficient to evict the Appellants from the lands in dispute would still remain to be decided. The Collector rests on the title of the Prince. That title is derivative through mesne transfers from *Johnson*. The place, the *Sahiban Bageecha*, is said to have been the residence of European Gentlemen. It seems probable that both *Johnson* and *Green* were British subjects; if they were British subjects these lands could not have been orally conveyed by *Johnson* to *Green*. It is not shown, therefore, by the Plaintiff, on whom the burden of proof lies, that the entries in the Register could of themselves operate as a conveyance. They must, at the highest, amount only to evidence from which, with other matters, a conveyance might be presumed. Had the possession of the lands been enjoyed by virtue of and consistently with the title asserted by the Plaintiffs, there would have been legal grounds for making such a presumption; but there has been a long adverse possession, and there is no sufficient proof of a contemporaneous possession consistent with the title insisted on by the Plaintiffs. The presumption of a conveyance is restored to, when such presumption is made, to support a long possession; but here it would be applied to defeat a long possession. If possession be not consistent with a title, which is to be supported by a presumption of a former conveyance, that very possession would furnish ground for building another presumption on the first, viz. of a subsequent retransfer or reconveyance. In such a case, therefore, as the present, the defective link in the claimant's title cannot, in the opinion of their Lordships, be supplied by presumption. Then, as it is not shown that these lands could have been transferred orally, and as no direct evidence exists of a conveyance, and as the state of the possession does not support a presumption of one having existed, the question which is asked by the Judge of the Civil Court as to the missing link, is at once pertinent and unanswered. Again, the title from *Green* to *Brown*, the immediate vendor to the Prince, has not been traced or proved. It has been assumed that it is sufficient for the Respondents to establish that the lands were part of the rent-paying lands comprised in Holding No. 1. But even this fact has not, in their Lordships' opinion, been satisfactorily made out. Both parties agree that the lands in dispute lie in block No. 1, which, by the *Chittahs* of 1783, appears to have belonged to *Johnson*, and to have contained 46 *beegahs* 10 *cottahs*. The inference which the Respondents draw from the Register Book at page 213 is, that this parcel of 46 *beegahs* 10 *cottahs*, was subject to a *jumma* of Rs. 39. 13 as.; that it had been transferred, before 1816, from *Johnson* to *Green*; that a fresh *Pottah* for it was then granted in the name of *Green;* and that it is identical with the joint holding mentioned in the *Terij* of 1833 under the head of *Pergunnah Khaspore*. It is, however, clear on the face of the *Terij*, that that holding had been supposed to comprise only 30 *beegahs;* that on a remeasurement it had been found to comprise 42 and a fraction; and that in consequence of the

remeasurement the *jumma* of Rs. 39. 15 as. had been raised to Rs. 56. 14 as. 1 p. But no satisfactory or consistent explanation has been given how or why a holding which, in 1816 was taken to contain 46 *beegahs* 10 *cottahs*, and as such was assessed at Rs. 39. 15 as., was at some intermediate period between that date and 1833 taken to contain only 30 *beegahs*; and having, on remeasurement, been found to contain 42 *beegahs* and 16 *cottahs*, was treated as subject to a higher *jumma* than that assessed upon it when it was supposed to be 46 *beegahs* 10 *cottahs*. Mr. *Forsyth* thought that there must have been two measurements, of which the first, being inaccurate, had reduced the quantity of land to 30 *beegahs*,—and that the first estimate of 46 *beegahs* 10 *cottahs* was a conjectural one. It does not, however, seem probable that if this original estimate had been tested by measurement, the measurement would have been so inaccurately made. Again, Sir *Roundell Palmer's* theory is that the original block No. 1 may have contained some 16 *beegahs* and 10 *cottahs* of rent-free lands; that the rent-paying lands were, therefore, taken to be only 30 *beegahs*, but were found, on remeasurement, to be 42 *beegahs* and 16 *cottahs*. This theory implies that block No. 1 contained, in fact, about 59 *beegahs* of land. The learned Judges of the High Court admit the difficulty, but say that it is not insuperable, and seem to incline to some such explanation as that offered by Mr. *Forsyth*. These hypotheses, which are not consistent, are all, in their Lordships' opinion, of too conjectural a character to be received in explanation of an admitted difficulty, in order to defeat a title founded on long possession. It may be observed, too, that all of them, and indeed the Register Book itself, are not consistent with the case made by the Collector in his plaint, which is founded upon the transfer of the 46 *beegahs* 10 *cottahs*, less 3 *beegahs* and a fraction, from *Johnson* to *Green*. The question of the identity of these lands appears to their Lordships to be one of extreme doubt and difficulty. They are by no means prepared to say that the Appellants have made out that the lands in dispute are identical with the parcels of the conveyance under which they claim title; or have proved a title under which they could recover if they were out of possession. But the burden of proof is on the Respondents,—it is for them to establish, by sufficient and satisfactory evidence, the identity of the lands conveyed to the Prince by *Brown* with those sought to be recovered from the Appellants; and their Lordships are of opinion, that they have failed to do so. If their Lordships had thought otherwise, and that the suit was to be determined upon proof of this identity, they would have felt it very difficult to refuse to send the cause back for a new trial. For the strength of the Respondents' case is the Register Book;—that Book was first produced in the appellate Court, under circumstances in which the Appellants may have been, in some measure, taken by surprise; and they may, in the documents produced in support of their unsuccessful application for review, have the means of meeting the inferences to be drawn from that Book. Objection to reception of those documents here was taken and allowed; and their Lordships have excluded them from their consideration. Upon the whole case, however, and for the reasons already given, their Lordships are satisfied that the suit of the Collector was properly dismissed by the *Zillah* Court; and that this judgment, notwithstanding the fresh evidence produced, ought to have been affirmed by the High Court.

Their Lordships wish it to be understood that this judgment leaves the subject of the liability of these lands to be assessed for *jumma* wholly untouched. All that they decide, is the question of proprietary right, as between the contending private owners.

It may be right to observe that, in their Lordships' opinion, the provision in the Code of Procedure, which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with. It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of litigation, and the

statement of the reasons may inspire confidence and disarm objection. Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed with costs; and that the decision of the Civil Court, so far as it dismisses the Plaintiffs' suit with costs, be affirmed, and that this appeal be allowed with costs.

4th March, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

THAKOORAIN SAHIBA and CHOWDREE JAI CHUND,* ... } *Appellants*,

versus

MOHUN LALL and others, *Respondents*.

Hindu law as prevalent in Mithila—Sister's son not entitled to succeed—Locus standi—Adoption.

A sister's son, under the doctrines of the Benares school as prevalent in *Mithila*, has no title to succeed to his deceased uncle's estate, and has consequently no *locus standi* to bring a suit to challenge an adoption by the widow of the deceased proprietor.

JUDGMENT was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

Their Lordships have authorized me to state that in their opinion the preliminary objection which has been taken to the maintenance of this suit must prevail. It unquestionably lay upon the Plaintiff, *Mohun Lall*, one of the Respondents, to show that he had a right to sue. The suit is of a peculiar nature, because it is one brought by a person who, even if his own case were true, might probably never have an interest in the property, inasmuch as he can have only a contingent estate during the life-time of the Appellant, *Thakoorain Sahiba*. Such a suit is permitted simply on the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way,—in other words, that he holds the character which he professes to hold.

Now, the admissions which have been properly and candidly made at the Bar, have reduced the question to a very narrow compass. As the suit was originally launched, and upon the face of the plaint, there was some uncertainty as to the mode in which the parties sought to establish their title. There was apparently some confusion in the mind of the Pleader whether *Koor Inderjeet Sing* or his father was what we call the *propositus*, and whether it was not sufficient to deduce a title to inherit from the father. Before the case reached the *Sudder* Court that confusion had been dispelled, and the Judges of that Court (as appears by their judgment) considered the case on the assumption that *Koor Inderjeet Sing* was, as he no doubt was, the *propositus*, and that the Respondent, *Mohun Lall*, had to show that he was in the line of heirs to him.

The admission, however, which Mr. *Piffard* made at the Bar to-day, implies that the learned Judges of that Court decided in favour of that Respondent upon a ground which is no longer tenable. They treated him as having an interest, on the ground that, being a Sister's son, he comes within the category of the cognates or *Bandhoos*. That view is now abandoned, and, therefore, the question is narrowed to that raised by the very ingenious argument of Mr. *Piffard*, namely, whether, upon the true construction of the *Mitacshara*, the Sister's son does not come in as one of the earlier class of heirs known as *Sapindas?*

We think that if this question were *res integra*, and to be determined on a construction of the *Mitacshara* alone, there would be considerable difficulty in coming to the conclusion to which Mr. *Piffard*

* 11, Moore's I. A., p. 386.

would bring us. There is, no doubt, some foundation for the ingenious arguments which he has addressed to us. It is, perhaps, a startling anomaly, that whilst among the cognates the Aunt's sons are included, the Sister's sons should be altogether excluded from the inheritance; and there is also something plausible in the argument which he has founded upon the fourth article of the fifth section, which says that "on failure of the Father's descendants the heirs are successively the paternal Grandmother, the paternal Grandfather, the uncles and their sons." The difficulty, however, that occurs on the words "on failure of the Father's descendants" is really not insuperable, because they may well be taken to import the failure of the Father's descendants, who, according to the rules expressed in that Treatise, are capable of inheriting. Indeed, unless so qualified, they would give by implication a right to inherit not only to Sisters' sons, but to Sisters who, *ex concessis*, are excluded from the inheritance.

Mr. *Piffard's* argument had, in truth, a sort of double aspect. At first he dwelt a good deal upon the authority of the author of the Treatise called the *Vyavahara Mayucha;* but afterwards he fell back upon the authority of *Balambhatta* and *Nanda Pandita.* The two authorities are not consistent. We may at once dismiss that of the *Vyavahara Mayucha* by saying that that Treatise, though received in the *Bombay* Presidency, appears to be of no authority in the Districts the law of which has now to be applied. It is further to be observed that, if received, it would not support the contention of Mr. *Piffard*, because it gives the right of heirship to the Sister herself, and not merely to the Sister's son, and puts the Sister after the paternal Grandmother and between the paternal Grandmother and the paternal Grandfather.

The other argument, that on which Mr. *Piffard* finally rested his case, is shortly this. The seventh article of the fourth section of the second chapter of the *Mitacshara* says:—"On failure of Brothers also, their sons share the heritage in the order of the respective Fathers." Two ancient Commentators, *Balambhatta* and *Nanda Pandita*, held that the words "their sons share the heritage" are to be construed so as to include the Daughters as well as the sons of Brothers and the Sons and Daughters of sisters; and Mr. *Piffard* would have us adopt this construction. But the paragraph clearly implies that the parent, if in existence, is to take the succession. And accordingly the two Hindoo Commentators (see the note on paragraph 7, sec. 4,) would include Sisters in the term "Brothers," and give them a place in the line of succession. But Mr. *Piffard* is constrained to admit that Sisters are excluded. In fact, it would not suit his Client's case to admit them.

On the other hand, if "Brothers" are to be taken simply as "Brothers," and "their Sons" as Brother's sons, the text of the *Mitacshara* is perfectly clear; and the first clause of the fifth section shows that on the failure of Brothers' sons, Gentiles share the estate, the paternal Grandmother being the first person of the class of heirs who take the estate. Again, were the arguments in favour of the construction which Mr. *Piffard* would put upon the *Mitacshara* far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that Treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by the *dicta* of received Treatises, by some novel interpretations of the vague and often conflicting texts of the Hindoo Commentators, would be most dangerous, inasmuch as it would unsettle existing titles.

Of what may be called the modern authorities, we have, first, the decision of the *Sudder Dewanny Adawlut* at *Calcutta* in 1801. *Rajchunder Naraen Chowdry* vs. *Goculchund Goh* (1 *Ben. Sud. Dew. Adw.* Rep. 43.) It is impossible to read that case without seeing that the point was clearly raised before the Court, which at that time consisted of Judges who were considerable authorities on Hindoo law. That decision has received the high sanction of Sir *William Macnaghten*, "Hindu

Law," Vol. I. p. 28; it is also cited by Sir *Thomas Strange*, "Hindu Law," Vol. I. p. 147, and it has ever since been considered to be a correct exposition of the law. Nor can it be said, as was suggested by Mr. *Piffard*, that all the subsequent authorities rest upon this decision, which he attributed in part to the inability of English Judges fully to appreciate and apply the terms of the Hindoo Treatises. For at page 84 of the second volume of *Macnaghten's* Principles and Precedents of "Hindu Law," we have the *Bywusta*, or opinion of the *Pundit* of the *Dacca* Court of appeal purporting to interpret the text of *Yajnyawalcya*, and making no reference whatever to this decision of the *Sudder* Court. He there puts Sisters' sons out of the category in which Mr. *Piffard* would include them; although, erroneously perhaps, he puts them among the *Bandhoos*, or distant kindred. Again, from the MS. case cited at the Bar* we find that the *Agra* Court, overruling its decision in this case, has recently held that the Sister's son is not in the line of heirs at all; that the same point has been decided at *Madras*, and was recently decided in the High Court of *Bengal*. It had previously been decided in the case which is set forth in the record. Against all these concurrent authorities we have nothing to set but the decision now under review, which it is admitted at the Bar cannot rest upon the ground on which the Judges put it.

Their Lordships are, therefore, of opinion that they must humbly recommend Her Majesty to reverse the decrees under appeal, and to declare that the suit ought to have been and be dismissed with costs. The Respondent, *Mohun Lall*, must also pay the costs of this appeal.

*MUSSUMAT MOONEEA & MITHOO, *Appellants*,

versus

DHURMA, ... *Respondent* †

THIS was a regular appeal (No. 20 of 1866) from the decision of *W. S. Pater*, Esq., the Judge of *Agra*, and heard on the 13th of June, 1866, before *F. B. Pearson*, Esq., and *R. Spankie*, Esq., Officiating Judge of the *Sudder Dewanny Adawlut*, North-West Provinces, *Agra*.

† 11, Moore's I. A., p. 393.

It was a claim to establish title to real estate in the town of *Agra*, and to prevent alienation by the Appellants.

The case was thus set forth in the Judge's decision :—

"The Plaintiff states that *Mussumat Mooneea* has illegally adopted *Mithoo* as her husband's heir. Her husband, *Mool Chund*, Uncle of the Plaintiff, died about two years ago. A Hindoo Widow cannot adopt an heir. The income from the property is ample for her during her life-time.

"The Defendants in reply urge, first, that the Plaintiff, as Nephew, has no title to oppose the adoption; second, that *Mool Chund* himself acquired the property, and not by inheritance; third, *Mithoo* is a relative of the deceased *Mool Chund*, and the adoption is legal. *Mithoo* was brought up by him during six years, and shortly before his death *Mool Chund* authorized me to adopt him."

The material issues were—first, was the Plaintiff, as nephew of *Mool Chund*, entitled to oppose the adoption of *Mithoo*? second, did *Mool Chund* authorize his wife, *Mussumat Mooneea*, to adopt *Mithoo*? and third, is *Mithoo* a relative of the deceased *Mool Chund*, and is the claim void on that score?

Upon these issues the following judgment was pronounced :—"I find, first, that the Plaintiff is Nephew of the deceased *Mool Chund*, and is so entitled to oppose any illegal adoption by *Mussumat Mooneea*; second, it is not shown that *Mool Chund* authorized *Mussumat Mooneea* to adopt *Mithoo*. Had he done so, *Mithoo* would sooner have been adopted by her. It appears that a misunderstanding had arisen between *Mussumat Mooneea* and the Plaintiff's wife; and upon that *Mussumat Mooneea* sent for *Mithoo* from a distant village, and then represented him to be the adopted heir of *Mool Chund*, and this occurred only about six months ago, as shown in the evidence on both sides; third, *Mithoo* is not shown to be related to the deceased *Mool Chund*, but only one of the brotherhood, or connection. I decree in favour of the Plaintiff, with costs."

On the appeal to the *Sudder* Court it was contended, amongst other objections, by the Respondent, that the Plaintiff, being *Mool Chund's* sister's son, could not inherit his property, and, therefore, the suit should have been dismissed as barred by the Hindoo Law.

The *Sudder* Court's judgment was in these terms :—"We think it unnecessary to refer to the other pleas, and confine ourselves to the objection in bar of the suit. We are of opinion that the objection is fatal to the suit. We are aware that there is a ruling of this

Court in the case of *Sahiba Thakoorain* and *Chowdree Jai Chund* vs. *Mohun Lall*, dated 18th of April, 1863, which declares that a sister's son may inherit his maternal uncle's property, but this decision only accepts him as an heir in the absence of any lineal male descendant of the fourteenth degree, or distant kindred. We, however, observe that the weight of precedent and opinion is against this ruling. *Macnághten*, Vol. II. p. 87, does not admit of such a claim ; nor does *Strange*, Vol. I., 147. We do not find a Sister's son in the table of succession in the *Mitacshara*. The Sister's son appears to be regarded as sprung from and belonging to a different family. In the *Madras* Presidency he would not inherit. *Madras Sud. Dew. Ad.* 1859, p. 249, quoted in p. 14, Appx. translation of Law of Inheritance according to the *Mitacshara*, and the *Mitacshara* has paramount authority in that part of the Country. We are further confirmed in our opinion on this case by a decision of the High Court, dated the 6th of September, 1864, (*Morgan* and *Shumboonath Pundit*, Judges,) which rules that a sister's son is no heir where the *Mitacsharâ*(the authority in *Benares*)prevails. We, therefore, consider the Plaintiff has no *locus standi* in Court, and that his suit should have been dismissed on that account. With this view of the case, we decree the appeal and reverse the decision of the Lower Court, with costs."

9th and 10th July, 1867.

PRESENT :

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bombay.

RUTTONJI EDULJI SHET,* *Appellant*,

versus

THE COLLECTOR OF TANNA and THE CONSERVATOR OF FORESTS, } *Respondents*.

Construction—Lease.

Plaintiff *R. E. S.* obtained a lease from the Government of Bombay of a large tract of swamp land in the Island of *Salsette* for a term certain and proceeded to clear all the unassessed timber, which was objected to and prevented by the Defendants.

R. E. S. thereon instituted a suit for damages against the Defendants.

Held on a proper construction of the lease, that ;

(1) The right to cut the timber in dispute, was not necessarily incident to the lease, as there was no work to be done, and apparently no right to execute any work upon the land on which this timber grew.

(2) No positive law justified the act of the Plaintiff with which Defendants had interfered.

(3) The alleged customary right had not been proved.

(4) No such express right was given by the lease.

Judgments of the Courts below, dismissing the Plaintiff's suit upheld accordingly, with costs.

THE facts and circumstances of the case were these :—

On the 23rd of May, 1843, the Appellant presented a petition to the Government of *Bombay* for a lease of the above village, for the purpose of recovering the swamp land and converting it into salt batty crops, and forming salt pans. Upon this application the then acting Collector of the District of *Tanna* granted to the Appellant a *Cowl* for the village of *Ghatkopur*, bearing date the 31st of December, 1845. By the terms of this lease the village was granted to the Appellant in farm from the year 1844, for a period of ninety-nine years, on the revenue of the year 1842, on certain conditions specified in the lease. In the lease the quantity of land was specified, some of which was described as under cultivation and the rest as waste ; the number of *brab* trees was likewise specified, amounting to 2,568, of which 82 were on cultivated, and 2,486 on waste land. The first condition provided, that the produce of waste land and waste *brab* trees was to be deducted from the *Jumma-bundy* (revenue settlement or rent,) "in consequence of the waste land and *brab* trees having been given to you in *Mafee* (rent free) as specified below." The rent was fixed at Rs. 1,135. 14 as. 7 p.

The other important conditions in the lease were these :—

2nd clause.—"The waste land of the village, including *Junglegurk*, *Naligurk*, and *Nowsad*, &c., is hereby granted to you in *Mafee* for forty years from 1844-45. You are to make the necessary outlay and bring it under tillage, out of the sweet

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11, Moore's I. A., p. 295.

waste land, one-fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period; in failure whereof the produce of the hay, amounting to Rs. 27 herein deducted, will be collected from you from the first to the last year of the exemption. You are to prepare the salt land for cultivation within five years from 1844–45, but if you fail to do so, a fine of Rs. 500 will be imposed on you, and after the expiration of forty years the full assessment, according to the prevailing usage of the country, will be collected annually from you on such land as may be under cultivation, as well as on such quantity as may remain waste out of the present waste entered in the public accounts."

3rd clause.—"The waste *brab* trees are in like manner made over to you, and after the expiration of forty years they will be surveyed and assessed according to the undermentioned rates, and the amount collected from you."

4th clause.—"You are prohibited from cutting down or destroying any *brab*, date, or other trees, liable to taxation, without the permission of the Collector."

"Should you, during the period of exemption, draw the juice from any trees, and at the expiration of that period allow them to rest with the view of obtaining them at a lower rate, the full tax on all such trees that may have been cultivated by you in any year during the term of exemption will be collected from you."

6th clause.—"The rights of the present proprietors of land, and other privileges of any description whatever, remain unaffected by this lease. It is clearly to be understood that this lease confers no right which Government does not now possess, and only such portion of the rights of Government as may be herein specifically granted is hereby granted to you."

16th clause.—"For breach of any of the conditions of this lease for which a specific penalty has not been laid down, Government is at liberty to inflict such punishment as may be provided by Regulations, and to cancel the lease and resume the village without reimbursing you for any expense you may have incurred. No claim for losses will be attended to."

25th clause.—"Should the inhabitants of your as well as of other villages be in the habit of carrying hay, wood, &c., annually from the jungles of your village, you are not to interfere with such practice."

32nd clause.—"There are in the aforesaid village about 150 *beegas* of swampy land which might be available for salt pans; you are, therefore, as proposed by you in your petition, to expend whatever sums of money may be necessary and convert the said land into salt pans," within a certain period there specified and subject to certain penalties.

Mr. *Manisty*, Q. C., and Mr. *T. Chisholm Anstey*, for the Appellant, and

Mr. *Forsyth*, Q. C., and Mr. *Merivale*, for the Collector of *Tanna* and Conservator of Forests.

Without calling on the Respondents' Counsel, their Lordships delivered judgment by

THE RIGHT HON. LORD CAIRNS:

In this case a plaint was filed in the *Konkum* District Court by the Appellant, and the complaint which he made was founded on a lease which was granted to him by the Acting Collector of the District of *Tanna*, on the 31st of December, 1845, of the village of *Ghatkopur*. The complaint was that, contrary to the terms of that lease, the Defendants did not allow the Appellant to fell unassessed trees in the village, or to apply them to his own use,—that is, to carry off the trees from the ground on which they grew, and to dispose of them to the use of the Appellant; that claim being on the face of it founded upon the lease which had been granted to the Appellant.

The evidence with regard to this timber is to be found in the testimony of *Ruhimoo Kosum*. That witness thus describes the timber:—"I know *Ruttonji Edulji*, the Plaintiff in this case. Three or four years ago I entered into a contract with him to cut all the teak, blackwood, and *kheir* trees, small and great, in the forests of *Ghatkopur*, for Rs. 4,900. It was agreed that I should cut the trees at my own cost. I accordingly cut a portion of

the trees, but was prevented from doing so by the Government authorities, and the trees cut down were attached, and, therefore, I could not remove the trees. I paid *Ruttonji Edulji* Rs. 1,225 on account of the contract, but as the wood was not made over to me, *Ruttonji Edulji* paid me Rs. 1,950, including expenses, etcs." In answer to the Defendants' questions, he says,—"Some of the trees for which I had made a contract were timber trees, and some were fit for firewood, and had I carried out the contract I should have cut down all the teak, blackwood, and *kheir* trees, great and small. Some of the trees would only have been fit for firewood, other jungle trees fit for firewood would have remained in the forests of *Ghatkopur*. I took the said contract at a public sale, and there was a written agreement for the same. I have not brought it with me. The auction was held in the village of *Ghatkopur*." Afterwards, in answer to the Court's questions, he says,—"If I had cut the trees according to the contract, wood to the value of Rs. 1,000 or Rs. 2,000 would have been left in the jungle. Before I was prevented by the authorities from removing the wood, I sold about Rs. 300 worth of wood to the neighbouring villagers, and the said sum was accounted for."

Another witness of the Appellant, *Manockjee Rustomjee*, adds this: "There are jungle *Gharaks* at *Ghatkopur*, which are on the tops of the hills and on the banks of ravines. If the jungle were not cleared, rice would not grow, but other grains might grow there; but it is not the custom here to raise other grains; but grass would grow on the said land. When the Plaintiff got the village, in A. D. 1845, Government had no right to the jungles in the *Talooka Salsette*, nor did Government interfere. I have no knowledge whatever regarding the other villages of Government. The Plaintiff did not fell the trees on the jungle *Gharak* with the intention of bringing the land into cultivation."

The claim, therefore, is not to cut certain trees for the purpose of clearance or cultivation—not to cut certain trees for the purpose of repairs or consumption on the ground of which the Appellant is lessee—but to sell to a Timber Merchant the whole of the trees, large and small, upon the land, to be cut and carried away by him for his own purposes.

It will be convenient now to observe the position of the Appellant under the lease upon which he grounds his claim.

The petition for that lease is in these terms:—"That your Petitioner is desirous of farming the village of *Ghatkopur*, on the Island of *Salsette*, and prays that your Honourable Board will be pleased to lease it to him on the same terms as villages have been granted to different individuals in *Salsette*. In submitting this application to your Honourable Board's favourable consideration, your Petitioner begs to state that he is aware there is in the village in question little or no waste land, whereby he could at present much benefit himself, but he is desirous of obtaining it to give effect to a speculation which he has had for a long time under consideration, viz. the recovering a large tract of swamp land, for the purpose of converting it into salt batty fields and salt pans. Your Petitioner wishes to lay out capital on the work contemplated, which, when finished, he feels assured, while it will benefit himself, will much improve the village, benefit the *Ryots*, and increase the revenue which Government derives from it."

Founded on that application, the lease was made on the 31st of December, 1845. It begins by stating that the Lessee had "petitioned Government on the 23rd May, 1843, that if the village of *Ghatkopur Turf Trombay*, *Talooka Salsette*, be allowed to you in farm, in the same manner as villages have been granted to other Farmers in *Salsette*, that you would reclaim certain swampy land, and that you would form salt pans and salt batty fields, whereby the inhabitants on the one hand, and the Government on the other, will be much benefited. Your application having been duly reported upon by the Acting Collector, under date the 10th August, 1843, Government, in its Secretary's letter, dated 4th September following, No. 2903, intimated its sanction to the aforesaid village being granted to you in farm; accordingly it is hereby leased to you from the year 1844–45, for a period of ninety-

nine years, on the revenues of the year 1842-43 (exclusive of the *Abkary*,) on the following conditions." The objects, therefore, for which the lease was solicited, and the objects for which the lease was granted, were the reclaiming certain swampy land, and forming salt pans and salt batty fields, together with such incidental advantages as might be obtained from the use of the waste land as it then stood in the village.

It may be convenient to advert here to an argument which was much pressed upon their Lordships, namely, that inasmuch as the application had been for a lease to be made in the same manner as villages had been granted to different individuals in *Salsette*, therefore, as it was contended, this lease was upon whatever terms it might be found that leases had been made to other Farmers in that District.

Their Lordships are of opinion that, although the application was general, the response was specific and clear. The answer to the application was, that a lease would be granted on "the following conditions," which are described in the lease itself, and which, therefore, determine the contract, and the only contract, between the parties.

Proceeding with the lease. The first clause describes, as it states, the details of the boundaries, houses, inhabitants, lands, and the *Jummabundy* of the village.

It is important to observe that, among the details of lands under this head, it is admitted there are no lands upon which the trees in question are growing. The lands described under the first head are the arable or cultivated lands of the village, and certain limited waste land described by admeasurement. It is admitted that they had not growing upon them any of the trees which are now in question. The second section of the lease provides that "the waste land in the village, including *Junglegurk*, *Naligurk*, and *Nowsad*, &c., is hereby granted to you in *Mafee* (that is to say rent free) for four years from 1844-45. It then provides that this waste land was to be brought under tillage, "out of the sweet waste land, one-fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period," that is, so that at the expiration of forty years the whole might be under tillage and bring revenue to the Government accordingly.

It is to be observed here again, that it is admitted that the land upon which the timber now in question grows was not included under the second head. The contest, indeed, of the Appellant is, that for the land upon which that timber is growing he is under no circumstances to be called upon to pay rent.

The 32nd clause of the lease states,—"There are in the aforesaid village about 150 *Beegas* of swampy land, which might be made available for salt pans; you are, therefore, as proposed by you in your petition, to expend whatever sum of money may be considered necessary, and convert the said land into salt pans, within five years from 1844-45," under a certain penalty in the event of failure so to do.

It is admitted, again, that with regard to the lands specified under the 32nd head, none of the timber is growing upon that land. We have, then, under the 2nd and the 32nd heads of the lease an enumeration of the whole of the land upon which any operation of farming or reclaiming was to be performed by the lessee. It is for the land specified under those heads, and for that land alone, that any rent or any assessment is to be paid by the lessee; and for the land upon which the timber in question is now growing no rent had already been paid, or is in any event to be paid.

Then there are a series of provisions, especially contained in paragraphs 6, 7, 9, 10, 11, 12, 25, 26, 27, 28, and 29, which provide for the preservation and protection of the possessory and other rights of the *Ryots* and other persons having pre-existing claims upon land in the village. Among them is an important section, referred to in the argument, the 6th, that provides as follows, "It is clearly to be understood that this lease confers no right which Government does not now possess, and only such portion of the rights of Government as may be herein specifically granted, is hereby granted to you."

We are in a position, from this statement of the paragraphs of the lease, to understand distinctly the objects for which the lease was granted. The first object was to enable the Lessee to cultivate the arable land. The second object was to enable him, and to oblige him, to reclaim and bring under tillage certain specified waste lands—land other than that upon which this timber is growing. The third object was to convert into salt pans 150 *Beegas* of land, being, again, land other than that upon which the timber in question is growing.

Over and above these three objects, he was to be styled the "Farmer" of the village; not that he was to have possession of other parts of the village, or to dispossess those already in occupation—not that he was to be the cultivator or Farmer of other parts in the English sense of the term "Farmer"—but, as the 12th section expressly provides, "In respect to the above-named village, you are considered Farmer thereof; you are, therefore, to exercise the authority vested in Farmers by chap. 6 of Regulation XVII. of 1827, or such as may be hereafter vested in them by any new enactment."

Upon referring to this Regulation, it is apparent that the term "Farmer" is used, not as a cultivator of the ground, but as a Farmer of the public revenue,—a person, namely, who would stand between the Government and the *Ryots* as possessors of the ground in the village; he being, as it were, the custodian or Ranger, taking care that the revenue of the Government was collected, and the rights of the Government as against the possessors in the village maintained.

At the time, then, that this lease was made, the whole of the land, and all the rights connected with the land, subject to such claims as third parties might have upon it, belonged to the Government. The trees upon the land were part of the land, and the right to cut down and sell those trees was incident to the proprietorship of the land.

The Appellant, therefore, who complains of an interruption such as is described in his plaint, must ground his title to these trees, and the right to cut them down, either upon this, first, that it is a necessary incident of the lease by reason of the objects of the lease; or, secondly, under some positive law; or, thirdly, under some custom to be incorporated in the lease; or, fourthly, under the express terms of the lease.

Now, as regards the right to cut timber being necessarily incident to the lease, it plainly is not so. There was no work to be done, and apparently no right to execute any work, upon the land on which this timber grows. Clearance or cultivation of the other land might require the cutting of timber on that other land, but that right does not come into question in the present suit.

As to positive law, none has been cited to justify what has been done by the present Appellant. We were referred to *Bombay* Regulation I. of 1808 with regard to the Island of *Salsette;* but, so far as that Regulation is concerned, the whole drift and tenor of it, when it deals with timber at all, is in favour of the preservation of the right, and not of the surrender of the right, in the Government to the timber.

The Appellant, however, relies upon a custom which he says justified the cutting of timber; and evidence of that custom has been adduced.

Their Lordships would entertain very considerable doubt whether any evidence of custom could be allowed to control the express stipulations which they find in the lease of this village; but, turning to the evidence which has been given in support of the alleged custom, their Lordships find that several of the witnesses, speaking to that custom, admit that the villages upon which they say timber has been cut down by the Lessees, were villages leased under written contracts,—contracts which dealt, in some way or other, with the subject of the timber; contracts, therefore, which prevented any general custom flowing out of the rights exercised by those tenants. Their Lordships find that other of the witnesses, when speaking of the timber cut on other villages, expressly state that that timber has been cut, not as of right, but by permission of the Government. And their Lordships find generally

with respect to all the witnesses, or all but one, that they are silent as to any information leading them to judge whether the timber which they say was cut, was cut for the purpose of repairs or other consumption in the villages, or was cut for the purpose of clearance or cultivation, or cut (as the right to cut is here alleged) for the purpose of sale or other disposition as property of the tenant.

Their Lordships, therefore, are of opinion that the allegation of custom entirely fails to be supported by evidence.

With regard, lastly, to any express right given by the lease itself, their Lordships can find none; on the contrary, the 6th clause, which has been already referred to, expressly declares that only such portion of the rights of the Government as may be therein specifically granted is thereby granted to the Lessee.

The 4th clause, however, was said by implication to confer the right to cut that timber. The words of that clause are these:—"You are prohibited from cutting down or destroying any *brab*, date, or other trees liable to taxation, without the permission of the Collector."

Their Lordships, however, do not consider that this clause is susceptible of the implication which is derived from it by the Appellant.

In the course of clearing and cultivating the waste land which the Appellant was obliged to clear and to cultivate, it naturally would be requisite to cut down and remove the timber growing upon that waste land, and their Lordships read that permission as simply declaring that if, with reference to that timber which it would thus be necessary to cut down and remove, any of it was "*brab*, date, or other trees liable to taxation"—even as to such timber, none should be removed without the express permission of the Collector.

Their Lordships, therefore, are of opinion that the case of the Appellant entirely fails; they concur with the judgments pronounced by the Judge of the District Court, and by the appellate Court at *Bombay;* and they will humbly advise Her Majesty that the appeal should be dismissed with costs.

10th July, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of the Punjab.

LALLA NARAIN DOSS,* ... *Appellant,*

versus

The estate of the Ex-King of *Delhi* (in possession of the Government of *India*), ... *Respondent.*

Ex-King of Delhi—Sovereign rights—Limitation.

The Order of the Governor General of India in Council dated the 21st February 1860, does not prevent the Government from setting up a plea of limitation, like any other suitor.

Held however that the suit was not barred by limitation under the Punjab Code, and that even if it were barred, there was "sufficient reason" for not suing earlier.

The technical difficulties which might have attended legal proceedings against the Ex-King of *Delhi*, during his Sovereignty, could not be pleaded by Government in a suit brought under their own orders above-mentioned.

10th July, 1867.

JUDGMENT was pronounced by

THE RIGHT HON. LORD CAIRNS:

In the peculiar circumstances of a case of this description, in which the Government of *India* takes upon itself to pay out of the assets of the Ex-King of *Delhi* such claims as can be established against the Ex-King, their Lordships are of opinion, that the Government does no more than what is incumbent upon it, when it narrowly and jealously scrutinizes claims which are made; it being within the experience of all that where the claim is against, not the person who originally contracted the debt, but those who have taken upon themselves the duty of satisfying it, exaggerated and sometimes un-

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11, Moore's I. A., p. 277.

founded demands are made. Their Lordships also think that if in those circumstances a claim were made which was found to be barred by the letter of any Regulation or Act of limitations, the Government of *India* might well say, that they had not taken upon themselves to provide for the payment of State demands, and that they were entitled to the benefit of any rule of limitation of that kind. Subject, however, to these observations, their Lordships think that any claim which justly and fairly, in equity and conscience, could be made and substantiated against the Ex-King, is a claim to be allowed in the investigation which the Government has instituted before its judicial Officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his Sovereignty, leaving, of course, the question of the payment of that claim, when established, to be dealt with in reference to the assets out of which the payment is to be made.

Now, as to the Bond upon which the claim is made in this case, their Lordships think that the evidence establishes to their perfect satisfaction, as it appears to have established to the satisfaction of the Judges below, the *factum* and the existence of that Bond; and they conceive that no imputation can successfully be made against the Bond as an instrument in the first instance executed by the Ex-King. Their Lordships think that, with regard to the *Punjab* Code as to limitation of actions, it does not apply to the present case, because the claim is made, in their opinion, within the period actually allowed by that Code; and even if there were any doubt as to that, there is amply sufficient reason, from the position of the Ex-King, to account for an action not having been maintained against him within the period prescribed by the rule.

Then arises the question whether the whole amount of principal originally due upon the Bond remains due? No evidence appears to have been adduced tending to show any payment on account of principal. The Officer of the Ex-King, who was examined, by his evidence confirms that which is alleged by the Appellant, viz., that the whole sum remains due, and that nothing has been paid on account of principal. The witness who was last examined, and who produced the documents which passed between the King and Colonel *Skinner*, also by his evidence tends to show that the only payments which were made were the payments through Colonel *Skinner*—payments which, by the very calculation and addition of them, would show that nothing could have been paid on account of principal.

It is said, however, that in the year 1852, when an action was attempted to be maintained against the Ex-King in the Civil Court of *Delhi*, an action which was defeated by the plea of want of jurisdiction, the claim made was a claim for Rs. 36,000 alone. We have not got the proceedings or documents in that action. We have the evidence of the Appellant, who states that what was claimed in that action was the sum of Rs. 36,000. But their Lordships see no reason to doubt that if the claim in that action was upon the face of it described as a claim for Rs. 36,000, that Rs. 36,000 was nothing more than a short and compendious mode of stating the principal sum due upon the Bond. Their Lordships, however, finding that the claim in the action of 1852 was for this sum of Rs. 36,000, and finding also that in the detail of the claim in the present case the principal is taken at that amount, as on the 1st of January, 1852, and interest claimed from the 1st of January, 1852, only, are of opinion, that while the Appellant is entitled in the present proceedings to recover the amount of the principal of his Bond, he must be content to take his interest as from the 1st of January, 1852, until the present time.

Their Lordships, therefore, will humbly recommend to Her Majesty that the decree appealed from should be reversed, and that the Appellant should be declared to have established his claim for the principal sum appearing on the face of the Bond, with interest from the date that has been mentioned, together with the costs of his litigation in the Courts below, and that he is also entitled to the costs of this appeal.

11th and 12th July, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

TAREENY CHURN BONNERJEE,* ... } *Appellant*,

versus

WILLIAM MAITLAND and FREDERICK ADDINGTON GOODENOUGH, ... } *Respondents*.

Inoperative Deed—Fraud against Creditors—Concurrent Judgments on facts.

Held on a review of the circumstances that the Deed of assignment and trust executed in favor of his Grandfather's estate by O, an involved trader shortly before Insolvency was fraudulent and wholly void as against creditors.

The Privy Council will not disturb the unanimous judgment of the Indian Courts on a question of fact unless the very clearest proof is shewn that the decision is erroneous.

JUDGMENT was delivered by

THE RIGHT HON. LORD CAIRNS:

Their Lordships are of opinion, that the only question in this case is the validity of the Deed which the Bill was filed to set aside.

It has been contended for the Appellant that, even supposing the Deed were out of the way, the Appellant, as against *Obhoychurn Bonnerjee* and those who claim under him, would be entitled to have a lien or security upon the share of *Obhoychurn* in the estate of the Testator for any money which might be coming from *Obhoychurn* to that estate; and that the Appellant would be entitled to that security or lien, not by virtue of the contract, but upon a well-known principle of equity independent of contract.

Their Lordships have very considerable doubt whether, having regard to the Will in this case, and the nature of the property, viz., immovable or real estate, any such lien could be maintained; and further, the right to maintain a lien would depend on the proof of the two debts due from *Obhoychurn* to the estate, which, if not proved for the purpose of maintaining the Deed in this case, would of course not be proved for the purpose of maintaining an equity independent of the Deed. But, putting aside those difficulties, their Lordships think that if any such lien could be introduced, or be attempted to be enforced, the attempt to enforce it could only have been made by other proceedings, viz., by a Bill in the nature of a cross-bill filed by the Plaintiff, insisting upon that equity, and undertaking to prove the facts which it would be necessary to prove in order to give effect to the equity, if the equity did exist.

Their Lordships, therefore, address themselves to consider the question of the validity of the Deed.

Now, in the first place, an objection has been made to the title of those who were the Plaintiffs in the suit below to impugn that Deed. It is said that the Plaintiffs in the revived suit represent, as they do, *Palmer*, the sole Plaintiff in the original suit; that *Palmer* was merely purchaser at the Sheriff's sale, who took a conveyance from the Sheriff of all the interest of *Obhoychurn* in the property in question; and it is contended that he and the Plaintiffs must take that interest as *Obhoychurn* held it, and that, because *Obhoychurn* could not set aside the Deed which he had executed, therefore, no more can those who claim by sale from the Sheriff.

There might be considerable foundation for that argument, if the execution had gone against *Obhoychurn*, and the sale had been made by the Sheriff of his property, and then, without anything more, a conveyance to the purchaser under that sale had been executed by the Sheriff. But that was by no means the case with regard to the execution we have now to deal with, because, after execution levied and before sale, the first suit was instituted which is referred to in the Bill in the present suit. That first suit was instituted

* 11, Moore's I. A., p. 317.

by the firm of *Mackillop, Stewart* & Co., against *Obhoychurn* and against his Mother; and the result of that was that, before any sale took place, a decree of the Court was made, by which the Court declared that the Deed in question, so far as related to the Defendants in the suit, and their respective interests and claims thereunder, was fraudulent and void as against the Plaintiffs in the suit,—reserving, nevertheless, to *Nanychurn Bonnerjee* and *Ramessur Chowdry*, the Trustees under the Deed, and to all persons other than the Defendants in the suit, all their rights and interests under or by virtue of the Deed.

Therefore, before any sale took place, there was a determination of the Court in a suit to which the Creditors were parties, to which *Obhoychurn* and his Assignee were parties,—to which *Hurrosoondery*, the Mother of one of the parties to the Deed, was a party,—a determination that the Deed was fraudulent and void as against Creditors; and after that determination it was that the property was sold.

Now, it is perfectly clear that the object of obtaining that decision was that the property on the sale might fetch the higher price that would result from the decision, the Court having declared that the Deed in question was no impediment to a purchaser obtaining possession of the property which had belonged to *Obhoychurn*.

Their Lordships think, therefore, that the title of the purchaser under the sale is a title which, in consequence of that decree, is in no way affected by any right of *Obhoychurn* or of *Hurrosoondery*. It is true, the decree reserves the right, if there be any right, in third parties; notwithstanding the decree, therefore, the conveyance by the purchaser would be no impediment to third parties asserting a right, if they had a right, under the Deed. But that leaves open this question, and this only, whether any third party—the Appellant, for instance—had such a right? And upon that point their Lordships will express their opinion in their observations on the next part of the case.

Passing, therefore, from this subject of the title of the Plaintiff in the original suit to sue, their Lordships proceed next to consider the main question of fact which has been raised, and which has occasioned so much argument in the case. That is the question of fact with regard to the large debt of Rs. 43,674, professed to be secured with interest by the Deed.

Now, the learned Judges in the Courts below,—the two Judges in the primary Court and the three Judges in the Court of appeal,—have all arrived, without hesitation, at the conclusion that that debt of Rs. 43,674 was not a *bonâ fide* debt due from *Obhoychurn*; and it would be far from consistent with the rules which their Lordships have always laid down in dealing with cases of this kind for them to reverse a decision upon a question of fact thus unanimously arrived at by five Judges, unless the very clearest proof were adduced to their Lordships that that decision was erroneous.

It is true that only the two primary Judges had before them the witnesses, or the witness, who were or was examined; but the three Judges of the Court of appeal, conversant with testimony of the kind which has to be dealt with in this case, were of opinion that the two Judges of the Court below had arrived at a just conclusion upon the evidence that was ever adduced.

But passing from the great respect which, upon a question of this kind, would be shown to the determination of the Judges below upon a question of fact, their Lordships have examined with care the whole of the evidence which was before those learned Judges, and they are of opinion, that there is no ground whatever to be dissatisfied with the conclusion at which the learned Judges arrived.

It appears that *Obhoychurn*, at an early age, had been sent by his family into the employment of Mr. *Marjoribanks*. It is clear from the evidence that Mr. *Marjoribanks* was largely indebted to the estate of the Grandfather of *Obhoychurn*, and there is abundant ground to conclude that the reason for which *Obhoychurn* was placed in the service of Mr. *Marjoribanks* was that he might, as far as possible, recover and realize for the estate of his Grandfather the debt which was due to that estate from Mr. *Marjoribanks*.

Large sums, beyond all doubt, were received by *Obhoychurn* in the course of that employment under Mr. *Marjoribanks;* nor do their Lordships intimate any doubt but that these sums, in the year 1830, had amounted to the sum of Rs. 43,674; but the question is, what did *Obhoychurn* do with that money? Did he appropriate it to his own purposes, leaving himself the debtor to his Grandfather's estate; or did he pay it over, from time to time, to those who represented his Grandfather's estate?

Now, the story which is told upon that subject by *Obhoychurn* appears to their Lordships to be utterly incredible. He says he received the money. He admits that he did not pay it over, but he is unable to account in any satisfactory way for his application of the money,—as to how he employed or spent it, or as to where he invested it; and it is extremely difficult to believe that those who sent this young man into the employment of Mr. *Marjoribanks* for the purpose of obtaining payment for his Grandfather's estate of the money in question, should have taken no care to secure that money as it was received by *Obhoychurn* from time to time.

There are certain Exhibits, the genuineness of which is not challenged, and which are appealed to by the Appellant in corroboration of the statement which he has made. But assuming that *Obhoychurn*, from time to time, received from Mr. *Marjoribanks* the amount of Rs. 43,674 for the purpose of satisfying the debt due by Mr. *Marjoribanks* to his Grandfather's estate, and assuming that Mr. *Marjoribanks* owed that amount at one time to the Grandfather's estate, these Exhibits are really nothing more than the formal record or evidence which might be made, or might be preserved, as between Mr. *Marjoribanks* and the Grandfather's estate, at the close of their dealings in 1830.

Mr. *Marjoribanks* commences by writing a letter on the 25th of March, 1830, to *Obhoychurn*, in which he desires him to bring up his private account with him, Mr. *Marjoribanks*, and compare it with his Books; he says it must be rather large against *Obhoychurn;* however, he adds: "We shall have no difficulty in coming to a settlement."

These are expressions by no means inconsistent with *Obhoychurn* having been, from time to time, receiving moneys which otherwise would have belonged to Mr. *Marjoribanks* for the purpose which has been referred to.

It appears that a few months afterwards, on the 21st of August, 1830, Mr. *Marjoribanks* wrote a letter addressed to *Obhoychurn*, desiring him to pay to the two acting Executors of his Grandfather's estate, Rs. 43,674—to pay that sum to the Executors—not to pay it to their order, and not, in point of fact, making any negotiable instrument for the payment of the amount. Mr. *Marjoribanks*, it appears, sent that order to the two acting Executors, and it reached their possession. At the same time, Mr. *Marjoribanks* wrote a note to *Obhoychurn* in these terms:—"On paying *Goureechurn Bonnerjee* and *Bissonath Muttyloll*, Executors to the estate of your Grandfather, the draft I have given them for S. Rs. 43,674, all accounts between us are settled."

The acting Executors, in whose favour the draft was made, appear to have signed their names on the back of it, and to have handed it over to *Obhoychurn*, and at the same time to have given to *Obhoychurn* two Bonds from Mr. *Marjoribanks*, by which Mr. *Marjoribanks* had become bound to the estate of the Grandfather for a sum almost the same in amount as that for which the draft was made.

Now, it appears to their Lordships entirely contrary to what would be, and what must be presumed to be, the natural course of business on such an occasion, to suppose that these Executors would have handed back this draft endorsed by themselves to *Obhoychurn*, and to have handed over to *Obhoychurn* the evidence which they had against Mr. *Marjoribanks* of the debt due from Mr. *Marjoribanks* to the estate, thereby releasing Mr. *Marjoribanks*, and thereby putting in the hands of *Obhoychurn* the evidence of any sum due from Mr. *Marjoribanks*, unless, in point of fact, the estate had at that time received payment in some shape or other of the whole of the sum of Rs. 43,674.

Again, passing from the year 1830, and going down to the year 1843, when the

Deed was executed, it appears to their Lordships incredible that those who were interested in protecting the estate of the Grandfather, would during that period have remained perfectly quiescent, taking no security and exacting no payment from *Obhoychurn* in respect of that amount, if the amount really were due from *Obhoychurn*.

The Books of *Obhoychurn* have been produced. They appear to have been appealed to on behalf of *Tareeny Churn Bonnerjee*, and it is possible that under an Act of the Legislature on the subject, they might have been admissible, but, if so, only as corroborative evidence of the testimony of *Obhoychurn*; and their Lordships do not dissent from the view of the learned Judges below, that if they are right in concluding that the evidence of *Obhoychurn* is not to be received as truthful, neither can these Books kept by *Obhoychurn* be considered as satisfactory evidence of that which when taken by itself is not more credible.

Their Lordships, therefore, agree with the learned Judges that there is no evidence whatever which can be relied upon that this sum of Rs. 43,674, which, with the interest thereon, is part, and a very large part, of the amount secured by the Deed, was a *bonâ fide* debt due from *Obhoychurn*.

Now, this question of fact being once determined, the consequence appears to their Lordships to be inevitable. They are compelled, arriving at this conclusion of fact, to hold that the Deed professing to secure that amount on the estate of *Obhoychurn* was a Deed executed with intent to defraud and delay the Creditors of *Obhoychurn*. He was much pressed by his Creditors at the time the Deed was executed, and insolvency supervened very shortly afterwards.

But then it is said that the Deed secured the further sum of Rs. 13,873, and that there is nothing to impeach the statement that this was a debt due from *Obhoychurn* to the estate of his Grandfather, and that the Deed, therefore, at all events, should stand as a security for that amount.

It appears to have been considered by the Court below that on the principle of the appropriation of payments, it might be taken that there were payments on the opposite side of the account which would wipe out this lesser sum. But their Lordships do not rest their decision upon that ground. If the Deed was executed with a view to defraud and delay Creditors, and if the facts which have been referred to with regard to the sum of Rs. 43,674 are sufficient to show the Deed was executed with that intent, it appears to their Lordships to be utterly impossible for any party to that Deed, or any person claiming under those who were parties to that Deed, to maintain the Deed for any purpose whatever.

The Deed is one which, in that view of the case, is not executed to secure the Rs. 13,873, but it is a Deed executed to defeat and to delay Creditors; the Deed, therefore, utterly falls to the ground, and cannot be maintained, as their Lordships think, as a security for any sum whatever.

Upon the question of the form of the decree, their Lordships, agreeing entirely with what has been done by the Court below in point of substance, consider that the decree has, in point of form, gone too far in providing for the cancellation of the Deed, the Plaintiff in this suit not being interested to cancel the Deed as a whole, but being interested only to remove the Deed out of the way of the assertion of his own rights in regard to the property which he has purchased; and their Lordships think that portion of the decree which retains the Deed for cancellation should be omitted.

Their Lordships, therefore, with that alteration, will humbly recommend to Her Majesty to affirm the decree in other respects, and to dismiss the appeal; and the alteration their Lordships have made is not of that kind which, according to their general rule, would induce them to vary their view with regard to the general costs, therefore, they will humbly recommend that the appeal be dismissed with costs.

By an Order in Council, it was ordered, that the decree of the High Court in its appellate jurisdiction be varied by striking out the words "and it is ordered that the said Indenture be retained by the Registrar for the purpose of being cancelled,"

and that in all other respects the decree be affirmed, with costs.

16th and 17th July, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

MUSSUMAT CHEETHA, & after her death, her daughter, MUSSUMAT JUSSOONDAH,* ... } *Appellant*,

versus

BABOO MIHEEN LALL, & after his death, his son, AJODHIA PERSHAD, ... } *Respondent*.

Joint Hindu Family—Ancestral Estate—Separation—Onus probandi—Registration as Zemindar—Exclusive right.

It is a well-established presumption of Hindu Law that a family once joint retains that *status*, unless it is shewn to have become divided; and that the ancestral family property remains joint, unless it is shewn, by partition or otherwise to have become separate, and the *onus* lies on the party alleging separation.

Held that the Plaintiff had failed to discharge such *onus*.

The mere registration of the name of one member of a joint family as *Lumberdar* or *Zemindar* for fiscal purposes does not establish his exclusive proprietary right to that property as against other members of the joint family.

JUDGMENT was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Plaintiff, whom the present Appellant represents, commenced her suit in December, 1852, to recover possession of certain villages, to which she claimed title as Widow and heiress of one *Damodur Doss*, who died in 1841. The original Respondent, the nephew of *Damodur Doss*, had been in possession of the property for upwards of eleven years before the institution of the suit. These villages being situated in a Province governed by the law of the *Benares* school, it was necessary for the Plaintiff, in order to make out her title to eject the Respondent, to establish that the property claimed was the separate estate of *Damodur Doss*. And it being admitted that this property was originally the ancestral estate, or part of the ancestral estate, of a joint and undivided Hindoo family, she had to make a case sufficient to rebut the well-established presumption of the Hindoo law, that a family once joint retains that *status*, unless it is shown to have become divided; and that the ancestral property of such a family remains joint, unless it is shown, by partition or otherwise, to have become separate.

The family originally consisted of three brothers, *Shama Doss*, *Damodur Doss*, and *Koonj Kishore Doss*. It is admitted on all hands that *Shama Doss* separated himself from his brothers, and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the Appellant) that the two other brothers continued joint after the separation of *Shama Doss*; and further, that for many purposes *Damodur Doss* and the Respondent (being his nephew, the son of *Koonj Kishore Doss*) were members of a joint family at the time of *Damodur Doss's* death.

In what way, then, did the Plaintiff in the suit seek to relieve herself of the heavy burden of proof which the law in these circumstances casts upon her? She has neither alleged nor proved that a formal partition ever took place between *Damodur Doss* and his brother. Nor has she alleged or proved that any conveyance of his proprietary right was ever executed by the latter to the former. But she relies on certain settlements of the revenue and other proceedings before the Collectors, the effect of which was, that these villages, which at one time were all recorded in the name of *Koonj Kishore Doss*, at another were recorded partly in his name and partly

* 11, Moore's I. A., p. 369.

in that of *Damodur Doss*, came ultimately to be all recorded in the name of *Damodur Doss*, as if he were the sole *Zemindar* thereof, or, at least, the sole *Lumberdar*, or person liable for the due payment of the revenue assessed thereon. And from these proceedings she would have it inferred that *Koonj Kishore Doss* had duly parted with or relinquished his proprietary interest in the villages, and allowed them to become the separate estate of his brother. Mr. *Leith* has candidly admitted that this inference cannot legitimately be drawn from the mere fact that the villages were recorded in the sole name of *Damodur Doss*. He does not dispute the correctness of the proposition laid down by the *Sudder* Court, that, "as the law stands, the mere record of one name does not establish the exclusive proprietary right of the individual so recorded." But he contends, that particular statements and expressions to be found in their proceedings, which he says must be taken to have been made and used with the knowledge and assent of *Koonj Kishore Doss*, or of his son, the Respondent, are sufficient to raise the inference in question, and to make out the title of the Plaintiff.

To this argument their Lordships cannot assent. Both the plaint and the decree of the Principal *Sudder Ameen* refer the alleged relinquishment of proprietary right to the date of the fifth settlement, which took place in 1818, and in the lifetime of *Koonj Kishore Doss*. But it is obvious on the face of the proceedings, that on that occasion the villages were treated as the joint property of the two Brothers, though the settlement was, with the consent and at the request of *Koonj Kishore Doss*, made with *Damodur Doss* alone; whilst, on the other hand, a claim put forward by *Shama Doss* was treated as an adverse claim of proprietorship; for the enforcement of which he was referred to a civil suit. *Koonj Kishore Doss's* petition, which signified his consent, neither relinquished nor disclaimed his interest in the villages; it prayed only that *Damodur Doss's* application to be regarded as Proprietor be granted, the Petitioner being perfectly satisfied with the arrangement. No other or subsequent act imputing a transfer of proprietary right by *Koonj Kishore Doss* is either suggested or proved; and he died before the sixth settlement, which took place in 1840.

If, then, the Appellant's title rests, as it seems to do, upon the alleged transfer or relinquishment of right by *Koonj Kishore Doss* in 1818, statements made and expressions used in the course of the settlement of 1840 are material only in so far as they reflect light upon the true nature of the transaction of 1818.

Nothing can really turn upon expressions in those public documents, to the effect that *Damodur Doss* was sole *Zemindar* and without partners, because whenever property is, for whatever reasons, recorded in the sole name of one of several co-proprietors for fiscal purposes, it must obviously be part of the arrangement to make him who is to pay the Government revenue, and through whose hands the collections from the *Ryots* must, for that purpose, pass, appear to be the sole owner. Yet it is admitted, that one so recorded may be really what we should term a Trustee for the other members of a joint family, and that the rights of the co-parceners *inter se* may not be affected by the arrangement. The expressions, therefore, in the *Ikrarnamah* importing that on the death of the *Lumberdar*, or person settling for the revenue, his son or next heir, or even an appointee, shall be substituted for him, are all consistent with such an arrangement, the essence of which is that the person in question shall be made ostensibly and on the face of the Revenue records the sole owner of the *Zemindary* rights. Any argument drawn from such expressions seems to their Lordships to be too weak to supply the failure of positive proof of the title set up by the Appellant.

The same answer may be made to the argument which Mr. *Leith* founded on the nature of the Respondent, *Baboo Miheen Lall's* application to the Revenue authorities to be admitted as heir to his Uncle on the death of the latter. On the face of the Revenue records *Damodur Doss* was the sole registered proprietor. It was, therefore, only as his heir that the Applicant could claim to be substituted as sole *Zemindar* and ostensible owner in his

place. A suggestion of joint interest was unnecessary, if, indeed, it would not have been improper, on that occasion. And it is to be observed that, inasmuch as it appeared before the Collector by the *Kanoongoe's* reports that *Damodur Doss* had left a Widow, the claim of his Nephew as heir implied that the property was not the separate estate of the deceased, and that the succession to it was to be governed by the law which regulates the descent of the property of a joint and undivided Hindoo family.

Their Lordships have hitherto dealt, as the argument before them dealt, exclusively with the documentary evidence. Of the parol evidence it is sufficient to say that each party has produced that which, if believed, would go far to prove his or her case; that the statements of the witnesses for the Plaintiff are, in most respects, in direct conflict with those of the Defendant; and that it is only by its consistency with the documents and the admitted facts of the case that the truth of the testimony on either side can be tested.

One serious difficulty of the Plaintiff was to explain the long possession of the Respondent, *Baboo Miheen Lall*, and her failure to take proceedings for nearly two years after the alleged quarrel between them. The case made on her pleadings, and sworn to by her witnesses, is that he held possession as her Agent, rendering, for a considerable period, accounts to her. But this story is unsupported by the production of any documents or other corroborative proof, and is, in their Lordships' opinion, a most unsatisfactory explanation of the Respondent's possession.

The proofs, therefore, adduced by the Plaintiff below seem to their Lordships insufficient to support the case made by her, and to rebut the strong presumptions of the Hindoo law which she had to meet. But against these proofs their Lordships have to set not only the inferences arising from *Damodur Doss's* petition when about to proceed on a pilgrimage to *Gyah*, the deposition of his *Mookter*, *Sookhe Lall*, in October, 1839, and the petitions presented on behalf of the Plaintiff, which are referred to in the judgments, but the almost conclusive evidence contained in the account Books.

That these Books were proved with the strictness which would be required in our Courts cannot be said; but they seem to have been received according to the course of the Indian Courts. No objection to their reception was made in the first instance; they were submitted by the Judge to the examination of *Mahajuns* appointed for the purpose, who were questioned by him upon them. Nor does it appear that their genuineness or correctness was ever very formally or directly impugned, though some objection may have been taken to the proof of them.

The course of the argument here induces their Lordships to regret that these material documents were not strictly proved, but they were sent up to the appellate Court as part of the record; and in these circumstances their Lordships think that, according to the course of these events, the appellate Court was justified in considering them as part of the evidence in the cause; and that the conclusions which they drew from them were correct. But even if this part of the evidence were withdrawn, their Lordships would be of opinion, that no sufficient ground has been shown for disturbing the judgment of the *Sudder* Court; and they will humbly recommend to Her Majesty that this appeal be dismissed with costs.

17th and 19th July, 1867.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GREEDHAREE DOSS,* ... *Appellant,*

versus

NUNDOKISSORE DOSS, MOHUNT, ... } *Respondent.*

Mohunt—Usage—Reversion—Will—Precatory Trust—Plaintiff—Weakness of Defendant's title.

The only law as to the office functions and duties of *Mohunts* is to be found in custom and practice.

Held upon a construction of the Will of *Gopaul Doss* that the direction therein conveyed to *N.*, to appoint *L.* as *N.'s* successor was only a gift in the nature of a precatory trust and not a grant to *N.* for life with reversion to *L.*

It was unnecessary therefore to decide whether the *Mohunt* had power to make such successive appointments.

A Plaintiff must succeed on the strength of his own and not on the weakness of the Defendant's title.

JUDGMENT was delivered, as follows, by

THE RIGHT HON. LORD ROMILLY:

Their Lordships do not think it necessary to hear Counsel on behalf of the Respondent in this case.

They have come to the conclusion that the decision of the High Court of Judicature is proper to be affirmed by Her Majesty. It is an appeal from the High Court, which reversed a decree of the Principal *Sudder Ameen* of *Zillah East Burdwan*, which was in favour of the Appellant; and the only facts in the case to which their Lordships think it necessary to refer are those which I am about very shortly to state.

It appears that *Gopaul Doss* was the *Mohunt* of the *Akra*, a religious institution wealthily endowed, at *Rajgunge*, in the *Zillah of Burdwan*. In the year 1857, being afflicted with illness, and expecting shortly his dissolution, he made his Will. It is addressed to *Ladlee Doss*. In it he refers to the illness he was labouring under, and, after referring to the *Akra* of *Rajgunge* and the subordinate *Akras*, he says:—[His Lordship read the extract from the Will.*]

* 11, Moore's I. A., p. 405.

* In the month of May, 1857, *Gopaul Doss*, the then *Mohunt*, being in ill-health, and shortly before his death, made his Will, which was addressed:—"To the most blessed *Ladlee Doss*." After referring to his state of health and the nature of his office, the Will contained the following passage:—"There is no one among my *Chellas* (Disciples) so fit, wise, virtuous, and loving towards religious men, that I can entrust him with the performance of these duties so as to protect the immoveable and moveable properties and perform the religious ceremonies after my death, consequently, I think it expedient and necessary to make arrangement during my own life, whereby the said worship and the entertainments of the guests, &c., will continue as they now do, and whereby the properties annexed thereto may be properly managed. As you are my *Gooroo* brother, and specially since the time of my late *Gooroomohasoy* and my election to the *Guddee*, you, by your ability, wisdom, and virtue, and good conduct, have satisfactorily fulfilled the several duties relating to the *Akras* in your capacity as *Adhicarry* (head) of the *Akras*, and you have authority over everything. I have, therefore, a firm conviction that if you are appointed *Mohunt* in my place, the properties belonging to these several *Akras* will be properly managed, and the religious rites which are performed there will have perfect justice in your hand. Therefore, of my own free will, and in a sound state of mind, without any compulsion and coercion, I execute this my last Will, whereby I make the following promise and arrangement:—If the present sickness prove, which God forbid, fatal to me, you will succeed me in my absence in the *Guddee* as the next *Mohunt*, and have your own name entered as proprietor in the records of all those properties in substitution of mine, and take charge of all the properties both real and personal belonging to the said *Akras*, and keep in safe custody the gold and silver ornaments, and plates, and brass utensils belonging to the idols at those *Akras*, and receive the outstandings due to the *Akras*, and pay the debts due by them, and thus representing me every way, you will

In this case two questions arise, one on the construction of this Will, and another independently of the Will itself. The question on the construction of the Will is, whether there is an absolute gift of the *Mohuntship* to the Appellant, *Greedharee Doss*, as soon as he becomes competent to perform the duties, or whether the gift of the *Mohuntship* is in reversion after the incapacity of *Ladlee Doss*. The question, independent of the Will, is whether, if there be such a gift contained in the Will, there exists such an authority within the power of a *Mohunt* as to enable him to make such a gift.

Their Lordships are of opinion, that the points which depend on the contents of the Will itself must be decided against the Appellant in the present suit. They think, in the true construction of the Will, that it does not give the Appellant an absolute, positive, unqualified right at any time to the *Mohuntship*, even on the incapacity of *Ladlee Doss* to perform the duties of *Mohunt*. They think, until *Ladlee Doss* becomes incapable, no trust or duty is suggested, and that even when *Ladlee Doss* becomes incapable, it cannot be put higher than Sir *Roundell Palmer* himself put it, viz. as a gift in the nature of a precatory trust—that is, one requesting *Ladlee Doss* to perform the wishes of the Testator, and to appoint the Appellant his successor, provided he found that the incapacity which then existed in the Appellant (who was not then of sufficient age to be appointed *Mohunt*) should cease to exist at the time when *Ladlee Doss* was unable to perform those duties.

It is, therefore, clearly unnecessary for their Lordships to consider the second question, whether, in point of law, a grant of *Mohuntship* can be made by any holder of the Office with the superadded obligation imposing on the Grantee the necessity of following the wishes of the Grantor as to the person whom he is to appoint to be his successor in that Office.

It is to be observed that the only law as to these *Mohunts* and their offices, functions, and duties, is to be found in custom and practice, which is to be proved by testimony; and no evidence has been adduced before their Lordships to show that any appointment has ever been made in reversion on any former occasion.

The only question, therefore, which their Lordships have to consider on the present occasion is, whether in this state of circumstances, in the events which have subsequently occurred, the Appellant has obtained any right which can entitle him to be placed in that particular situation on the decease of *Ladlee Doss*, in the absence of any compliance by him with the wishes of his Testator or Grantor.

The facts are these: *Gopaul Doss*, after executing his Will, died in June, 1857, and thereupon *Ladlee Doss* was installed or invested as *Mohunt;* and it is to be observed that the other *Mohunts* placed the same construction upon the Will that their Lordships have placed by electing him. Accordingly, as the *Maharajah* (who, as chief Benefactor and Patron,) had invested him with the full *Mohuntship*, they gave him the *Ticca*, or mark of investiture. They did not merely appoint *Ladlee Doss*, *Adhicarry*, or Agent, which, according to the contention of Sir *Roundell Palmer* and Mr. *Leith*, was the extent of the *Maharajah's* authority. It is plain that the other *Mohunts* considered him to be entitled to have the full *Mohuntship*, and he was fully invested with the *Ticca* accordingly.

Mr. *Leith* has called their Lordships' attention to some evidence which was in-

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perform the religious duties in the usual way. Of my *Chelas Sreejoot Greedharee Doss* is a little intelligent, but he is of immature age. If he studies the *Dharma Shastra*, religious Books, for a short time he may become a fit person, therefore you shall keep him under you, and instruct him in the *Dharma Shastra*, and other Books studied by *Mohunts*. When you will find yourself incapable of fulfilling the duties aforesaid, you will appoint the said *Greedharee* in your place as *Mohunt*. You shall not be able to act otherwise. To this purport I make my Will, and after my death any demand or objection by any person against it will not be admissible; but if by the grace of God I recover from illness, then this Will shall cease to take effect, and I shall continue *Mohunt* as I used to do. To this effect I execute my last Will, dated 6th Joistee, 1264."—*Moore's I. A., p.* 406—8.

tended to show that there was a double *Ticca*. What the nature of that double *Ticca* was does not very clearly appear. This seems to be clear, from all the evidence in this case, as far as it has been brought under their Lordships' attention, —that there cannot be two existing *Mohunts;* that the office cannot be held jointly; and that, therefore, if there was a double *Ticca* at all, it must have been a *Ticca* of the office in reversion after the existence of the incapacity of *Ladlee Doss* to perform the duties. But the evidence upon that point, and the law adduced upon the subject before their Lordships, fail entirely to satisfy their minds that any such species of investiture was according to the rules and customs of these *Mohunts*, or that any such *Mohuntship* can be given in reversion.

They therefore consider that *Ladlee Doss* was invested as the *Mohunt* of the *Akra*.

This was the view also taken in the Court in *India* when the suit was instituted in September, 1859, by the Appellant against *Ladlee Doss*, insisting that he was entitled to be appointed on the ground that he was then capable, and that his right arose as soon as he was so. He appealed from that decision, and the decision was affirmed.

Mr. *Leith*.—He withdrew his appeal.

THE MASTER OF THE ROLLS.—Yes, he withdrew the appeal, but not till after the death of *Ladlee Doss*.

Ladlee Doss died on the 5th of November, 1860, and upon his death *Nundokissore Doss* received the *Ticca*.

Their Lordships are of opinion, that it is not necessary for them—nay, more, that it is very undesirable for them—to go into the question of whether the Respondent was duly appointed *Mohunt* or not. They are of opinion, that that is not the question which they have to determine; because, for the present Appellant to succeed in this case, he must succeed by force of his own title, and not by the infirmity of the Respondent's title.

Mr. *Leith* suggested that the *Mohunt*, or any person connected with the establishment of the *Akra*, would have a right to contest the appointment of the Respondent as *Mohunt*, and he insists that it has become necessary that that question should be determined. If that be so, their Lordships are of opinion, that it must be raised in a suit properly framed for that purpose. Without expressing any opinion upon the point itself, they are of opinion, that this is not a suit properly framed for that purpose.

Their Lordships observe also that the Judges of the Court of appeal, the High Court of Judicature, make use of these expressions, which are strongly confirmatory of this view of the case: "We can understand," they say, "a suit being brought to set aside the election of the Defendant, and to order the *Mohunts* to make a new election; but this was not a suit to set aside the election, but to put the Plaintiff in possession of the whole estate. So it was in the case cited, *Gunga Doss* v. *Tiluk Doss* (*a*). It was a suit to recover the office of *Mohunt*, together with the lands attached to it. Supposing we thought the election of the present Defendant an improper one, what authority have we to direct a new election?" (*b*)

This is the view which their Lordships took of the case below, and their Lordships here have only had to consider whether, upon the case brought before them, the Appellant has made out his title?

It is not for them to consider whether he has shown any infirmity whatever in the title of the Respondent; but whether he has made out a satisfactory case to entitle him to recover the office and the land and property belonging to the office of *Mohunt*.

Upon a complete review of the case, their Lordships are of opinion, both on the construction of the Will and the evidence brought before them of the facts which have occurred throughout (which they think it unnecessary to detail with greater minuteness), that the Appellant has completely failed in the attempt to set up his own title, and that, consequently, the decision of the Court below, which simply asserts that he has failed to establish any title of his own, ought to be affirmed,

(*a*) 1 Select Reports, p. 309.
(*b*) Marshall's App. Cases, Bengal, 588.

and their Lordships will humbly advise Her Majesty to direct that this appeal be dismissed, with costs.

25th, 27th and 28th November, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns (Lord Justice), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

BABOO DHUNPUT SINGH,*... *Appellant, versus*

GOOMAN SINGH, MUDDUN LALL DOSS, & others, } *Respondents.*

Claim to enhance rent, assumption of right of occupation in,—Execution purchaser in a mere civil suit of Government for money, rights of—Jurisdiction of Collector under sec. 23, Act X. of 1859, to try suits for arrears of rent against intermediate Tenants—Pottah, a generic term, taken by itself, not to grant a Mocurrery-istimrary tenure in the absence of such words as "Mocurrery" or "from generation to generation,"—a deficiency which, however, might be made up by proof of long uninterrupted possession accompanied by recognition of the hereditary and transferable character of the tenure—Construction, sec. 15, Act X. of 1859—Pleading,—Suing intermediate Tenants as occupying Ryots, a fatal defect.

A claim to enhance rent assumes the existence of some right of occupation in the Defendants (the actual tenants) and of a right to raise the rent previously paid in the Plaintiff (the *Zemindar*.)

The execution purchaser, in a mere civil suit of Government for money, acquires none of the extraordinary rights of a purchaser at a revenue sale. He takes merely the right, title and interest of the judgment debtor, and, therefore, subject to whatever subsisting interests in the lands had been effectually granted or created by any former *Zemindar*.

A suit for arrears of rent due on account of land, against intermediate tenants, *Held* to be within the jurisdiction of the Collector under sec. 23 of Act X. of 1859, whether it was to be treated as what it substantially was, viz. "a suit for the rate of rent at which a *Pottah* or *Kaboolyat* should be given," or as what it was in form, a suit "for arrears of rent due on account of land." *Ranee Surnomoyee* vs. *Maharajah Satischundra Roy, Bahadoor*, (10 M. I. A. 123; *post* p. 60) and *Babu Gopal Lall Thakoor* vs. *Teluk Chandra Roy*, (10 M. I. A. 183; *post* p. 98) *Held* not to apply, having been tried before Act, X. of 1859, was passed.

Pottah is a generic term embracing every kind of engagement between a *Zemindar* and his under-tenants, or *Ryots*, and is not to be *primâ facie* assumed, in the absence of all words of inheritance, to give an hereditary interest.

Where, therefore, a *Pottah* was addressed to the lessee as "*Moostager*" or "*Farmer*" and contained such expressions as "*Mocurrery*" or "from generation to generation"—*Held* that the *Pottah*, taken by itself, could not be taken to have granted a *Mocurrery istimrary* tenure; but that, upon proof, that the tenure had been held under the *Pottah* as against the *Zemindar* at one unvarying rent since 1792, treated *de facto* as an hereditary tenure, and, from time to time, described both by the *Zemindar* and tenants as a *Mocurrery* tenure, and, as such made the subject of sale and transfer, to the knowledge and with the assent of the *Zemindar*, who on one occasion bid, through his manager, for a portion of it, the want of the words "from generation to generation," in the *Pottah* would be supplied and the *Zemindar* could be successfully resisted in a suit in the Civil Court to disturb the possession of the tenant. *Joba Singh* v. *Meer Nujeeb Oollah* (4 Ben. S. D. A. 271) cited and followed.

Whatever be the interpretation to be given to the somewhat loose and ambiguous expression, "a terminable lease," it is clear that a tenure under which the Tenant can no longer be dispossessed by his superior cannot be brought within that exception.

Held, further, without deciding the case on that point, that the fact of intermediate Tenants being sued as occupying *Ryots* liable for the rent assessed upon them in that character, raised objections both of form and of substance fatal to the maintenance of the suit, inasmuch as the notice on which it was founded did not in that case accurately specify "the ground on which enhancement of rent was desired;" and the assessment on which the sum sued for was calculated, was improperly made. *Dyaram* v. *Bhobindur Narain* (1 Ben. S. D. A., 139) and the note of Sir *William Macnaghten* at the foot of it, p. 140, approved of.

20th December, 1867.

THEIR Lordships' judgment was reserved, and now delivered by

THE RIGHT HON. SIR RICHARD TORIN KINDERSLEY:

This is an appeal against a decree dismissing the suit brought by the Appellant under Act. No. X. of 1859. for the en-

* 11, Moore's I. A., p. 433.

hancement of the rent of lands within his *Zemindary*. The argument before their Lordships raised various questions of some perplexity, and of great public importance; but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the Defendants (the actual Tenants), and of a right to raise the rent previously paid in the Plaintiff (the *Zemindar*). The Appellant's title is thus derived:—He is the son and representative of *Baboo Pertab Singh*, who, in 1851, purchased the *Zemindary* in which the lands in question are situate at an execution sale. The execution, though at the suit of Government, was one in a mere civil suit for moneys, and, accordingly, the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment debtor, and, therefore, subject to whatever subsisting interests in the lands had been effectually granted or created by any former *Zemindar*.

The following is the history of the Respondents' occupation:—

In 1792, shortly after the Decennial Settlement of this *Zemindary* had been completed, but before that Settlement had been declared perpetual, the then *Zemindar* granted the lands in question to one *Aghum Singh*, at an annual rent of S. Rs. 101, under a *Pottah*, of which the terms and effect will hereafter be considered. *Aghum Singh* continued to pay that rent, without variation, up to the time of his death, which took place in 1820; and in some of the latest of the *Zemindar's* receipts or acquittances, which have been produced in evidence, he is described as *Mocurrereedar*. After his death his sons, *Pertab Singh* and *Neerbhan Singh*, continued to hold the lands on the same terms, and some of the *Zemindar's* receipts, accepting the same rent of S. Rs. 101 from *Pertab Singh*, and describing him as *Mocurrereedar*, are also in evidence. *Pertab Singh* died in or before 1838, for in a proceeding before the Deputy Collector of *Zillah Purneah*, dated the 24th of January, 1842, his son, *Gooman Singh*, one of the present Respondents, and *Neerbhan Singh*, are described as the then occupants of the lands.

That proceeding was in a suit brought by Government for the resumption and assignment of these lands, which failed on proof that they were included in the *Zemindary*, of which the revenue had been permanently settled in 1793, and were, therefore, not subject to any claim on the part of Government. The *Zemindar* being no party to this proceeding, it is material only as showing that the title on which the Respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of S. Rs. 101, was received from *Gooman Singh*; and in these also he is described as *Mocurrereedar*. It is not, however, clear that these last-mentioned receipts were granted by the then *Zemindar* or his Officers. It seems more probable that they were granted by a Receiver, who, under the Court of Wards, during the minority or incapacity of the *Zemindar*, or under some other unexplained circumstances, was at that time in possession of the *Zemindary*. It also appears that although the rent was often taken from one member of the *Singh* family, as shown by the receipts, there were many persons of that family beneficially interested in the lands, *Pertab Singh* having left five sons besides *Gooman Singh*, and *Neerbhan Singh* having on his death left two sons, *Dabee Singh* and *Akbur Singh*. And from one of the documents in evidence in the cause it appears that fees were paid by the two last-named persons to, and accepted by, the Receiver in 1845, on a mutation of names, as upon the devolution of a *Mocurrery tenure*.

The Father also of the Appellant is shown to have brought, in 1855, a summary suit for the recovery of one year's rent, at the rate of S. Rs. 101, alleging that the lands were held as a *Mocurrery* at that rent by the Defendants there named.

So far the tenure, whatever was its nature, remained in the *Singh* family, but it afterwards became the subject of transfer

by sale. By various transactions, partly of voluntary sale and purchase, partly of purchase at judicial sales, of which the earliest is in 1858, the Respondent, *Muddun Lall Doss*, had, before the commencement of the present suit, acquired the whole interest in the tenure, except the shares (at most one-twelfth each) of *Gooman Singh* and of one of his brothers; and it is stated in the Respondents' case that he has since acquired the last-mentioned shares also, and is now the only person interested in supporting the decree under appeal. The result, therefore, of what has been stated is, that at the commencement of this suit the lands had been held as against the *Zemindar* at one unvarying rent since 1792, under a tenure originating in the *Pottah* of that year, but treated *de facto* as an hereditary tenure, and, from time to time, described by both the *Zemindar* and the tenants as a *Mocurrery* tenure; and that, as such, it has been made the subject of sale and transfer, to the knowledge and with the assent of the *Zemindar*, who on one occasion bid, through his manager, for a portion of it.

The first proceeding in the suit was necessarily the notice which the 13th section of the Act directs to be served on the under-tenant or *Ryot* whose rent is sought to be enhanced. That document stated that the *taisdad*, meaning probably the rent-roll, of the lands was extremely small; that the Respondents had produced "no reliable document," showing on what special grounds they occupied them; that with a view to settle the rent, the lands had been measured, and were found to consist of 11,645 *beegahs;* and that the rent of them, according to the rate paid by other *Ryots* cultivating the same kind of land, would amount to Rs. 24,842 10 as. 8 p. And the plaint founded on this notice accordingly claimed that sum with interest, amounting in all to Rs. 26,752 6 as. 9 p. as due from the Respondents to the Appellant.

The learned Counsel for the Appellant have argued, that the defence set up by the Respondents must be taken to be that they are the holders of a *Mocurrery-istimrary* tenure, *i. e.* an hereditary tenure, at a fixed rent under the *Pottah* of 1792; and that they must stand or fall, according as the terms of that instrument establish, or fail to establish, such a title. Their Lordships cannot accede to that argument. It is to be observed, that Act, No. X. of 1859, sec. 59, does not require the Defendants to put in any written pleading. And, in their Lordships' opinion, the fair construction of the written statement which, under the option given to him, the Respondent, *Muddun Lall Doss*, did put in is, that under all the circumstances stated above, he and those from whom he derives title must be taken to have held as hereditary *Mocurrereedars*, which of itself would be an answer to the suit; and that if that contention could not be supported to its full extent, they were protected against an enhancement of rent by the provisions of Act, No. X. of 1859.

The Respondents have been successful in every stage of the suit in the Courts below; but the several decisions in their favour have proceeded on different grounds. The Collector (the Judge in the first instance), in his judgment of the 31st of March, 1862, seems to have held, that though the *Pottah* neither stated the amount of the land, nor said that it was to be held for ever at the rate fixed, the Defendants had proved that they had held for upwards of seventy years at one rate, and that the Plaintiff had totally failed to prove that his proposed enhancement was a fair one, or at a rate which could be enforced under the Act. From this there was an appeal to the High Court. The petition of appeal treats the Respondents as *Ryots;* and on the first argument in that Court their Counsel argued their case on the assumption that they were properly described as *Ryots*. On that occasion the Judges held that the *Pottah* did not in its terms confer any *Mocurrery* title; and that the statement of the Appellant's father, and the receipts describing the tenants as *Mocurrereedars*, would not, in the absence of all *Mocurrery* title in the original lease, confer such a title, or form an estoppel to the Appellant's suit. But they also held that the law, as declared by the 3rd and 4th sections of Act, No. X. of 1859, conferred in fact a *Mocurrery* title on all *Ryots* in the position of the

Defendants, who held lands at fixed rents, which had not been changed since the date of the Permanent Settlement. The Appellant petitioned for a review of this decision, partly on the ground afterwards decided against him, and now abandoned, as to what in legal contemplation is the date of the Permanent Settlement; and partly on the ground that the Court had proceeded upon the provisions of the 3rd and 4th sections of the Act, No X. of 1859, which were specifically applicable to *Ryots* only, whereas it ought to have proceeded under the 15th and 16th sections, relating to persons possessing a transferable interest in the land intermediate between the Proprietor of the estate and the *Ryots*, such as the Defendants were; that between these last-mentioned sections, on the one hand, and the 3rd and 4th sections on the other, the right may be dependent on the conditions of a lease, whereas under the latter it would be independent of the conditions of any lease; and finally, that the question was to be treated not as one of prescriptive right, but as one dependent on the terms of the *Pottah*. The High Court, on this final hearing, held that the Defendants were not *Ryots*, but Tenants intermediate between the Proprietors and the *Ryots*; that they did not hold under a terminable lease, nor under the *Pottah*, which did not in any way refer to them, but only to the original Lessee; but that inasmuch as they had been allowed by the Proprietors to hold the tenure without any *Pottah* for fifty years, and ever since the death of the first Lessee, and the Proprietors had by their acts admitted the tenure to be transferable and *Mocurrery*, *i. e.* permanent, it was not for the Court, sitting as a Revenue Court under Act, No. X. of 1859, and in a suit for rent, to declare the tenure neither permanent nor transferable; and that the Respondents, holding a tenure at a fixed rent, which had not been changed from the time of the Perpetual Settlement, were protected by the 15th and 16th sections of the Act from enhancement.

It is now assumed on both sides that whatever was the interest of the Respondents in these lands, they were not *Ryots*, but Tenants intermediate between the Proprietor and the *Ryots*. And one of the points taken for the first time here was, that that being so, they were not subject to the jurisdiction of the Collector under Act, No. X. of 1859; that this tenure, if it could be made the subject of enhancement of rent at all, could be made so only by suit in the Civil Court; and for examples of this we were referred to the cases of *Ranee Surnomoyee* v. *Maharajah Sytteeshunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123; *post* p. 60); and that of *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* (10 Moore's Ind. App. Cases, 183; *post* p. 98.)

Their Lordships cannot entertain any doubt of the jurisdicton of the Courts below. Both the cases cited were tried before Act, No. X. of 1859, was passed. That Act throughout contemplates under tenants as distinct from *Ryots*, and contains provisions relating to both classes. And their Lordships think that the 23rd section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what is substantially is, viz. "a suit for the determination of the rate of rent at which a *Pottah* and *Kaboolyat* should be given," or as what it is in form, a suit for "arrears of rent due on account of land."

This being so, the first question is, what is the nature of the Respondents' sub-tenure? If it can be shown to be *Mocurrery-istimrary*, there is an end of the case. If this cannot be established, the question whether the Respondents are not protected by the 15th and 16th sections of the Act will arise.

The *Pottah* is addressed to *Aghum Singh* as "*Moostager*," which is translated "*Farmer*" of *Mouzah Cheloone*, and other villages in Forests of *Sukhooa* trees in the *Zillah* named; and the operative part of it, according to one version of it, is in these words: "Inasmuch as, in accordance with your application, the lands of the villages in the said Forests have been assessed with a rental of 101 rupees, everything being consolidated, and a *Pottah* granted to you, it is required that you will in all confidence have the lands

of the said Forests occupied by *Purbuttea* and other *Ryots*, and keep paying to the *Sircar* the rent year by year, according to this *Pottah;* and whenever you may be summoned for the purpose of hunting, you will attend accompanied by all the *Purbutteas*."

In the course of the arguments for the Appellant, a question was raised whether this *Pottah* was more than a lease of the village lands then in cultivation; and whether the greater part of the land now in the occupation of the Respondents had not been acquired by subsequent and gradual encroachment. Their Lordships, however, are of opinion, that the *Pottah* covered, not only the lands then in cultivation, but also the Forest lands which the grantee was to settle and reclaim by bringing *Purbutteas* and other *Ryots* upon them; and upon the pleadings and evidence in this cause, they must assume that it included all the lands which the Appellant now seeks to re-assess. The nature and extent of the interest in these lands which it conferred on *Aghum Singh* have now to be considered.

Upon these points their Lordships are not prepared to dissent from the judgment of the High Court, in so far as it found that the *Pottah*, taken by itself, cannot be held to have granted a *Mocurrery-istimrary* tenure. It does not contain the term "*Mocurrery*," or any equivalent words from which an obligation on the part of the Grantor never to raise the rent is fairly to be inferred; nor does it contain the expression "from generation to generation," or other like words importing that tenure, whether the rent was to be fixed or variable, was to be hereditary. Their Lordships cannot accede to the argument for the Respondents, that a *Pottah* must *primâ facie* be assumed to give an hereditary interest, though it contains no words of inheritance. They do not think that the case cited from *Morton's* decisions, still less that that of *Freeman* v. *Fairlie* is any authority for such a proposition. "*Pottah*," as may be seen by referring only to Act, No. X. of 1859, is a generic term which embraces every kind of engagement between a *Zemindar* and his under-tenants, or *Ryots*. Nor can it be disputed that the expressions here wanting are ordinarily used in the grant of a perpetual tenure.

Again, neither the date nor the nature of the transaction is, on the whole, in favour of the hypothesis that the intention of the Grantor was to create a perpetual tenure at a fixed rent. It may be conceded to the Respondents that the *Zemindar* in 1791 may have deemed himself capable of granting such a tenure. For, though according to the preamble of *Ben.* Reg. XLIV. of 1791, *Zemindars*, before the Perpetual Settlement, had no power to enter into engagements for a period exceeding that of their own engagement with Government, and in 1792 the Decennial Settlement, which had just been completed, had not been declared perpetual, yet at that time there was every reason to believe that the settlement would be declared perpetual; and the second section of the Regulation last referred to, which restricts the *Zemindar's* power of disposition, had not been enacted. The whole policy, however, of the Decennial Settlement, as appears by Regulation VIII. of 1793, was adverse to *Mocurrery* tenures. It made them all subject to re-assessment, unless they fell within the protection of the 49th section of that Regulation. It is, therefore, not probable that the *Zemindar* would, immediately after the completion of the settlement, grant such a tenure, except upon special grounds and adequate consideration; and of these there is no proof. Though the *Pottah* contains some reference to future services, as incidental to the tenure, the transaction on the face of it is a grant of lands partly cultivated but chiefly waste, with the object, on the part of the Grantee, of bringing the latter into cultivation.

If, on the one hand, it is improbable that the Grantee should undertake such an obligation without some fixity of tenure, and some assured and permanent interest in the lands; it is, on the other hand, equally improbable that the Grantor should part for ever with all his interest in the improvable value of his lands. But passing from the *Pottah*, taken by itself, it is necessary to consider the character of the occupation of the land, as shown by the uncontested facts of the case.

The Appellant, as we have already remarked, is not, as was the Plaintiff in the case of *Baboo Gopal Lall Thakoor* v. *Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 183; *post*, p. 98), which was cited in the argument, an auction Purchaser, who, under the Revenue laws, can throw upon the Tenant the burden of showing that his tenure would have been valid against a *Zemindar*, unfettered by any personal engagement, at the time of the Perpetual Settlement. He is bound by the engagements and acts of his predecessors in the *Zemindary;* and we must consider the evidence of these as it bears first upon the duration of the tenure, and next upon the question of fixed or variable rent. And, in doing this, we must recollect that, after the passing of Regulation V. of 1812, there was no restriction upon the disposing power of the *Zemindar*.

The facts already stated, afford incontestable proof that ever since the death of *Aghum Singh*, the hereditary character of this sub-tenure has been recognized by the successive *Zemindars*. There is also evidence, which is not contradicted, that some of them have recognized its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the *Pottah*, or that, if the original grant were limited, as was suggested, to the life of *Aghum Singh*, his tenure has by some subsequent grant become hereditary and transferable. And, upon the proof here given of long and uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character, it is almost impossible to suppose that a suit by the *Zemindar* in the Civil Court to disturb the possession of the Respondent, could not be successfully resisted. The case of *Joba Singh* v. *Meer Nujeeb Oollah* (4 *Ben.* Sud. Dew. Ad. Rep. 271) is an authority for the proposition, that evidence of this kind will supply the want of the words "from generation to generation" in the *Pottah*, which is the foundation of such a title.

Upon this second point, the evidence of the subsequent acts and conduct of the *Zemindars* is material only in so far as the receipts and proceedings above referred to show that both *Aghum Singh* and his successors were described as *Mocurrereedars*. Their Lordships are not prepared to say that, from this evidence, a Court or jury might not legitimately infer, as against the first *Zemindar* and his successors, either that the rent had been always fixed, or that by subsequent contract, that, which had been originally variable had been made invariable. It is not, however, necessary for the determination of this appeal that they should so decide; and they are unwilling, without necessity, to draw from the facts proved conclusions which were not drawn by the Court below.

It is sufficient to say, that if the tenure was or has become hereditary and transferable, as stated above, and if, as is abundantly shown, the rent has not been changed from the time of the Perpetual Settlement, the case, as ruled by the High Court, falls within the protection of the 15th section of Act, No. X. of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression, "a terminable lease," it is clear that a tenure under which the Tenant can no longer be dispossessed by his superior cannot be brought within that exception.

There is another ground upon which, though it does not seem to have occurred to the Court below, their Lordships cannot but think that the present suit ought to have been dismissed. It has been seen that the Respondents were sued as occupying *Ryots*, liable for the rent assessed upon them in that character; that the High Court held that, considered as *Ryots*, they were protected by the 3rd and 4th sections of the Act, No. X. of 1859, and that thereupon the Appellant, shifting his ground and treating the Respondents not as *Ryots*, but as Tenants intermediate between him and the *Ryots*, obtained an Order for review.

But if the Respondents were Tenants intermediate between the Proprietor and the *Ryot*, that fact seems to raise objections both of form and of substance fatal to the maintenance of the present suit. The notice on which it was founded did not in that case accurately specify "the ground on which enhancement of rent was

desired;" and the assessment on which the sum sued for was calculated, was improperly made: the case of *Dyaram* v. *Bhobindur Naraen* (1 *Ben.* Sud. Dew. Ad. Rep., 139), and the note of Sir *William Macnaghten* at the foot of it, p. 140, show that, where the suit is against an intermediate Tenant, the enhancement ought to be made according to the Pergunnah rate of the rents payable, not by *Ryots*, but by the holders of similar tenures. To assess such an intermediate Tenant according to the rents paid by *Ryots*, must necessarily deprive him of all beneficial interest in his tenure.

Their Lordships, however, do not decide this case on this last ground. For the reasons above stated, they think that the decision of the High Court was substantially right, and they will humbly recommend Her Majesty to dismiss this appeal with costs.

29th and 30th November, 1867.

Present at the first hearing, on the 26th November, 1867: The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

Present at the second hearing, on the 29th and 30th November, 1867: The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. the Lord Justice Rolt.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of Oude.

NAWAB UMJAD ALLY KHAN,* *Appellant*,

versus

MUSSUMAT MOHUMDEE BEGUM and MUSSUMAT NAWAB BEGUM, AFZUL MUHUL and others, ... } *Respondents.*

Mahomedan Law—Sheah School—Gift with reservation of interest during life-time of the donor—Succession ab intestato—Will—Practice—Costs.

A Mahomedan Donor of the *Sheah* School transferred certain Company's paper in the hands of the Government Agent at Calcutta at the time of and after the gift, to his only son, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but stipulating for and obtaining a right to the recurring produce during his life-time: *Held* that, in the absence of evidence of any attempt or design to conceal from the Government Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment, and of illegal and immoral purposes prompting the disposition, the transaction could not be fraudulent either in fact or in contemplation of law.

That the disposition was not an absolute transfer of the whole property, including all future interest, beneficial as well as legal, nor was it a *Benamee* transaction; and

That the transfer was complete and valid according to the Mahomedan Law, on the grounds—

(i) That if the agreement for reservation of interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, the Mahomedan Law defeats not the grant, but the condition;

(ii) That as the arrangement between the father and the son was founded on a valid consideration, the son's undertaking was valid, and could be enforced against him in the Courts of *India* as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated, and

(iii) That, therefore, the transfer did not violate any of the provisions of the *Hedaya*.

Hedaya, vol. iii. Bk. xxx., pp. 294, 307 referred to.

The Mahomedan Law of succession *ab intestato* applies only to the assets which constitute the succession.

Though the transfer of a legal title will satisfy that provision of the Mahomedan Law which relates to the point of seizin in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future.

Quære.—Whether the non-assent of the heirs does or does not vitiate the will of Mahomedan of the *Sheah* school in favour of an heir?

The Appellant having named in his petition on which special leave to appeal was granted only two Respondents, a third party, alleging an interest, was on her application to dismiss or suspend the hearing of the appeal, made a party Respondent to the appeal.

The contention having fairly arisen from the mode of dealing of the last owner, the costs of the appeal of both parties were ordered to be paid out of the residuary estate.

26th November, 1867.

BEFORE the hearing of the appeal took place, *Afzul Muhul*, the Widow, applied to have the appeal dismissed for irregularity, or that it might stand over to amend the petition of appeal, and that she might be admitted as a co-Respondent, to appear and be heard, also for liberty to appeal from so much of the decree of the Judicial Commissioner as affected her rights as the *Nawab's* Widow. Leave was granted for

* 11, Moore's I. A., p. 517.

her to appear and be heard, so far as her rights were concerned, and if necessary to appeal from the Judicial Commissioner's decree.

The appeal now came on for hearing.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant.

Mr. *J. Bell*, for the two first Respondents.

20th December, 1867.

Judgment, having been reserved, was delivered by

THE RIGHT HON. SIR EDWARD V. WILLIAMS:

This is an appeal, under an Order made on a special application to Her Majesty, for leave to appeal against so much of the decree of Mr. *Campbell*, made by him when Judicial Commissioner of *Oude*, as reverses or varies a decree of Mr. *Fraser*, the Civil Judge of *Lucknow*, in favour of the Appellant. The suit in which Mr. *Fraser's* decree was made was brought by the Respondents, *Mohumdee Begum* and *Nawab Begum*, as Daughters and co-heirs of the deceased *Nawab*, against the Appellant as the Son and the Administrator of his Father's estate, under Act, No. XXVII. of 1860, against the Widow of their Father and two Sisters of the Plaintiff, also co-heirs; and, lastly, against certain other persons described as nominal Defendants whom it is unnecessary here to name or further to describe.

The suit was in the nature of an administration suit; it sought a discovery of a portion of the assets alleged to be withheld, and an account, and a division of the assets amongst the heirs according to the Mahomedan Law. The deceased and his family were Mahomedans, and followers of the *Sheah* school. The Widow of the deceased instituted also a distinct and separate suit against the heirs, claiming her dower according to a settlement of it upon her by her Husband, and claiming, in addition to it, a large sum of money by gift from her Husband during his life-time. Her claim to one-eighth of the clear assets seems not to have been disputed. The Appellant claimed a large portion of the property, consisting of Promissory Notes of the Government, commonly called Company's paper, amounting to Rs. 7,35,300, as his property by gift from his Father in the life-time of the latter, the validity of which gift was disputed by the Respondents, the Plaintiffs in the suit, as well as by the Widow, a co-Defendant.

Mr. *Fraser's* decree established this gift in favour of the Appellant. The decree of Mr. *Campbell* reversed that portion of Mr. *Fraser's* decree, and declared the gift invalid according to Mahomedan Law. The Appellant claimed also against the co-heirs, the immoveable property described in the suit. Of this a large proportion was situate in *Oude*, and was claimed by him under a *Firman* from the Government of *India*, granting it to him exclusively as property which had been declared forfeated, and to be the property of the State, by Lord *Canning's* Proclamation on the suppression of the rebellion in *Oude;* and a smaller portion, being land situate in *Furruckabad*, was claimed by him under a certain instrument of conveyance from his Father, termed a *Soolehnameh*. This property was adjudged to him by Mr. *Fraser's* decree. Mr. *Campbell* did not adjudicate upon that part of Mr. *Fraser's* decree relating to the above-mentioned immoveable property, otherwise than by declaring his intention to reserve the consideration of those issues to a further time, for the reason assigned in the concluding paragraph of his judgment. The Appellant treats this reservation of judgment, as a variation by Mr. *Campbell* of Mr. *Fraser's* decree, and makes the propriety of it a ground of appeal. The Respondents, on the other hand, contend that, as a mere reservation of a judgment, on appeal, by the appellate Court, is neither a reversal nor a variation of a decree appealed against, the Appellant is not entitled to insist on this part of Mr. *Campbell's* judgment as a grievance against which he has been permitted to appeal. The appeal is brought not as of right, but by special leave, and in the petition on which leave to appeal was granted, the Appellant named only the two Respondents, who were Plaintiffs in the suit;

but the Appellant has, nevertheless, now named all the parties interested in the general estate, including the Widow, as Respondents.

Application was made, on the part of the Widow, to their Lordships, on the first day of their sittings, to dismiss or suspend the hearing of the appeal, on the ground of irregularity; her Counsel stated that the Widow had not appealed against the decrees affecting her claims to the sum disallowed as a gift, being, on the whole, content to take her portion of the seven *lacs* which, by Mr. *Campbell's* decree, fell into the residuary estate; but that, if this appeal succeeded, she would be prejudiced thereby to so large an extent that she should then desire to appeal against the disallowance of a part of her claim by the decrees of the two Courts. Leave was given to her to appeal against that portion of the decrees, and she has been heard by her Counsel as a party Respondent on the present appeal. The decision of their Lordships on the present appeal will be without prejudice to her rights in her own appeal, if preferred, as respects the claims disallowed her by those decrees; in other respects it will conclude her rights, in the ordinary way, as a party Respondent to this appeal.

The matters to be determined on this appeal are three in number, and are:—First, the validity of the gift to the Appellant of the Company's paper, amounting to Rs. 7,35,300; secondly, the appointment of a Stranger to be and act as co-Trustee with the Appellant in the trust as to the family, religious, or charitable fund called *Rud Muzalim*, and the direction to settle a scheme for the administration of that fund; and, thirdly, the reservation of his judgment, indefinitely, by the Judicial Commissioner, on the right of the Appellant, as declared by Mr. *Fraser* in his decree, in respect of the landed property adjudged to the Appellant by that last-mentioned decision.

The first in order of these matters involves an important point of Mahomedan Law relating to gifts, *inter vivos*.

If the gift be sustained as a valid gift, *inter vivos*, it will be unnecessary to review the evidence as to the genuineness of certain documents propounded by the Appellant, and said to constitute a valid testament by the Mahomedan Law, or to consider in any way the validity or effect of those documents.

The effect of the non-assent of co-heirs to a bequest to an heir by a Mahomedan of the *Sheah* sect becomes also immaterial as a subject of inquiry here, if the gift be valid as a gift *inter vivos*.

Before the validity of this gift, as one *inter vivos*, is determined, it must first be considered by their Lordships what the real nature of the transfer was. The legal title in the Promissory Notes was undoubtedly in the Appellant, in his Father's lifetime, by virtue of an act of the Father.

But though the transfer of a legal title will satisfy that provision of the Mahomedan Law which relates to the point of seizin, in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future. The facts relating to the gift have been most carefully investigated by Mr. *Fraser*, the Civil Judge. The Judicial Commissioner, paying a just tribute of commendation to Mr. *Fraser* on his accurate investigation of the facts, expresses no dissent from his conclusion as to them, but reverses his decision as to this gift as erroneous in point of law. Mr. *Fraser's* observations as to the mode of dealing amongst Natives living amongst themselves as a family, in a state of family union, and dealing in this state with the proceeds of property standing in the names of separate members of the family, to whom it has been transferred by the parent and head of the family, and on the deference to his wishes and arrangements, and acquiescence in them commonly exhibited, are forcible as arguments to exclude the notion of fraudulent concealment or design in a transfer circumstanced as the present. They strengthen the probability of an intended transfer of property in the life-time of the Donor, with a reservation of the use or proceeds of the money transferred during the life-time of the Donor only.

In consequence of the tendency amongst natives to disguise their ownership under *Benamee* transfers of property, a natural

suspicion arises often that such is the design when the transaction is really fair and open, and the apparent and real title are entirely consistent. The transaction questioned in this case, though between Natives, differs in no respect as to the manner of dealing with the property in question (Company's paper in the hands of the Government Agent at *Calcutta* at the time of and after the gift,) from the mode in which an European Father and Son, designing to make between themselves a similar disposition of the like property, giving the paper to the Son with a reservation of the interest to the Father for life, might have dealt with it so as completely to effectuate their intention. There is no evidence of any attempt or design to conceal from the Government Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment. Mr. *Fraser* accordingly, and very reasonably, negatives any fraud in the transaction as to these notes, and Mr. *Campbell*, though he treats the case as one undeserving of support in a Court of Justice, proceeds not on actual fraud, but on his views of the policy of the law, and treats the transaction as fraudulent in contemplation of law, and done in evasion of its provisions, which limit the testamentary power of a Mahomedan, and aim in some degree at equality of division amongst the descendants *ab intestato*.

Everything which took place in respect of these notes at the Government Agent's Office was perfectly consistent with the Appellant's real title in them. It is true his case is stated higher in his pleadings than the real title warrants; but the case, as stated, includes the real title, and is only the common error which is so frequently observed in the cases of Natives in *India*, where their legal advisers, from ignorance or foolish craft, misstate a good case, and place it on false grounds. This was not an absolute transfer of the whole property, including all future interest, beneficial as well as legal; nor was it a *Benamee* transaction. A mere *Benamee*, or *ism furzee* title, is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a Donor, where the transfer of the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favour, and would, of course, leave the disposition *ab intestato* undisturbed. But such was not the intention here, and such is not the nature of the disposition. The object of the disposition is correctly stated by Mr. *Fraser* to have been to give the Son a larger share of the Father's property than would come to him by succession *ab intestato*. Mr. *Campbell*, the Judicial Commissioner, treats that intention and act as evasive of the testamentary law of Mahomedans, and as inconsistent with their law of gifts. Upon the first ground of decision it is to be observed, that in the absence of immoral or illegal purposes accompanying and prompting an act of disposition of property, a disposition which the law admits, cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allow alienation so as to defeat a succession, the question, whether a subject of property is part of the assets, or not, raises simply the question, whether the transfer of it is legally complete. The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unforbidden design. The other view of the subject, that this is an incomplete gift by the Mahomedan Law, is one which presents more difficulty, and will be presently considered. On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from the cause assigned for it in Mr. *Fraser's* judgment, viz., a desire to maintain the dignity of the eldest branch of the family; neither can the policy of the law be invoked, for the reason above assigned, that the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that if the law suffers a Father by an act, *inter vivos*, to alter his succession, his exercise of that power cannot be deemed a fraud upon the law.

It remains to be considered whether a real transfer of property by a Donor in his life-time under the Mahomedan Law, reserving not the dominion over the *corpus* of the property, nor any share of domi-

nion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his life-time, is an incomplete gift by the Mahomedan Law. The text of the *Hedaya* seems to include the very proposition and to negative it. The thing to be returned is not identical, but something different. See *Hedaya*, tit. "Gifts," Vol. III. Book XXX. p. 294, where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, "The Donor is subject to a participation in a thing which is not the subject of his grant, namely, the use [of the whole indivisible article] for his gift related to the substance of the article, not to the use of it." Again, if the agreement for the reservation of the interest to the Father for his life be treated as a repugnant condition, repugnant of the whole enjoyment by the donee, here the Mahomedan Law defeats not the grant, but the condition. *Hedaya*, tit. "Gifts," Vol. III. Book XXX. p. 307. But as this arrangement between the Father and the Son is founded on a valid consideration, the Son's undertaking is valid, and could be enforced against him in the Courts of *India* as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the *Hedaya*, and the transfer is complete. The Mahomedan Law authority whom Mr. *Campbell* consulted, supported it. His opinion is treated somewhat lightly as a nude opinion, unsupported by authority; but it is to be observed, that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties.

The second matter of complaint is the appointment of a co-trustee. The ground taken on the argument of the incompatibility of such an association with the *status* and dignity of the Appellant, and with family usage, seems to their Lordships to be displaced by one of the documents which the Appellant propounded and used before the Court, which does associate a co-trustee with him. As against the Appellant the appointment of a co-trustee will justly give effect to what he alleges to have been the intention of the founder of the trust. The discretion of the Judicial Commissioner as to the person appointed is a matter with which their Lordships are indisposed to interfere, and no sufficient reasons are advanced to control it in this instance. His direction as to a scheme for the administration of this trust seems to their Lordships reasonable.

The third point requires a more detailed statement of the grounds on which their Lordships think, that the decision of Mr. *Fraser* may be affirmed here, rather than by the Judicial Commissioner acting under their Lordships' expression of opinion. As it is clear, that the Appellant meant to include this part of the judgment in his appeal, any merely verbal insufficiency in his grounds of complaint, or of the Order made thereon, might be removed by leave given to renew and extend the application to appeal, so as to cover and remove a mere technical defect. But as the intention is manifest, and the decree of Mr. *Fraser*, though untouched in terms, is in effect suspended by Mr. *Campbell's* judgment, upon a liberal construction of the language of the petition to appeal, this part of the judgment of Mr. *Campbell* may be considered as included within the term "varied." When the appellate Court in *India* on appeal has omitted to decide a question raised by the appeal, their Lordships have remitted the case for decision to that Tribunal, in all cases where they did not find clearly on the Record before them materials for a final judgment doing complete justice between the parties. This case is not of that nature. Mr. *Fraser* forebore to question the Appellant's title under the *Firman*, because that *Firman* could not be questioned in that Court. That Court itself existed under an exercise of powers of a similar character, and it did not think itself invested with a jurisdiction to question an act of State, under which the *Firman* had its origin. The Proclamation was necessarily impeached by impeaching the *Firman*, and it was undoubtedly an act of State. Even if this act could be directly or indirectly questioned in a Municipal Court (on which we express

no opinion), the contention must be raised on a suit duly constituted to which the Government must be made a party. The forfeited estates were not assets at the time of the *Nawab's* death, and could only be treated as such when the Government title was displaced. To remand the case for hearing to the Judicial Commissioner would be simply to involve the parties in unnecessary expense, and subject them to unnecessary delay, since it must be accompanied with a declaration that in the suit, between those parties, and on those pleadings, the legality of the title of the Grantors of the *Firman* could not be questioned.

The objection raised to the *Solehnameh* by Mr. *Bell* (which it is necessary to notice only as respects the lands in *Furruckabad*) does not arise on the facts. The consideration, two rings, may be small and inadequate in the sense of purchase money; but it cannot be treated as of no pecuniary value; and the Record furnishes no grounds to justify a remand to the Judicial Commissioner on this comparatively trifling point.

Their Lordships think, that a valid gift, *inter vivos*, as to the Company's paper, was effected by the *Nawab* in his life-time in favour of his Son, the Appellant, and, therefore, they deem it unnecessary to consider the question as to the genuineness of the documents set forth as constituting his Will, or to consider, whether the non-assent of the heirs does or does not vitiate the Will of a Mahomedan of the *Sheah* school in favour of an heir.

On the whole case, they will humbly advise Her Majesty to reverse the decision of the Judicial Commissioner of *Oude*, except as to the appointment of a co-trustee, and to affirm the decision of the Civil Judge, Mr. *Fraser*, with that variation.

As the contention in this appeal arises from the acts of the last owner, who has subjected his property, by his mode of dealing with it, to questions fairly raised, their Lordships think that the costs of the appeal of both parties should come out of the residuary estate.

2nd December, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, the Right Hon. Sir Richard Torin Kindersley, and the Right Hon. the Lord Justice Rolt.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

MOHUMMUD ZAHOOR ALI KHAN,* ... ... } *Appellant,*

versus

MUSSUMAT THAKOOR-RANEE RUTTA KOER, and others, ... } *Respondents.*

Regulation LII. of 1803—Disqualified Proprietor, circumstances constituting incapacity of,—Bengal Regulation X. of 1793—Misjoinder of parties—Pleading, effect of—Omission to refer to documents in pleadings—Practice—Plaint, amendment of, by the appellate Court.

R., executed a Bond before she succeeded to a *Talook* in the custody of the Court of Wards, under Regulation LII. of 1803, as the property of a disqualified female *M*. After *R.'s* succession, the *Talook* continued to be under the Court of Wards until a suit was instituted against *R.*, for the recovery of the money due on the Bond:—*Held, reversing the decisions of the Courts below, that R.*, was not by reason of that possession, a disqualified female and incapable of binding herself by contract; that in order to give effect to such a disqualification, the Regulations must be strictly pursued; and that the provisions of the Regulation for reporting a female disqualified, were not mere forms, but necessary preliminaries to the disqualification of a female, so as to invalidate an alienation even of the property under charge of the Court of Wards by her.

Regulation LII. of 1803 is little more than an extension of Bengal Regulation X. of 1793 to the N. W. Provinces.

The case of *Jan Khatun* v. *Khwaju Ali Mullah* (5 Bengal Sudder Dewanny Adawlut Reports, 240) followed.

In a suit for recovery of money due on a simple money Bond, certain persons no way parties to the Bond, were made co-defendants with the Obligor, on the allegation that they had combined with the latter to get her estates illegally transferred to

* 11, Moore's I. A., p. 468.

them:—*Held* that the allegation of illegal transfer was no ground of suit against the co-defendants, the suit being based upon an instrument which created no charge upon, or estate or interest of any kind in, the lands; and that the Plaintiff was only entitled to a money decree against the person, and could not obtain any decree against the property, of the Obligor.

So ruled, although the plaint was entitled as a petition of Plaint against all the Defendants and against "the *Zemindary* rights" of the Principal Defendant, and went on to pray for a decree both against the person and property of the Obligor; and the Plaintiff tendered in evidence a Bond of a subsequent date pledging the *Zemindary* rights of the Obligor; their Lordships observing that—

Though the Judicial Committee was always disposed to give a liberal construction to pleadings in *Indian* Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet a Plaintiff could not be entitled to relief upon facts or documents not stated or referred to by him in the pleadings.

Where the suit was wholly misconceived, the Judicial Committee, considering that if the appeal be dismissed altogether, without prejudice to the Appellant to bring a fresh suit, he might unjustly be met by the plea of limitation, did what the Court of the first instance could do, and allowed the plaint to be amended.

10th February, 1868.

THEIR Lordships reserved judgment, which was now pronounced, as follows, by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This is an appeal from a decree of the late *Sudder Dewanny Adawlut*, of the North-Western Provinces of *Agra*, bearing date the 11th of July, 1864, which affirmed a decree of the Principal *Sudder Ameen* of *Meerut*, bearing date the 25th of February, 1863.

The plaint was filed in the Court of the Principal *Sudder Ameen* of *Allygurh* on the 3rd of May, 1861, and is entitled, the petition of plaint of the Plaintiff against *Rutta Koer* and nine other persons, there named, and against *Zemindary* rights in certain *Mouzahs*, there named, the property of *Rutta Koer;* and claimed to recover Rs. 21,280, the amount due on a Bond, dated the 19th of August, 1856, and stated that, *Rutta Koer* borrowed from the Plaintiff Rs. 10,000, and executed a Bond engaging to pay the amount on demand with interest at 2 per cent. *per mensem;* and that the Plaintiff had repeatedly demanded the amount due, but that *Rutta Koer* evaded payment, and had not discharged the debt. It further stated, that in order that the money might be lost to the Plaintiff the other Defendants had combined, and got the above estates belonging to *Rutta Koer* illegally transferred to them, though they had not been put in possession; and, therefore, as a precautionary measure, the Plaintiff filed the petition of plaint, with the Bond on which his suit was based, against *Rutta Koer*, the Principal Defendant, and the other Defendants who claimed her property; and it concluded by praying, that the amount sued for might be decreed against the Defendants, and the property aforesaid, with interest to the date of realization.

The Bond of the 19th of August, 1856, filed with the plaint, and on which, as stated in the plaint, the suit is based, is a simple money Bond, purporting to have been executed by *Rutta Koer* for Rs. 10,000, and interest. None of the other Defendants are in any way parties to it, nor does it purport to be a mortgage or charge upon, or in any way to refer to the property mentioned in the plaint.

The Plaintiff has also tendered in evidence another Bond, dated the 28th of November, 1857, by which *Rutta Koer* purports to secure a further advance, and to pledge her *Zemindary* estates to the Plaintiff until she should pay off the whole debt to him. But his suit is in no way based upon this second Bond.

Now, as to all the Defendants, except *Rutta Koer*, it is obvious on the face of the plaint that no relevant case is made against them. The allegation that they have combined with the Plaintiff's alleged Debtor to get her estates illegally transferred to them, is no ground of suit against them, if, as is the case here, the Plaintiff sues upon an instrument which creates no charge upon or estate or interest of any kind in the lands. If he can obtain judgment on his Bond, and is not satisfied, he may possibly be entitled hereafter to raise such a case, as that suggested in the plaint, against the land and against these Defendants; but any such proceedings before execution on the judgment are premature. It follows, therefore, that as

against these Defendants, at all events, the appeal must be dismissed, and it is wholly unnecessary to consider as to them the other defences set up in their several written statements.

Nor as to *Rutta Koer* was it open to the Plaintiff on this plaint, to ask for any decree other than a personal decree for payment of the amount due on the Bond. The Plaintiff is not entitled to rely on his second Bond. Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A Plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings, and the only thing that can be rightly insisted on by the Plaintiff here is a decree for payment against *Rutta Koer*. To a decree so limited, he would be entitled in a suit properly framed, if he proved his case; and the only defences that could usefully be raised by *Rutta Koer* are—that she was incompetent to contract debt—or that she did not in fact contract debt—or that she had satisfied it.

Two of these defences she has in fact pleaded; namely, first (in substance and effect), that no such money was ever lent her, and that the Bond was fabricated; and, secondly, that her property was under the Court of Wards, and that the Government Officials had not been made cognizant of or accorded their sanction to the institution of the suit, and that, even supposing the Bond to be genuine, the claim of the Plaintiff could not lie against the person and property of the Defendant.

Amongst the issues fixed for trial by the Principal *Sudder Ameen* (besides those relating to the validity of the Bond and the existence of the debt) was one in the following terms:—"Thirdly, had the Defendant the power to contract debts, her estates being under charge of the Court of Wards; and is the fact of no notice having been given of the execution of the Bond and the contracting of the debts at the Collectorate a sufficient argument for the falsity of the Bond or not?"

The form of the issue apparently assumes that *Rutta Koer's* estates were under charge of the Court of Wards, and that the only question was the effect of this circumstance on her power of contracting debts; but it will be observed that the question is, "Had the Defendant the power to contract debts?" and not the more limited question, whether she had power by contract to charge her land with debts.

It is further to be observed that, though the third issue appears to assume that the Defendant's estates were under the charge of the Court of Wards, yet the fact of their being, or of their having been under charge, was the only fact or point treated as open to dispute or question in the Courts below. It was assumed by both the Courts that, if her estates were in charge the case was at an end—the Plaintiff could have no relief of any kind; and both Courts being of opinion, that there was sufficient proof of the estates having been in the custody of the Court of Wards, from a time anterior to the date of the Bond to a time subsequent to the institution of the suit, the Plaintiff's suit was dismissed with costs, and there was no examination of, or observations upon the evidence, which the Plaintiff had tendered of the loan of the money to *Rutta Koer*, and the execution by her of the Bond.

Under these circumstances, the principal questions to be considered on this appeal are, whether the estate and property of *Rutta Koer* were in fact under the charge of the Court of Wards when the Bond is alleged to have been executed, and if so, whether such custody or charge was of a character which made her what is called, under the Regulation to be presently referred to, a disqualified female, and incapacitated her to contract debt in any way.

These questions turn mainly on Regulation LII. of 1803. That Regulation, after reciting that it is essential to the interest and happiness of Minors, and of such Females as shall not be deemed competent to the management of their own estates, and of Idiots, Lunatics, and other proprietors of land paying revenue to Government, who are or may be rendered incapable of

managing their lands by natural defects or infirmities, of whatever nature, that the lands of persons coming within the above descriptions, should be managed for the benefit of the Proprietors, by persons appointed to the trust by Government, and that a Court of Wards should be instituted, with powers to superintend the conduct and inspect the accounts of the Managers of the estates of such persons, it was enacted by section 5, that the superintendence of the Court of Wards should extend to the persons and estates of (amongst other persons) all proprietors of entire estates paying revenue immediately to Government, who were or might be Females not deemed by the Governor-General in Council competent to the management of their own estates. Section 6 enacts, that the lands of disqualified landholders should not be liable to be sold for arrears of public revenue on account of the periods during which such lands might be under the charge of the Court of Wards. Section 8, that the Collectors of the revenue should ascertain and report to the Board of Revenue what proprietors were disqualified. Section 9, that if a proprietor of lands were disqualified solely from being a Female, the Court was to take charge of the estate and to report to the Governor-General, with power to the Governor-General to declare her exempt from the Regulation. Section 10, that Managers and Guardians were to be distinct, and Managers to have care of estates, real and personal; and by sections 22 and 23 provision was made for the application of moneys received of Managers, in which there was a provision that any just debts then outstanding against, or thereafter adjudged against the estates of disqualified landholders, must necessarily be satisfied; but that the circumstances of all such debts were to be reported to the Collector, and by him to the Court of Wards, previous to payment by the Manager; and by section 26, Females, though disqualified, were not to be subjected to Guardians, but might themselves receive and disburse their own maintenance.

There is no pretence for saying that, but for the application of this Regulation to her, *Rutta Koer* was incapable of contracting the debt in question. The Regulation itself does not in terms declare the incapacity, or define the circumstances in which it is to arise. The provisions of such a law should be strictly pursued, in order to effect the disqualification of any particular person; and no one should lose her natural liberty of contracting debts unless the relation of Ward and Guardian between her and the Court of Wards be regularly and completely constituted.

The examination, however, of the evidence in the Court below appears to have been addressed solely to the object of discerning whether the *Talook* was, in fact, under charge; and it seems to have been assumed, that if in charge, *Rutta Koer* was a disqualified person. But their Lordships are of opinion, that this does not necessarily follow; the Court of Wards may have obtained the custody originally under circumstances not affecting her personally, and may have continued in charge after the estate devolved upon her under circumstances which do not necessarily make her a disqualified Female under Regulation LII. of 1803. It becomes, therefore, material to ascertain, not merely, whether the estate was under charge, but also what were the circumstances under which it was first brought under charge, and afterwards so continued.

The material facts are these. The landed property in question of *Rutta Koer* (usually called throughout these proceedings the *Talooka Chukkathul*, in the Collectorate of *Allygurh*) had previously belonged to her Sister, *Maha Koer*. She was declared a disqualified Female, under Regulation LII. of 1803, as far back as the year 1811, and the *Talook* was then placed under the Court of Wards, and a Manager was appointed under that Regulation; but in 1838, in lieu of continuing it in the hands of a Manager, the *Talook* was let to Farmers, who paid their rents to the Collector, who exercises the powers of the Court of Wards, and throughout the whole period from 1811 until *Maha Koer's* death (with the exception of a few years arising from circumstances not material to the question) the *Malikana*, or maintenance, was paid by the Collector to *Maha Koer*.

Maha Koer died in 1853. On her

death adverse claims were set up to the property; one by *Aram Singh*, claiming as heir of her deceased husband; another by one *Ali Buksh*, claiming under a Deed from her; and the third by *Rutta Koer*, claiming as her Sister and heir. The claim of *Ali Buksh* appears to have been first disposed of, and was found to be groundless. As between *Aram Singh* and *Rutta Koer* the Government, through the *Sudder* Board of Revenue, appears to have decided in favour of *Rutta Koer*, whose name was recorded as Proprietor of the *Talook* in place of the deceased *Maha Koer;* but she was not put into possession. About this time, and apparently in consequence of the decision of the *Sudder* Board, and certainly in or before the year 1855, a civil suit was instituted by *Aram Singh* in the Court of the Principal *Sudder Ameen* of *Allygurh*, to enforce his claim against *Rutta Koer*, and to this suit he made the Government a party, on the ground of the estate being under the control of the Court of Wards. Thereupon the official correspondence of the Collector took place. This mentions that in August, 1855, a petition was filed by *Rutta Koer* in the Court of the *Allygurh* Collector, stating "that she was not subject to the Court of Wards; that Government had been wrongly made Defendant; also that she had succeeded by inheritance to the property of her deceased Sister, *Mussumat Maha Koer*, who was subject to the Court of Wards; that the functions of the Court had ceased with the Ward's demise; and that the Board, in paragraph 16 of their Orders, No. 83, dated the 6th of February, 1855, had ruled that, in the absence of any other rightful Claimant, the *Malguzary* management must depend upon her discretion;" and from this correspondence it appears, that the final determination of the Government was to put in an answer to the effect, that Government was not interested in the suit, that the question of right should be settled between the contending parties themselves, and that Government should be exempted from all costs. This was done, the litigation went on between *Aram Singh* and *Rutta Koer;* a decree was made in favour of the latter by the Principal *Sudder Ameen*, the date whereof does not appear in the proceedings; there was an appeal from that to the *Sudder* Court, where the suit finally ended in a compromise some time in or before the year 1862. If the evidence stopped here, it would be impossible to hold that the continued possession of the Court of Wards was more than that of a Stakeholder; since if it really held the *Talook* as a Court of Wards on behalf of *Rutta Koer*, treating her as a disqualified Proprietor, it was clearly the duty of the Collector representing the Court of Wards actively to defend her title to the estate. It appears, however, that the Revenue authorities have not acted consistently on their then view of the case; for in February, 1856, *Rutta Koer* being recorded as Proprietor, a mutation of names as to several villages in the *Talook* was applied for on behalf of certain persons, including the present Appellant, who claimed under assignments from her; and this application having been disallowed by the Collector, because a civil suit was pending, and it was difficult to say who was in possession, the *Sudder* Board confirming, on appeal, the Collector's decision, declared that *Chukkathul* never had been emancipated from the control of the Court of Wards, and had never been given into the possession of *Rutta Koer*.

In 1856 the Farmers set up claims to a settlement adverse to the proprietary title of *Rutta Koer* in *Chukkathul*. Their claim was disallowed, and thereupon a correspondence between the Government authorities took place, in the course of which the Secretary to Government, in a Letter, dated the 21st of August, 1856, stated that the Lieutenant-Governor agreed in opinion with the *Sudder* Board that no claim adverse to the proprietary title of *Thakooranee Rutta Koer* existed, nor had any sprung up during the administration of the Court of Wards, and that he authorized the acceptance of proprietary engagments from the *Thakooranee*, with certain terms of setttlement in favour of the *Theekadars*, or Farmers. And, it appears from the judgment of the *Sudder Dewanny Adawlut*, though the document itself is not set forth in the Record, that a Proclamation, dated the 1st of October,

1856, issued from the Collector's Office, in conformity to the orders of Government and the Board, giving full proprietary possession to *Rutta Koer*, who had filed the usual *Durkhast*, or petition, asking to engage for the payment of revenue, and that the *Putwarry* of the *Talook* acknowledged receipt of the Proclamation and the possession of *Rutta Koer* on the 13th of October, 1856. This arrangement, however, was not finally carried out. It appears from the Letter of the Collector of the 18th of September, 1858, that before the contemplated settlement was completed the Mutiny broke out. He says: "Then happened the Mutiny, with the Farmers still in possession of the Villages, and the Government orders for giving possession to *Rutta Koer* not carried out." From the same document it appears that, in October, 1857, when order was restored to the District, he, as Collector, resumed charge of the *Talook*, of which, on the 2nd of March, 1858, he appointed a Manager; and, there is further proof that, between the last-mentioned date and April, 1862, the *Talook* was under the management of the Court of Wards. But in or before the month of August, 1862, the Court of Wards, for some unexplained reason, gave up the possession and management of the property, as appears from the *Perwannah* of the Collector filed in this suit, which is referred to by the Principal *Sudder Ameen*, in his proceeding fixing the issues.

Their Lordships are of opinion, that the Courts below were warranted in concluding from this evidence that, with the exception perhaps of the period during which all order and government may have been suspended in this District by the Mutiny, the Court of Wards was continuously in the actual possession of this *Talook* from the year 1811 to August, 1862. They do not, however, think that by reason of that possession, which began in the time of the *Maha Koer*, *Rutta Koer* was, when this Bond is alleged to have been executed, incapable of binding herself by contract. They have already observed that, in order to effect such a disqualification, the Regulations must be strictly pursued. Under this Regulation the Collector is to report a female Proprietor as disqualified to the Board of Revenue, and the Board of Revenue, in their capacity of a Court of Wards, are to report that they have taken the estate under their charge, to the Governor-General in Council, so as to enable him to exercise his discretion of exempting her from the operation of the Regulation. Nor are these mere forms; they are necessary preliminaries to the disqualification of a female, so as to invalidate an alienation even of the property under charge of the Court of Wards by her. This was expressly decided in the case of *Jan Khatoon* v. *Khwaja Ali Mullah* (5 *Ben. Sud. Dew. Ad.* Rep., 240.) That case arose in Lower *Bengal*, and under Regulation X. of 1793. But Regulation LII. of 1803 is little, if anything, more than an extension of the earlier Regulation to the North-Western Provinces. The provisions of the two Regulations upon the point in question are absolutely identical. Again, the present case is far stronger than that of *Jan Khatoon* v. *Khwaja Ali Mullah*. The Bond here impeached does not, like that which was then in question, affect the land. It is a simple money obligation. And the evidence in this case not only fails to show that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the Revenue authorities to treat *Rutta Koer* as a disqualified Proprietor, or a person incompetent to manage her affairs. It shows, that when her title was attacked in 1855, they declined to act as a Court of Wards in its defence, but left her to sue or be sued, as a person *sui juris*, on her own responsibility, and at her own cost. It further shows that in 1856, and in the very month in which she is alleged to have executed the Bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the *Talook*, as a Proprietor competent to its management, on her entering into proper engagements for payment of the Government revenue; and that the completion of that arrangement was only prevented by the accident of the Mutiny. The fact, if fact it be, that for some time in and after the year 1858, the property was regularly managed by the

Court of Wards, can have no bearing on the question of her capacity to bind herself by contract in 1856.

The decisions of the Principal *Sudder Ameen* of *Meerut*, and of the *Sudder* Court of *Agra*, nevertheless rested exclusively on the ground, that *Rutta Koer* had no capacity to contract debts, because the *Talook* was in the custody of the Court of Wards. The *Sudder* Court expressed itself thus: "Holding the opinion, that the superintendence of the Court of Wards did not cease until the year 1862, and hence that *Rutta Koer* was not competent to incur any debt, or make any alienation of her property, or that she is in any way answerable for the claims, there is no necessity for our inquiring into the second issue."

The question, whether any formal report was ever made of *Rutta Koer* being a disqualified female was left wholly unnoticed.

The attention of the *Sudder* Court was called to the unsatisfactory nature of the decision in this respect on an application by the present Appellant for a review of the judgment, when he stated, as one of the grounds of his application, that "no formal Order was passed placing *Rutta Koer* under the charge of the Court of Wards. Hence, though the property to which she succeeded may have been under the charge of the Court of Wards, yet *Rutta Koer* in person was a free agent, and should be held responsible for her acts." And the *Sudder* Court, in refusing leave to review, gave the following, among other reasons, for so doing:—"Even allowing, for the sake of argument, that no formal Order was given during the years 1855, 1856, and 1857, placing the person of *Mussumat Rutta Koer* under the charge of the Court of Wards, yet, as it is admitted by the Counsel for the Plaintiff, that the property to which she succeeded was under the Court of Wards during 1855, and a part of 1856, we cannot allow that such omission, if omission there be, in any way affects the case, for to all intents and purposes *Mussumat Rutta Koer* was under the charge of the Court of Wards. We are unable to dissociate the person of *Mussumat Rutta Koer* from the property to which she succeeded. We think that she, in person, and her property were under the charge of the Court of Wards, and that she was not free to contract debts, and to hypothecate her property for the liquidation of such debts. Regulation LII. of 1803 certainly does provide for the liquidation of the just debts of disqualified Landholders,—'just debts now outstanding against, or hereafter adjudged against the estates of disqualified landholders;' but it does not permit a Ward to contract debts without the sanction of the Court of Wards. It would be strange indeed if the law allowed the Ward to contract debts, to alienate and hypothecate property under charge of the Court of Wards, when it distinctly declares that the Manager in charge shall not dispose of any portion of the property confided to his care without the consent of the Court of Wards."

For the reasons already given, their Lordships cannot agree with this conclusion. They are of opinion, that the finding of the Courts below, on the only issue which they have really tried, is wrong.

They have, however, felt some doubt as to the Order which it will be their duty to recommend Her Majesty to make on this appeal. They have already intimated that the appeal must be dismissed against all the Respondents except *Rutta Koer;* and they have felt some doubt whether, inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the right of the Appellant to bring a new suit against *Rutta Koer* upon this Bond, treating it as a mere money Bond. Considering, however, that such a suit would probably be met by a plea of the Act of Limitation; that in the circumstances of this case such a defence would be inequitable; and that, the Respondent not having appeared, their Lordships are not in a condition to put her on terms as to her defence to a fresh suit; they have come to the conclusion that the fairer course is to do what the Judge of the Court of First Instance might, under the Code of Procedure, have done at an earlier stage of the course,—namely, allow the Appellant to amend his plaint so as to make it a plaint against *Rutta Koer* alone for the recovery of money due on a Bond.

Her liability on the Bond may thus be tried on the issues already settled. Upon those issues, and the evidence taken on them, their Lordships will intimate no opinion. The nature of the transactions, and the *status* of the Obligor, make it peculiarly desirable that the appellate Court should have the benefit of the judgment of the Courts below on those issues.

The Order, therefore, which their Lordships will humbly recommend to Her Majesty is, that the appeal be dismissed against all the Respondents except *Rutta Koer;* that the decrees of the Courts below be reversed, except so far as they dismiss the suit against those Respondents with costs; that it be declared that *Rutta Koer* was not, at the date of the alleged Bond, incapable of binding herself by contract by reason of the *Talook Chukkathul* being still in the custody of, or under the charge of the Court of Wards; that the cause be remanded to the High Court of Judicature for the North-Western Provinces, with directions to allow the Appellant to amend his plaint so as to make it a plaint against *Rutta Koer* alone for the recovery of the money alleged to be due to him on the Bond; and to take all necessary steps for the trial of the said suit upon the issues already settled, or to be hereafter settled; with liberty to the Respondent, *Rutta Koer*, to make any defence to the suit which is not inconsistent with the declaration aforesaid. Their Lordships will give no costs on this appeal.

2nd, 3rd and 6th December, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, the Right Hon. Sir Richard Torin Kindersley, and the Right Hon. the Lord Justice Rolt.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Suddder Dewanny Adawlut, North-Western Provinces, Agra.

BHUGWANDEEN DOOBEY,* *Appellant,*

versus

MYNA BAEE, ... *Respondent.*

Benares School—Hindu widow's estate—Inherited property, no Stridhan—Survivorship amongst widows—Jurisdiction under Act XIX. of 1841 to effect partition—Widow's acquiescence in an adverse title, when no bar to a subsequent suit for recovery of her share—Reviews—Act VIII. of 1859, s. 378—Power to enlarge grounds of review on oral application—Practice.

According to the law of the Benares school, no part of a childless Hindoo's estate, whether moveable or immoveable, to which a widow succeeds by inheritance, forms part of her *Stridhun*, or particular property. Her power of disposition over both is limited to certain purposes, and on her death, both pass to the next heir of her husband.

The estate of two Hindoo widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor take the whole property, to the exclusion even of the daughter of the deceased widow. They are, therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other.

On one of two Hindoo widows applying under Act XIX. of 1841 to determine the right to the immediate possession of the property, a third party set up a will and claimed the property supported by the other widow. The claim was, however, rejected, and, by order of the Court, the property was equally divided between the widows in which they acquiesced. *Held* that, notwithstanding the acquiescence, no regular and complete partition was effected, the Judge in that summary proceeding having had no jurisdiction to make it.

The survivor of two Hindoo widows, notwithstanding her originally acquiescing in an adverse

* 11, Moore's I. A., p. 487.

title set up against the widows in a case under Act XIX. of 1841, does not lose any rights which accrued to her as one of the co-heirs of her husband, when that claim was decided to be untenable. Nor can alienation of her share be urged as a bar to a suit for recovery of the share of the other widow, deceased, against the latter's father and brother claiming the property as legatees under a will of the latter.

An application for review of judgment of the *Sudder* Court in appeal under sec. 378, Civ. Pro. Code, Act VIII. of 1859, being limited to the immoveable property, and the written grounds for review impugning the correctness so far as it related to the real property only to the exclusion of the moveable property in dispute both in the suit and appeal:—*Held* that it was competent to the Judges, by whom the order allowing or rejecting application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing, there seeming to be nothing in the Code of Procedure which expressly prohibited them from so doing.

Semble.—Whether, if the Court was wrong in its procedure, its miscarriage should prevent the Judicial Committee from deciding the question touching the disposition of the moveable estate on its merits, when there would be no surprise.

THE facts and issues raised by the suit are fully stated in the judgment.

The appeal was argued by

Mr. *Kay*, Q. C., and Mr. *J. Bell*, for the Appellant; and

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Respondent.

The following authorities were cited:—

Upon the question, whether by the Western School of Hindoo Law, current in *Benares*, a Hindoo Widow was competent to dispose of her husband's self-acquired estate, moveable or immoveable, which she, as a Hindoo Widow, had inherited from her husband, by testamentary disposition, or deed of gift, to the prejudice of his heirs, *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (a); *Keerut Sing* v. *Kooloohul Sing* (b); *Katama Natchier* v. *The Rajah of Shivagungah* (c); *Cossinaut Bysack* v. *Hurroosoondry Dossy* (d); *Morley's* Dig., N. S., tit. "Hindu Widow," p. 180, Note. *Colb.* Dig., Vol. III. pp. 458, 464-8, 575; The *Vivada Chintamani*, pp. 256, 266 (Trans. by *Prossonno Coomar Tagore*;) *W. H. Macnaghten's* "Hindu Law," Vol. I. pp. 19, 48, 50; *Ib.*, Vol. II. p. 46; The *Madras* Jurist, 31st of March, 1866, p. 128; 1 *Strange's* "Hindu Law," pp. 247, 268 [2nd Edit.]; The *Mitacshara*, ch. II. sec. xi. cl. 2, and cls. 11 to 25, were cited.

As to the estate two Widows take, whether as tenants in common or in coparcenary, *W. H. Macnaghten's* "Hindu Law," Vol. I. p. 38, was cited.

And, whether the summary Order of the Judge, under Act, No. XIX. of 1841, and the acquiescence of the Widows and possession by them of the moieties operated as an estoppel and a bar to the Plaintiff's claim, *Meer Nujeeb Ullah* v. *Mussummaut Kuseema* (a); *Rawlins* v. *Powel* (b); *Goodeve* "On Evidence," p. 325, were cited.

Upon the construction of the 378th section of the Act, No. VIII. of 1859, and the power of Court on an oral application to amend the written grounds of appeal, *Broughton's* Practice of the High Court, *Calcutta*, p. 28, was cited; and that the Court would not make a decree upon a variance of plea and proof, *Narainee Dossee* v. *Nurrohurry Mohonto* (c); *Morley's* Dig., N. S., tit. "Practice," p. 312, were relied on.

At the conclusion of the arguments the case stood over for consideration.

14th March, 1868.

Judgment was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The following are the undisputed facts upon which this appeal arises:—

Rae Deenanath, a Hindoo Banker, of great wealth, carrying on business at *Benares*, *Hyderabad*, and other places, died at *Benares* on the 7th of June, 1855, childless. He was separate in estate from his brethren, if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindoo law of the *Benares* school, were his two Widows, viz. the Respondent and

(a) 11 Moore's I. A., p. 139; *post*, p. 231.
(b) 2 Moore's I. A., p. 331; 1 P. C. J., p. 196.
(c) 9 Moore's I. A., p. 539; *post*, p. 25.
(d) 2 Morley's Dig. 204-5, 214.

(a) 1 Ben. Sud. Dew. Ad. Rep., 10.
(b) 1 P. Will., 297.
(c) 1 Marshall's App. Cases, Ben., 70.

Doola Baee, since deceased. Immediately after his death, however, a document, purporting to be a Will executed by him in favour of one *Hunwunt Pershad*, to whom, jointly with a person named *Bithul Pershad*, it gave the management of the property, was propounded. The title of *Hunwunt Pershad*, claiming under this alleged Will, or as the adopted son of *Rae Deenanath*, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An appeal to Her Majesty in Council against their decisions is pending (*a*,) but it has not yet been set down for argument, in consequence of the death of one of the parties; and for the purposes of this appeal it must be assumed that *Rae Deenanath* died childless and intestate, and that the claim of *Hunwunt Pershad* was unfounded. Nor would it be necessary to refer to that claim but for the arguments which the Appellant's Counsel have founded on the partition between the Widows, which was in some measure caused by it, and upon the alleged collusion of the Respondent with the Claimant.

The first consequence of the claim was that a summary suit, under Act, No XIX. of 1841, to determine the right to the immediate possession of the property, was instituted in the name of *Doola Baee*, who was then a Minor, by her Uncle and Guardian, in which a Curator was appointed under that Act. When this suit came to a hearing the Judge pronounced against the Will, and directed that the whole estate of *Rae Deenanath* should be equally divided between the Widows, and that the Curator should carry out that order without delay. The property was thereupon divided; each Widow was put in possession of her share; and *Doola Baee* continued in the separate possession and enjoyment of her share up to the time of her death.

She died on the 10th of November, 1857, having on the 21st of August, 1857, made a Will, which was registered on the same day, whereby she disposed of her share of the property inherited from her Husband in favour of her Father (the Appellant,) and her infant Brother, *Kaloo Ram*, who is also represented by the Appellant on this appeal.

Some steps seem to have been taken by the Respondent, and also by *Hunwunt Pershad*, to resist the registration of this Will in the life-time of *Doola Baee*; and upon her death the Respondent applied for the attachment of the property in dispute, being that taken by *Doola Baee* under the partition, as specified in the list before referred to; and for the appointment of a Curator under Act, No. XIX. of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld *Doola Baee's* Will, she commenced the regular suit out of which this appeal has arisen, on the 21st of December, 1857, in the Court of the Principal *Sudder Ameen* of *Benares*.

The issues settled in the suit were:—

First, whether there was any informality in the institution of the suit.

Second, whether the Plaintiff (the Respondent) was legally competent to institute it.

Third, whether *Doola Baee* was a Minor or not at the date of the alleged execution of the Will.

Fourth, whether the Will was fraudulent or a *bonâ fide* instrument.

Fifth, if a person die leaving two Widows, and one of the Widows subsequently dies leaving a Will, who is entitled to succeed according to the *Shasters*, the surviving Widow or the Legatee of the Will (supposing the Husband's estate to have been divided between the Widows, and also supposing no such division to have been made)? And is a Widow competent to make a Will in favour of her Brother and Father under the *Shasters*?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favour of the Appellant, and the correctness of this finding is not now impeached.

Upon the other issues the Principal *Sudder Ameen* found—first, that the Respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcileable with the averments made by her in the suit, under Act, No. XIX. of 1841, wherein she had

(a) Mussumat Lutchmee v. Bhugwandeen & others.

supported the claim of *Hunwunt Pershad;* secondly, that by reason of the partition, *Doola Baee* was fully competent to leave her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an appeal to the *Sudder* Court at *Agra*. The first judgment of that Court was adverse to the finding of the Principal *Sudder Ameen* on the first and second issues, and decided that the Respondent, notwithstanding her former acts and averments, was competent to maintain the suit. But holding, that *Doola Baee* was competent to dispose of the inheritance derived from her Husband, when it had been distinct and divided, and had effectually done so, it dismissed the appeal. It treated her power to dispose of the moveable property as certain; her power to dispose of the immoveable property as more open to question.

The Respondent applied for a review of this judgment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was, that the case was re-heard before a full Bench, when the Court decided that, according to the law of the *Benares* school, *Doola Baee* was incompetent to dispose of either the moveable or immoveable property which she had inherited from her Husband, and made a decree in favour of the Respondent. The present appeal is against that decree.

From the foregoing statement it is obvious, that the principal question between the parties is the broad and general one, whether, according to the law of the *Benares* school, a Hindoo Widow is competent to dispose, by Will or deed of gift, of either moveable or immoveable property inherited from her Husband, to the prejudice of his next heirs.

The learned Counsel for the Appellant have, however, contested the right of the Respondent to have the present case decided on this issue upon various grounds. They contend, first, that, if not precluded from maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Principal *Sudder Ameen*, she has so shaped her case on the pleadings, that she cannot in this suit insist on her rights, whatever they may be, as next heir of her Husband in succession to *Doola Baee;* secondly, that it was not competent to the *Sudder* Court, having regard to the application for review and the proceedings thereon, to review its first decision, except as to the immoveable property.

Two other points were taken at the Bar, which it will be convenient to consider after, rather than before the determination of the principal and general question of Hindoo Law. One was raised by Mr. *Leith* on behalf of the Respondent, and was to the effect that, as one of two Hindoo Widows taking as co-heirs to their Husband, she is in a more favourable position than that of person claiming as next heir of the Husband in succession to a single Widow deceased.

The other, which was taken by the other side, is what was the effect of the partition, either by way of enlarging the power of *Doola Babee* to dispose of the property, or affecting the right of the Respondent to question her disposition. Their Lordships will consider all these questions in their order.

At the close of the argument for the Appellant they intimated, that in their judgment the Respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her Husband against the claims of *Doola Baee*. Their Lordships agree generally in that part of the first judgment of the *Sudder* Court, which ruled that the Respondent, because she originally acquiesced in the title set up by *Hunwunt Pershad*, had not lost any rights which accrued to her as one of the co-heirs of her Husband, when that claim was decided to be untenable. Nor do they think, that her alleged alienation of her share can be urged against her by the Appellant as a bar to the present suit. It may have been an improper act; it may be one which *Doola Baee*, had she been the survivor of the two Widows, could have questioned, or which the next heirs of *Rae Deenanath* may yet question; but the improper alienation of part of her Husband's estate cannot affect the Respondent's right to recover other parts of it from those who,

if her view of the law is correct, have no title to it.

And upon the argument founded on the pleadings their Lordships have to observe, that the plaint does not inaccurately state the Respondent's claim to the right to succeed, on the death of *Doola Baee*, to that property which the latter took by inheritance from her Husband. The replication and the petition of appeal from the decree of the Court of First Instance are no doubt more open to the objection taken. In order to meet the case of quasi-estoppel set up, they attempt to draw a distinction between the claim to the original share which the Respondent took on her Husband's death, and her claim to that to which she became entitled on *Doola Baee's* death; and make some confusion as to the character of her heirship. But this mispleading has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case, it would be contrary to the practice of their Lordships to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is, whether the decree now under appeal ought to be reversed, so far as it affects the moveable property, merely on the ground that it was not competent to the *Sudder* Court to review its prior decree, with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied, that the proceedings on review were not within the powers of the *Sudder* Court. Two objections have been taken to them—first, that the Respondent never petitioned for a review of judgment, except as to the immoveable property; next, that whatever was the scope of her petition, the Order of Mr. *Gubbins* upon it, must be taken to have conclusively confined the review to the immoveable property.

Upon the first point their Lordships think, that the application for review must, on a fair construction of it, be taken to embrace the question as to the moveable as well as that relating to the immoveable property. The first plea seems to be confined to the latter; but the second plea is more general. It insists that the opinion of the *Calcutta Pundit* ought to be accepted as correct. That opinion made (as he himself stated in his second opinion) no distinction between moveable and immoveable property, but denied the right of the Widow to dispose of either, to the prejudice of her Husband's heirs.

Again, as regards the acts of the Court: the article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final Order contemplated by that section was the Order which, in the ordinary course, would have been made by Messrs. *Ross* and *Pearson* on the 15th of January, 1863. The proceeding of Mr. *Gubbins* was merely his fiat for the issue of that notice to the opposite party, which is required by the proviso of that section.

It may be admitted, that Mr. *Gubbins* understood the application to be limited to the immoveable property; that he so limited the notice; and that when the parties were together in presence before Messrs. *Ross* and *Pearson*, the written grounds for review impugned the correctness of the decision, so far as it related to the real property only. But the question still remains, whether it was not competent to the Judges, by whom the Order allowing or rejecting the application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There seems to be nothing in the Code of Procedure which expressly prohibits them from so doing. And their Lordships are of opinion, that Messrs. *Ross* and *Pearson*, though they might have made a final Order, granting or rejecting the application *in toto*, or in part, were not incompetent to make the qualified Order which they did make, leaving in the Court which was to review the decision, a discretion as to the extent to which the review should be carried.

They are also of opinion that, even if the Court below had been wrong in its procedure, its miscarriage ought not to prevent this Committee from deciding the question touching the disposition of the moveable estate on its merits. There has been no surprise. The question was fully

argued before the full Bench of the *Sudder* Court on ample notice to both parties. It has been fully argued here. The objection, therefore, is purely technical, and the result of yielding to it might be to place the Respondent at a very unfair disadvantage. She had a right to appeal to Her Majesty against the whole or any part of the first decree of the *Sudder* Court. She would not have lost that right of appeal even if she had limited her application for a review to the immoveable property. She was relieved from the necessity of appealing by obtaining a final decree in her favour as to the whole of the property, whether moveable or immoveable. If this objection were to prevail, there could be no final determination of the question as to the former or its merits; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her to appeal against that portion of the first decree of the *Sudder* Court. They are of opinion, that no such formality is necessary; and that it is competent to the Respondent, who has been brought here on appeal, to maintain, if she can, the decree which is under appeal, by showing that it is right upon the merits.

Their Lordships being, therefore, of opinion, that there is no obstacle to the determination on this appeal, and between these parties, of the general question involved in the judgment under appeal, will now address themselves to the consideration of that question.

The parties have brought together a large amount of conflicting authority concerning it, consisting partly of the *Bywustas*, or opinions of *Pundits*, partly of decided cases, and partly of passages from ancient or modern authorities, which are accepted as authoritative in the Courts of *India*.

It is impossible to reconcile the various opinions of the *Pundits* which are to be found in the Record. They are divisible into three classes—namely, first, that of opinions taken in other suits; secondly, that of opinions taken by the parties themselves for the purposes of this suit; and thirdly, that of opinions given in answer to the questions put by the *Sudder* Court in this suit.

Of the first class are No. 10 of the Record—probably No. 11 of the Record—No. 33 and No. 28 of the Record. Three of these are not very material. As far as they go, the first two support the contention of the Respondent; the third seems to be good law, but it has really no bearing on the question now under consideration. The point was, whether on the death of the Widow, the Daughter or a Nephew should succeed to property derived from the Husband; and inasmuch as the Widow could not have taken the property if it had not been divided, it followed that it must continue to descend in the course of succession to separate estate; and, therefore, to a Daughter before a Nephew. The fourth is strong against the right of a Widow to alienate immoveable property inherited from her Husband; and the case in which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same *Calcutta Pundit* who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a Widow has power to dispose of land inherited from her Husband.

The second class consists of No. 12 of the Record, being the opinion of thirty-seven *Benares Pundits* filed by the Respondent; and of No. 14 of the Record, being the opinion of twenty-one *Pundits* of the same place, filed by the Appellant. The first ruled that the surviving Widow was entitled to succeed to the share of the deceased Widow; and that that right could not be defeated by the disposition of the deceased Widow. The other goes the length of contesting the right of one Widow to succeed to another Widow of her deceased Husband in any case; it affirms the proposition that the property being once vested in the Widows, each had an absolute interest in her share, and might dispose of it as she pleased. It held also, that in the case of intestacy, the Father and Brother of the deceased Widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 of the Record, being the opinion of *Ram Nath*, one of the *Pundits* at the *Sudder* Court of *Agra*; of No. 7 of the Record, being the opinion of four *Benares Pundits*, taken by the Judge of that place, under

Orders from the *Sudder* Court at *Agra;* No. 5 of the Record, and No. 3 of the Record being the two opinions of *Heerna Nund*, the other *Pundit* at the *Sudder* Court of *Agra;* and No. 6 of the Record, and No. 2 of the Record, being the two opinions of the *Calcutta Pundit*. All these, except the later opinions of *Heerna Nund* and of the *Calcutta Pundit*, which were taken on the proceedings in review, were given in answer to the questions put by the *Sudder* Court before its first judgment.

The questions were prefaced by the following preamble, or statement:—

A dies, leaving two Wives, *B* and *C*, who inherit his property, real and personal. *B* and *C* make a complete partition of the property, and live separately from each other. *C* dies, having as blood relations a Brother and an Uncle; and the questions were—

First. Does the property left by *C* descend by inheritance to the other Widow, *B*, or to the Brother or Uncle of *C?*

Second. Would *C* be competent to bequeath by Will to her blood relatives the share of the property which she inherited from *A* (so divided,) to the prejudice of *B*, who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two Widows, and it substitutes an Uncle for the Father of the deceased Widow. The only variation in the references to the different *Pundits* was that, from accident or design, that to *Heerna Nund* was confined to real property.

To these questions the four *Benares Pundits* answered:—First, that the Brother of *C* was her foremost heir, and after him her Uncle, and that while these two existed *B* could not succeed. Second, that any Testamentary disposition by the Widow of the property which she had inherited from her Husband should be held valid, the property having been exclusively her own, and that she was, therefore, at liberty to dispose of it in any way she thought proper.

Three out of the four consulted *Pundits*, appear to be included amongst the twenty-one, who had previously given the opinion above referred to at the instance of the Appellant, and accordingly the two opinions are, as might be expected, to the same effect; except, perhaps, that the second does not deny so strongly as the first the right of the surviving Widow to succeed to the share of the deceased Widow in any case.

The answer of *Ram Nath* to the first question was, that *C's* share would descend by inheritance to *B*, because *C* could not be succeeded by her Brother or Uncle during the existence of her Husband's *sapinda;* and although, in his answer to the second question, he admits the power of *C* to defeat this right of *B* by her Will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly, "She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answers of *Heerna Nund* and the *Calcutta Pundit*, upon which the ultimate judgment was in great measure grounded, was, of course, in favour of the Respondents on both points. They, too, make no distinction between real and personal property. The first opinion of *Heerna Nund* was confined to real property; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following, then, is the result of the *Bywustas* of the *Pundits*:—If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court *Pundits* would agree in holding, that the Respondent, as the next heir of her Husband, is entitled to take by succession the share of *Doola Bace;* and that that right cannot be defeated, either as to moveable or immoveable property, by the Will of *Doola Bace*, *Ram Nath*, however, holds that, by reason of the partition, *Doola Bace* acquired the right of disposition. Again, the twenty-one or twenty-two *Benares Pundits* who are in favour of the Appellant's title are opposed by the twenty-seven *Pundits* of the same place, who have given their opinion in favour of the Respondent. And the *Bywustas* given in other cases are more favourable to the Respondent than they are to the Appellant.

The *Benares Pundits* who are in favour

of the Appellant refer only generally to the *Mitacshara*, but the particular passages on which they rely are probably the 1st and 11th sections of the second chapter, and especially the second article of the 11th section. Those passages, and the arguments in favour of the Widow's right of disposition which were deduced from them, were lately under the consideration of this Committee in the case of *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (11 Moore's I. A., p. 175; *post*, p. 238.) The following is the conclusion to which their Lordships then came:—"The result of the authorities seems to be that, although, according to the law of the Western schools, the Widow may have a power of disposing of moveable property inherited from her Husband, which she has not under the law of *Bengal*, she is, by the one law, as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her Husband." To the authorities then cited and reviewed by their Lordships may be added Sir *W. Macnaghten's* observations in his work on "Hindoo Law," Vol. I. pp. 19 to 21; Cases XIV. and XV. in the second Volume of the same work, pp. 32 and 37; and also some of the cases which will hereafter be mentioned, which, whilst they support the doctrine of the Widow's power to dispose of moveable property, admit that she cannot dispose of immoveable property inherited from her Husband.

It must, then, be taken upon the authorities to be settled law that under the law of *Benares* a Hindoo Widow has not the power to dispose of immoveable property inherited from her Husband to the prejudice of his next heirs; and the only question open to doubt is, whether she has any such power over moveable property.

It must be admitted that, in favour of this supposed distinction, there appears at first sight to be a considerable body of positive authority. In the case of *Cossinauth Bysack* v. *Hurroosoondury Dabee*, the leading case upon the rights and disabilities of a Hindoo Widow in *Bengal*, it was at first supposed that the distinction was recognized even by that School. The first decree in that case declared the Widow entitled to an interest for life in the immoveable, and to an absolute interest in the moveable estate of her late Husband. That was altered by the decree made on a Bill of review, which declared her entitled to the real and personal estate of her Husband, to be possessed, used, and enjoyed by her as a Widow of a Hindoo Husband, dying without issue, in the manner prescribed by the Hindoo law. On an appeal from that decree the whole subject was reviewed by Lord *Gifford*. His judgment (which is reported in the Appendix to Mr. *Longueville Clark's* Rules and Orders), whilst it establishes that, according to the law of *Bengal*, there is no distinction between moveable and immoveable property in respect to the Widow's power of disposition over it, seems to proceed on the ground that the Treatises known as the *Vivada Chintamani* and the *Ratnacára* are overruled and qualified in this respect by the *Daya-Bhága* and *Dayatutwa*, which give the law to *Lower Bengal*, and that where the two former Treatises prevail the distinction may exist. This judgment, therefore, affords some ground for the argument that the law of *Bengal*, which does not recognize the distinction, is an exception from the general Hindoo law. Again, in *Rajunder Narain Rae* v. *Bijai Gobind Sing* (2 Moore's Ind. App. Cases, 181; 1 P. C. J., p. 175.) decided here in 1839, the right of the Widow to dispose of moveable property inherited from her Husband, and its devolution on her dying intestate, are treated as open questions under the law of the *Mithila* school.

Of decided cases affirming the distinction, we have that in the High Court of *Bengal*, which was cited at the Bar from the Indian Jurist of the 31st of March, 1866, p. 128; and which appears to be a case governed by the law of the *Mithila* school. We have further the four cases cited in the judgment in that case, of which two show that the distinction has been recognized by the *Sudder* Court of *Madras* as prevailing in the Presidency of *Madras*; and two show that it has also been recognized by the High Court of *Bombay* as prevailing in that Presidency. And, lastly, we have Case VII., at p. 46 of the Second Volume of Sir *W. Macnaghten's* "Hindoo Law," in

which the law which ought to have been applied was that of the *Benares* school.

If it were clear that the law upon the point in question were necessarily the same for all parts of *India* except those Provinces of *Lower Bengal* which are governed by the *Daya-Bhága*, these cases might afford ground for saying that the doctrine under consideration, however questionable originally, must be taken to be now established by a course of decisions.

Is, however, this uniformity of the law to be presumed?

The Judges, indeed, of the High Court of *Calcutta* say, in the judgment just referred to, "This case comes from *Tirhoot*, one of the Districts forming the ancient Province of *Mithila*, but the law is admittedly the same in this particular both for *Mithila* and for the Provinces governed by the *Mitacshára*." Their Lordships, however, are not satisfied that this statement is correct.

The *Mitacshára* is no doubt accepted as a high authority by all the Schools, even by that of *Bengal*, when it is not controlled by the *Daya-Bhága*, and other Treatises peculiar to that School. But the other four Schools have, like that of *Bengal*, though in a less marked degree, their particular Treatises and Commentaries which control certain passages of the *Mitacshára*, and give rise to the differences between those Schools. In proof of this, it is only necessary to refer to the preliminary remarks of Sir *William Macnaghten*, pp. 21 to 23. From these it would appear that, whilst the *Mithila* School follows implicitly The *Vivada Chintamani* and the *Ratnacára*; the South of *India* the *Smriti Chandrika* and the *Madhavya*; and the Presidency of *Bombay* the *Vyavahára Mayúkha*; these works are by no means help in equal estimation at *Benares*.

Now, it appears from the judgment of Lord *Gifford*, that the works which were supposed to go furthest towards establishing the distinction between moveable and immoveable property, which is now under consideration, were the *Vivada Chintamani* and the *Ratnacára*. These may well be taken to establish such a distinction, according to the law of *Mithila*, and yet fail to do so according to the law of *Benares*. Again, the *Mayúkha* is cited as an authority for the decision of the case, at p. 43 of the second volume of *Macnaghten's* Hindoo Law. And, in the judgment under appeal, it is expressly stated that that Treatise is not accepted as an authority by the *Benares* school; and, consequently, that the case in question was not binding on the Court. In like manner the law established by the two decisions at *Madras*, if it be so established, may depend on Treatises and authorities peculiar to the South of *India*, and not accepted at *Benares*. From the reports of these, at p. 117 of the *Sudder* Decisions for 1849, and at p. 77 of the *Sudder* Decisions for 1850, it appears that both were decided on the *Bywustas* of *Pundits*. In the former case the authorities relied on by the *Pundits* are not given; but in the latter, mention is made of the Books called *Madhaveyen* and *Suraswativilása*, as well as of the *Mitacshára* (there called *Vijnyáneswara*); and it appears, from Sir *William Macnaghten's* remarks, that the two latter works are of paramount authority in the Territories dependent on the Government of *Madras*, whilst they are not enumerated amongst the works accepted at *Benares*.

If this be so, it follows that, even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of *Calcutta*, in so far as it confirmed the title of the Purchaser of the Government promissory notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the second volume of *Moore's* Indian Appeal Cases, were determinable by the law of *Mithila*; the two cases in the High Court of *Bombay*, and the cases, No. VII., at p. 46 of the Second Volume of *Macnaghten's* "Hindoo Law," were decided according to the peculiar law of the *Bombay* Presidency, including the *Mayúkha*; and those at *Madras* according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of *Benares*.

How, then, does the law stand independently of these decisions?

The startling differences of opinion amongst the *Pundits* show that the question cannot be taken to be clearly settled by the authorities accepted at *Benares*.

The text of the *Mitacshára*, on which, as has already been shown, the Appellant must mainly rely, is the second paragraph of section XI. of Chapter II., which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. These words make no distinction between moveable and immoveable property; yet it is settled, beyond all question, as we have already stated, that the immoveable property which a woman inherits from her Husband cannot be disposed of by her, and does not pass as her *stridhun*. The legitimate inference from this seems to be, that neither moveable or immoveable property inherited from her Husband forms part of a woman's *peculium* or *stridhun*. Sir *William H. Macnaghten*, indeed, ("Hindoo Law," Vol. I., p. 38,) excludes from *stridhun* all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit; that it includes under the head of *stridhun* all property inherited from the Husband; that from the fact of its inclusion the power of disposition over it is *primâ facie* to be inferred; but that the right to alienate immoveable property, whether inherited from the Husband or given by him in his life-time, having been taken away by positive texts, the distinction in this respect between moveable and immoveable property has arisen.

This argument, however, would fail to show why immoveable property, inherited from a Husband, should not (and all the decided cases show it does not) descend as *stridhun;* but passes, on the Widow's death, to the next kin of the Husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immoveable property given to her by her Husband in his life-time, are different from those which both restrict her power over immoveable property inherited from her Husband, and regulate the course of its devolution.

To the former class belong the text of *Nareda:* "Property given to her by her Husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses;" and the text of *Katyáyana:* "What a woman has received as a gift from her Husband she may dispose of at pleasure after his death, if it be moveable; but as long as he lives, let her preserve it with frugality." To the second class belongs the text of *Katyáyana*, on which the judgment under appeal so much proceeds, viz.: "The childless Widow preserving inviolate the bed of her Lord, and strictly obedient to her spiritual Parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these Texts as rendered by *Colebrooke*, Dig., Vol. III. p. 575 and p. 576.

It is impossible to deny, as will be seen on reference to the Digest, that there has been a considerable conflict of opinion amongst the Commentators concerning the texts. The better opinion, however, seems to be, that they relate to different subjects.

Again, the latter text certainly includes both moveable and immoveable property; and it seems to be only by reason of confounding the law as to property given by, with that relating to property inherited from the Husband, that the words "after her the legal heirs shall take it" can be restricted to the immoveable portions of the Husband's estate. The preponderance of authority is certainly in favour of the proposition that, whether the Widow has or has not the power to dispose of inherited moveables, they, as well as the immoveable property, if not disposed of, pass on her death to the next heirs of the Husband.

It is also worth remarking, that the doctrine that property inherited from her Husband forms part of a woman's *stridhun* receives no countenance from two of the Treatises current in other Schools which are supposed to recognize the Widow's power to dispose of moveables so inherited. Both the *Vivada Chintamani* and the *Mayukha* confine *stridhun* within the definitions of *Menu* and *Katyáyana*. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the *Mitac-*

shâra, but are excluded by Sir *W. Macnaghten*.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no son." The *Vivada Chintamani* expressly says (p. 262,) that the text of *Katyáyana* does not refer to the peculiar property of a woman; and although it cites from *Katyáyana*, "Let a woman on the death of her Husband enjoy her Husband's property at her discretion," and explains "that this refers to property other than immoveable," it also, at page 292, quotes from the *Mahabharata*, "For women the heritage of their Husbands is pronounced applicable to use. Let not women on any account make waste of their Husband's wealth;" to which it adds, by way of explanation, "Here waste means sale and gift at their own choice." (See *Vivada Chintamani*, pp. 256 and 266, and *Mayukha*, pp. 78 and 84.)

Another argument against including the wealth inherited from her Husband in a woman's *stridhun*, as defined by the 2nd clause of the 11th section of the 2nd chapter of the *Mitacshára*, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the Husband to be, in default of the issue, the heir to "the whole property as before described, cl. 11." This is intelligible, if the words "property which she may have acquired by inheritance," in the second clause, are considered to be property inherited in her Husband's life-time, or from some persons other than him.

The reasons for the restrictions which the Hindoo law imposes on the Widow's dominion over her inheritance from her Husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient Texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the *Benares Pundits* is sufficient to show, that the supposed distinction between moveable and immoveable property is anything but well established in that School. And the unanimous judgment of the five Judges of the *Sudder* Court, supported by the opinion of the Court *Pundits*, has, in this case, ruled that the distinction does not exist. Such a judgment ought not to be lightly overruled.

Their Lordships, therefore, have come to the conclusion that, according to the Law of the *Benares* School, notwithstanding the ambiguous passage in the *Mitacshara*, no part of her Husband's estate, whether moveable or immoveable, to which a Hindoo woman succeeds by inheritance, forms part of her *stridhun*, or particular property; and that the Text of *Katyáyana*, which is general in its terms, and of which the authority is undoubted, must be taken to determine—first, that her power of disposition over both is limited to certain purposes; and, secondly, that on her death both pass to the next heir of her Husband. They have already stated the grounds on which they think that the cases decided in *India* are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions; except that, in so far as they proceed—as that in the High Court of *Calcutta* unquestionably does in part proceed—on a different construction of the passage in the *Mitacshara*, they cannot be supported on that particular ground.

Their Lordships have now to consider, whether the effect of the so-called partition was to give *Doola Baee* any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a Widow, having a right to an ascertained share upon a partition with coparceners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question, whether her interest does not become absolute; though in a case coming from *Lower Bengal* the contrary was decided by this Committee on an appeal from the Supreme Court of *Calcutta*. But here the so-called partition was between two Widows, each having the limited interest

of a Hindoo Widow in her Husband's estate. It does not appear, that it was made at the suit or on the application of either. It was made by Order of a Judge who, in the particular proceeding (one under Act, No. XIX. of 1841,) had no jurisdiction to determine questions of title; and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either Widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her Husband.

It may be said, that the question here is only, whether the Respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and, as part of that contract, to release the rights of survivorship, supposing it to have been competent to the Widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition *in invitam*. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. The acquiescence of the Widows in the Judge's proceedings cannot have done more than bind each not to disturb other's possession.

If this be so, it follows that the opinions of those *Pundits* which were given in favour of the Appellant, on the assumption of a complete and regular partition, lose much of their power. It follows also, that the case of the Respondent is stronger than it would have been had she claimed merely as next heir to her Husband in succession to *Doola Baee*. For the estate of two Widows, who take their Husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property, to the exclusion even of Daughters of the deceased Widow (2 *W. H. Macnaghten's* "Hindu Law," p. 38, note 1.) They are, therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other. And, accordingly, this case might have been decided in favour of the Respondent on this ground alone.

Upon the whole, then, their Lordships are of opinion, that the decree under appeal is substantially right, and ought to be affirmed. Considering, however, that what has here been decided in respect to *Doola Baee's* interest is equally applicable to that of the Respondent, and that the latter is said to have assumed a power of disposing of her own share, they think it may be well to insert in the decree a declaration, that the property recovered by the Respondent is to be possessed and enjoyed by her as a Widow of a Hindoo Husband dying without issue, in the manner prescribed by the Hindoo Law. Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the *Sudder* Court of *Agra*. The Appellant must pay the costs of this appeal.

11th and 12th December, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

CAVALY VENCATA NARAINAPA,* ... } *Appellant*,

versus

THE COLLECTOR OF MASULIPATAM, ... } *Respondent*.

Mortgage by Hindu Widow—Onus Probandi—Mortgagee, rights of, against the Crown taking by escheat—Redemption.

A mortgage of a *Zemindary* being taken to secure a balance struck on a settlement of accounts, between a Hindoo widow and her creditor, of certain advances previously made under circumstances that would make them a charge upon her husband's estate or entitle her to alienate as against the next heirs; and it being shown that the widow succeed-

* 11, Moore's I. A., p. 619.

ed to the *Zemindary* encumbered with debts which she had no means of discharging, except the income of the *Zemindary*, which was admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and to provide for the expenses of her establishment and family, *Held* that the facts proved showing a strong improbability of the satisfaction of the debt, the *onus* of proof that the debt was subsisting at the date of the mortgage, could not be thrown on the Appellant (mortgagee);

That, because the Respondent had the right to demand the proof of the Appellant having a charge on the estate by the act of the widow, and of the debt being of a particular character, it did not follow the ordinary rule, which requires the party who alleges payment to prove payment, was to be invested in his favour, or that the debt was to be presumed to be satisfied unless the contrary was shown by the creditor, and

That the burden of proof that the settlement of account was not a *bonâ fide* transaction was upon the Reversioner.

Held, further, that the mortgagee was entitled to hold the *Zemindary* against the Crown taking it by escheat, as a security for so much of the said sum and of the interest thereon as then remained unpaid; and that the Crown would be entitled to redeem.

20th December, 1867.

THE appeal stood over for consideration.

Judgment was now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is the third appeal to Her Majesty in Council in this unfortunate case. On the first it was determined that the Crown, which is represented by the Respondent, was entitled to the *Zemindary* in question by escheat, subject to whatever interest the Appellant might have acquired therein by virtue of the transactions between his late Father and *Veregondah Lutchmedevammah*, the Widow of the last *Zemindar*. The Order in Council made on the second appeal, which bore date the 6th of January, 1862, amongst other things, declared, that the Crown, taking by escheat, had the same right to impeach the alienation of the Widow which the next heirs of the Husband (if such there had been) would have had; and that the Appellant, then the Respondent, was entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances (if any) made by his Father to the Widow, as were made for purposes for which, according to the Hindoo law, she would have been entitled to alienate the estate against the next heirs of her Husband, in so far as she had no other estate of her Husband to answer such purposes, —and by the same Order the cause was remitted to the *Sudder Dewanny Adawlut* of *Madras*, with directions to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the *Razenamah* relied on by the Appellant, and if not, to inquire what advances, if any, were made by the Appellant's Father to the Widow, and whether all, or any, and which of such advances, and to what amount, were made for the purposes for which, according to the Hindoo law, the Widow would have been entitled to alienate the estate as against the next heirs of her Husband, and whether the Widow had, when such advances were made, other estates of her Husband sufficient to answer such purposes.

The High Court sent down the issues so directed for trial in the *Zillah* Court. The judgment of the Civil Judge (Mr. *Elliot*) states very carefully the facts which he found to have been proved before him, and came to the following conclusions:—First, that the alienation by the Widow was for legal purposes sanctioned by the Hindoo law, and that the right of the Crown, as next heir of the Husband, was, therefore, actually defeated by the *Razenamah*; secondly, that the sums due for such advances amounted in April, 1838, to Rs. 48,614 13 as. 6 p., the balance of the account then adjusted and settled; and thirdly, that the *Zemindar*, the late Husband of the Widow, died possessed of no property available for any purpose, save and except the estate in dispute, which at his death was not unincumbered.

The decree of the High Court, made on appeal from this judgment, declared that the right of the Crown to take by escheat was not defeated by the *Razenamah*; that from the death of the *Zemindar* in 1810 up to 1813 advances were made to the Widow by the Appellant's Father for purposes for which, according to the Hindoo law, the Widow would have been entitled to charge or alienate the estate as against the next heirs of the Husband, and that on the 19th of May, 1822, the balance due to

the Widow on these advances, with interest, was about Rs. 20,000; that in the year 1828 a further advance of Rs. 1,033 3 as. 3 p. was made for similar purposes; and that when the before-mentioned advances were respectively made, the Widow had not other estates of her Husband sufficient to answer the purposes for which they were taken, and to which they were applied; but that the Defendant had not shown what, at the date of the advances last-mentioned, was the debt on the former advances, or whether such former debt, or any part of it, still subsisted; that no advances were made from that date to the date of the mortgage deed in 1838; and it lay upon the Appellant to show, and that he had failed to show, that the Widow was in debt to his Father at the date of the execution of the mortgage deed for advances made for the purposes aforesaid; and that accordingly the Respondent, on the part of the Government, was entitled to take the estate by escheat, unincumbered with charges created in favour of the Appellant or his Father.

Against this decree the present appeal has been brought; and their Lordships have now only to inquire what facts must be taken to have been proved on the trial of the issues directed by Her Majesty's Order in Council of the 6th of January, 1862, and what conclusions ought to be deduced from them.

That the *Zemindar*, the Husband of the Widow, died in debt, and left little or nothing except the *Zemindury* in question, is undisputed. There is, therefore, no contest as to the correctness of the conclusion to which both the Courts below have come upon the last issue. It seems to be also admitted that the gross annual revenue of the *Zemindary* was, on the average, little, if at all, in excess of Rs. 10,000, that the *Peishcush*, or Government revenue, was upwards of Rs. 4,000, and that the balance was not much more than would cover the *Zemindary* and other expenditure of the Widow. The probability, therefore, of her getting out of debt, if she ever found herself in debt to a considerable amount, was exceedingly small.

Again, it is proved, that the pecuniary transactions between the late *Zemindar* and the Uncle and Father of the Appellant (who were first cousins of his Wife,) began before the year 1804. This is shown by Exhibit No. XIII. (*a*) which both the Courts below

(*a*) Both parties entered into evidence. The Appellant's evidence consisted of the depositions of witnesses in favour of the genuineness of the documentary evidence, which consisted, so far as the same is material to mention, of the following documents, numbered respectively as follows:—No. XIII. A *Karanamah* Bond, dated the 9th of October, 1804, alleged to have been executed by *Varegondah Ramanappah*, the last *Zemindar*, to three Obligees, mortgaging twelve villages of the *Zemindury* for a term of eight years, as a security for 1,100 *hous* or *pagodas*, and stipulating that the Mortgagees should receive the profits of such villages, and credit the surplus after paying the Revenue Assessment against the debt. This Bond bore an indorsement to the effect, that on the 24th of September, 1800, or 1810, *Kavali Seethiah* paid the balance of principal and interest due as per accounts, after deducting the payments already made. No. XIV. A mortgage Bond alleged to have been executed on the 28th of December, 1810, by the Widow to *Kavali Seethiah*, mortgaging thirteen out of the fourteen villages of the *Zemindary* as a security for 5924¼ *hous*. and interest, of which 879 *hous* were said to have been borrowed by the Widow, as per accounts, extending from the 29th of February, 1810. This Bond stipulated that the Mortgagee should receive the profits, and thereout pay the revenue assessment and outgoings, and apply the balance in discharge of the debt. The Bond also stated as follows, "we have received the former Bonds, &c., relative to our *Taluq*, which you have returned to us." No. XV. A receipt, dated the 15th of January, 1811, (eighteen days after the date of the Bond,) given by the Collector for Rs. 620. 6 as. 3 p., paid through *Kavali Seethiah* for the revenue assessment up to November, 1810. No. XVI. A Document, dated the 28th of May, 1813, purporting to have been executed by *Kavali Seethiah* to the Appellant's Father, acknowledging the payment by the latter of the balance of debt due to *Kavali Seethiah* under the Bond of the 28th December, 1810. No. XVII. A notice from the Collector, dated the 11th of March, 1811, stating that there was an arrear in the discharge of revenue assessment up to that date, amounting to 1,400. 11. 30 star *pagodas*, being the amount of revenue assessment for a whole year. No. XVIII. An *Arsi*, dated the 11th of May,

have treated as genuine, and from which they have, as their Lordships think, legitimately inferred that the statements in Exhibit, No. XIV. (also found to be genuine) may be accepted as true. If this be so, we have it established that in 1810, when the Widow came into possession, her late Husband was indebted to the Appellant's Uncle, *Kavali Seethiah*, in a sum exceeding Rs. 20,000, and that she had to borrow from him a further sum amounting to about Rs. 3,200, in order to defray the expenses of her Husband's obsequies, and perhaps also for other purposes. That the debt so due to *Kavali Seethiah* was transferred to the Respondent's Father on the 15th of April, 1811, is proved by Exhibit, No. XVI.

It is unnecessary to consider, whether the debt thus assigned included any further sums paid for *Peishcush*, as the Appellant would infer from Exhibits, No. XV. and No. XVII., because the Courts below have, as their Lordships think, correctly held, that effect must be given to the Widow's admission, contained in her Letter (No. XVIII.) of the 18th of May, 1822; that at that date the debts on her own showing did not exceed the sum therein mentioned, a sum which this Letter states to be about Rs. 20,000, but which according to the printed record is Rs. 22,000. The antecedent proof, in the absence of any evidence to the contrary, is, their Lordships think, sufficient to establish that the whole of that sum represented debts which the Widow was entitled to charge upon the *Zemindary* as against the heirs of her Husband. The High Court has held, that the only other advance established to their satisfaction is that of Rs. 1,033. 3 as. 3 p. paid for *Peishcush* in 1828. And their Lordships will accept that finding as correct, though there is undoubtedly some evidence of other advances of the like nature.

This being so, the determination of this appeal must turn on the question, whether the High Court was right in holding, that it lay on the Appellant to show, by positive proof, what part (if any) of these debts remained unpaid in 1838, at the date of the mortgage, and that, in the absence of such proof, it was to be inferred that no part of these debts subsisting in 1822 or in 1828 was subsisting in 1838.

The Appellant had, no doubt, to sustain an extraordinary burthen of proof. He had to establish not only that he had a charge on the estate by the act of the Widow, but that the debt charged was of a particular character. He has shown that such a debt once existed. It does not, however, follow that because the Respondent had the right to demand this peculiar proof, the ordinary rule, which requires the party who alleges payment to prove payment, is to be inverted in his favour, or that the debt is to be presumed to be satisfied unless the contrary is shown by the Creditor. If, indeed, the facts had shown a strong probability of the satisfaction of the debt by the proper application of the sur-

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1822, and alleged to have been written by the Widow to the Collector, in which she stated, that up to that date, the debts on the *Zemindary* amounted to Rs. 20,000, and that she had borrowed large sums of money, and part of arrears of revenue due to Government. No. XXV. A Letter, dated the 30th of October, 1828, from the Collector to the Widow, stating that as she had not paid Rs. 1,033. 3 as. 3 p., the balance of the instalment due by her to the Government, he had ordered three of her villages to be attached. No. XIX. A Letter, dated 24th of November, 1828, written by the Widow to the Appellant's Father, in which she referred to the latter having paid off *Kavali Seethiah*, and having, in 1817, given her assistance in paying the revenue assessment, and requested an immediate loan to meet the demands of the *Circar*. No. XX. A petition, dated the 7th of January, 1832, preferred by the Widow to the Board of Revenue, stating that she had given away the *Zemindary* to *Kavali Vencata Rajeswara Row*, the grandson of her elder Brother, to whom she was "indebted in a very large amount," and asking that the *Zemindary* might be registered in his name. This petition made no mention of any debt owing to the Appellant's Father. No. XXI. The Mortgage Bond of the 20th of April, 1838, executed by the Widow to the Appellant's Father, to secure Rs. 48,614 13 as. 6 p., on which the Appellant founded his right to possession of the *Zemindary*, as against the Crown.

The Respondent examined witnesses, and produced documentary evidence, but neither the evidence of his witnesses nor the documents produced were found material to the points at issue.—11 *Moore's I. A.*, *pp.* 621—23.

plus revenues of the estate by the Widow, the High Court might have been justified in pressing against the Appellant the non-production of accounts, or of other satisfactory proof that the debt had not been so satisfied. They might legitimately have held, that the facts establishing that probability afforded *primâ facie* evidence of payment. But to their Lordships, it appears, that the facts proved are such as fairly lead to the opposite conclusion.

The Widow is shown to have succeeded to the *Zemindary*, encumbered with debts which she had no means of discharging, except the income, that is admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and provide for the expenses of her establishment and family. A landholder, whether male or female, when in such circumstances, rarely, very rarely in *India*, succeeds in getting out of debt. Again, in the present case, the *Zillah* Judge has shown that more than one of the years, in the course of which the process of payment is assumed to have taken place, were years of distress and famine, when the collections from the estate must have fallen short of the Government revenue. And there is also evidence of occasional litigation, in which the Widow had to defend her title against adverse Claimants. She seems to have been throughout her tenure of the estate a needy and embarrassed woman. Nor can their Lordships find reasonable grounds for assuming that, between the years 1822 and 1838, she was in a condition to make payments in excess of those which, from the account said to have been settled in 1838, it must be inferred that she had then made on account of interest.

The transaction of 1838, is on the face of it a settlement of accounts between the Widow and her Creditor; a balance struck; and a mortgage taken to secure that balance. It is treated by the Respondent as a mere contrivance to give the estate to the Appellant's family in accordance with the desire which the Widow's correspondence with Government shows she had expressed in 1832. There might be good grounds for so treating it, if the other evidence in the cause was in favour of the conclusion that she had then discharged the whole of the debts of Rs. 22,000, and Rs. 1,033. But their Lordships have already stated, that they cannot draw that conclusion from the evidence.

They think that the burthen of proof, that this settlement of accounts was not a *bani fide* transaction between the Debtor and the Creditor, lies on the Respondent, and that he has failed to adduce any evidence to that effect. Assuming it then to have been a *bonâ fide* transaction, it follows, that advances with which she was entitled to charge the estate as against her Husband's heirs had previously been made to her to the amount of Rs. 21,000 or Rs. 23,000; and that there is no sufficient proof that she had then paid off these debts. What, then, is the effect of the transaction? Those advances, with the interest thereon, would considerably exceed the sum secured by the mortgage. Their Lordships think, that it is a fair and just inference to take this sum of Rs. 48,614. 13 as. 6 p., which was secured by the mortgage, to be the balance due in respect of such advances after giving credit for all payments on account, and after deducting the Rs. 5,000, paid at the time of the settlement. If it be urged that the Appellant's case assumes other advances which the Courts below have not found to be of the character required, the answer is, that in a case like this, wherein both Debtor and Creditor were interested in appropriating the payments so as to make this balance a charge upon the estate, the transaction itself, which could only be valid in the event of appropriating the payments made towards discharge of advances which could not constitute a charge upon the estate, may reasonably be treated as evidence that such an appropriation was made. Their Lordships, therefore, are of opinion, that the Appellant has succeeded in establishing that, under the mortgage of 1838, his Father acquired a charge on the estate for the sum therein named, which, on the Widow's death, would have been valid against the next heirs of the Husband, if such there had been.

Further than this their Lordships are not prepared to go. They do not agree with the finding of the *Zillah* Judge, that the title of the Crown was absolutely defeated by the *Razenamah* of the 5th of

April, 1841. They do not think that the Crown is bound by that document, or by the judgment of the 20th of March, 1839, on which it was founded.

The result is, that their Lordships must humbly recommend Her Majesty to reverse the decree of the High Court, and to declare, that on the 20th of April, 1838, there was due from the Widow to the Father of the Appellant in respect of advances for which she would have been entitled to alienate the estate, as against the next heirs of Her Husband, if such there had been, the sum of Rs. 48,611. 13 as. 6 p.; that that sum was duly charged upon the estate by the mortgage of the 20th of April, 1838, and that accordingly the Appellant is now entitled to hold the *Zemindary* against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid. This declaration is fatal to the Respondent's claim to immediate possession of the *Zemindary;* but it will leave an equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for that purpose. It has, however, been suggested at the Bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the Order to be made on this appeal. But if they do not so agree, the Order which their Lordships must recommend to Her Majesty, as the consequence of the before-mentioned declaration is, that the Respondent's suit stand dismissed, without prejudice to the right of the Crown to redeem.

The Appellant is entitled to have the costs of this appeal and of the proceedings in the Courts below under Her Majesty's Order in Council of January, 1862, and the general costs of the suit below, except such portion of them as was occasioned by his contesting the title of the Crown to take by escheat. This latter portion ought to be borne by him, and unless already paid, should be set off in the usual manner. The apportionment of these costs will be dealt with by the Court below in *India*.

By an Order in Council made on the appeal, it was thereby ordered, that the decree of the High Court of Judicature at *Madras* of the 22nd January, 1866, be and the same is hereby reversed, and that it be, and it hereby is declared, that on the 20th of April, 1838, there was due from the Widow to the Father of the Appellant, in respect of advances for which she would have been entitled to alienate the estate as against the next heirs of her Husband, if such there had been, the sum of Rs. 48,611. 13 as. 6 p., that that sum was duly charged upon the estate by the mortgage of the 20th of April, 1838, and that accordingly, the Appellant is now entitled to hold the *Zemindary* against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid, and Her Majesty is further pleased to order, and it is hereby ordered, as the consequence of the foregoing declaration, that the suit of the Respondent do stand dismissed, without prejudice to the right of the Crown (if it shall so think fit) to assert its equity of redemption in a suit properly framed for that purpose, and the costs of this appeal, as well as the general costs of the suit below, are to be awarded in compliance with the terms of the Report.*

* The circumstances under which the Appellant claimed the *Zemindary* in question, and under which the two former appeals arose, are stated in detail in the reports of those appeals.—8 *Moore's I. A., pp.* 500 *and* 529; 1 *P. C. J., pp.* 752 *and* 820.

13th and 16th December, 1867.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Romilly (The Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Supreme Court at Calcutta.

BISSONAUTH CHUNDER and others,* ... } *Appellants,*

versus

SREEMUTTY BAMASOODERY DOSSEE and others, } *Respondents.*

Hindoo Law—Will—Construction—Joint family carrying on Testator's trade—Corpus of estate—Accumulations—Widow—Company's paper—Partnership assets.

A testator by his Will, directed his sons, continuing "joint in food," to take care of and look after his property moveable and immoveable and carry on his trading business. The Will further provided that if one of the sons should die leaving a son, the share of the son so dying would go to his son, or, in other words, the grandson of the testator; but that if any of the sons should die without a son, then the daughters of that son should receive Rs. 100, and his widowed wife, if she lived, being included as a member of the family, should receive the expenses of *brito neom* acts, and the other religious acts and ceremonies which she should perform; but, if she should prove ungovernable and, not living in the house, go and live elsewhere, or not wish to live in the family, should receive Rs. 2000 and be precluded from making any demand or claim on his moveable or immoveable property, trading business, estate, &c., upon the allegation of her husband's proper share. And should the sons disagree, the Will went on, after making certain directions as to the application of the income, to give a direction that the surplus was to be partitioned equally amongst them.—*Held,* upon the construction of the Will, one of the testator's sons dying without male issue,

I. That the interest which the testator gave to his sons was not accurately represented by the words "joint estate" in *England,* but was, as regards succession, more analogous to the tenancy in common which prevails in *England*;

II. That the share of profits made during the joint lives of the sons which belonged to the deceased son, should not follow his share of the capital and go over to the other sons, but to his heirs; and

III. That the testator did not attempt to dispose of, and that, if he had, could not have effectually disposed of the profits of his son.

Sreemutty Soorjeemoney Dossee v. *Denobundoo Mullick* (6 M. I. A., p. 526, 1 P. C. J., p. 583) cited and followed.

The partnership assets consisted in part of Company's paper which was taken in the name of the deceased son of the testator, or in his name jointly with the names of the other brothers and was indorsed and handed over to his brothers:—*Held* that that was a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership which would not affect the right that each son had to his share of the profits, not giving to the son who died, the exclusive right to Company's paper which he so even indorsed, though taken in his name alone, but making it only a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged.

IN this suit the question turned upon the construction of the Will of *Ramtonoo Chunder,* a Hindoo. The point raised being, whether the Plaintiff, as the Widow of *Muddoosoodun Chunder,* a Son of the Testator, was entitled to her Husband's share of the *corpus* of his Father's estate, and if not then, whether she was entitled to her Husband's share of the accumulations which accrued from the estate between the date of the death of the Testator, the Father of her late Husband, and the death of *Muddoosoodun Chunder,* his Son. The Plaintiffs' case was, that under the Will of the Testator, hereinafter set out, she was entitled to her deceased Husband's share of the *corpus.* On the part of the Defendants it was contended, that she was not entitled to anything beyond the sum of Rs. 2,000, bequeathed to her by the second paragraph of the Testator's Will.

The facts were these:—

Ramtonoo Chunder, a Hindoo resident in *Calcutta,* died in the year 1836, leaving five Sons, named *Nilmoney Chunder, Goluckchunder Chunder, Gocoolchunder Chunder, Muddoosoodun Chunder,* and *Bissonauth Chunder,* having previously made a Will.

The important passages in the Will (which was in *Bengalee*) were the following:—

"I am of advanced age, in ill health, considering the body perishable. My an-

* 12, Moore's I. A., p. 41.

cestral and self-acquired, whatever real and personal property, and trading business and dealings, that there are the same after my death, my five Sons, the eldest, *Sri Nilmoney Chunder*, the second, *Sri Goluckchunder Chunder*, the third, *Sri Gocoolchunder Chunder*, the fourth, *Sri Muddoosoodun Chunder*, the fifth, *Sri Bissonauth Chunder*, whatever these shall obtain and continue possessed of, and the *Dabee* services, the acts, ceremonies, &c., and to whomsoever whatever I intend to give, I direct the same in the following written paragraphs:—

"First paragraph.—My five Sons, the eldest, *Sri Nilmoney Chunder*, and second, *Sri Goluckchunder Chunder*, and the third, *Sri Gocoolchunder Chunder*, and the fourth, *Sri Muddoosoodun Chunder*, and the fifth, *Sri Bissonauth Chunder*, these, after my death, all continuing joint in food being unanimous, will preserve and look after my real and personal properties, &c., and business, trading business, &c., whomsoever, whatever there are the same, they will carry on conformably to the directions hereinafter written, they will perform the daily usual acts, &c., should they disagree and wish to separate, then deducting my real and personal properties and business, trading business, &c., they shall be unable to make and take a partition and division and demarcation, on account of my regulated acts, ceremonies, &c., and family expenses, and the profits and losses of the trading business, and after deducting the establishment charges, the surplus proceeds, the money that shall remain out of the same they will receive their respective shares.

"Second paragraph.—From amongst my aforesaid Sons, God forbid should any die without Sons, that is, die not leaving Sons, and leaving Daughters, and leaving a Wife; then the said Son's Daughters, each of them, will receive Rs. 100; and should his Widow continue in the family then, whenever whatever *brito neom* acts, ceremonies proper, that she perform, the expenses for the same she shall receive from my estate; should she be disobedient, and not remain in my House, depart, or live elsewhere; or, should she not wish to continue in the family, then the said Widow woman shall receive Rs. 2,000, on my real and personal properties, business, trading business, and properties, &c., she will be unable to make a claim or demand to her Husband's suitable share; and if, in like manner, the Son's Daughters have Sons born, then the said Sons, each person, will receive Rs. 200."

"Ninth paragraph.—From amongst my Sons, whenever whatsoever shall be the elder, under his direction all the business shall be performed, I hereby appoint the above five Sons the *Turney* of this my Will."

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellants.

Mr. *Kay*, Q. C., and Mr. *W. Pearson*, for the Respondents.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD ROMILLY:

Their Lordships are of opinion, that the decree of the Supreme Court of Judicature at *Calcutta* is correct. It is a question upon the construction of the Will, and the meaning of the Testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in *India* relative to these subjects.

It is important, in the first place, to consider what is the nature of the interest which he has given to his Sons. He has directed his Sons, using the words, "continuing joint in food," to take care of and look after his property, moveable and immoveable, and carry on his trading business. It is to be observed, that this interest is not accurately represented by the words "joint estate" in *England*, for if he had given the property simply to the Sons, with no further direction than that they should live jointly in respect of food, and one of the Sons had died, his share, with all the accretions, would have gone to his heir, to the person who was entitled to inherit according to the Hindoo law, so that in point of fact the interest was, as regards succession, more analogous to the tenancy in common which prevails in *England*. It is also proper to observe, that no analogy exists between the pre-

sent case and that to which it was endeavoured to be likened, viz., where a Testator in *England* has given the property to Executors for the purpose of carring on his trade, in which case a trust is imposed upon the Executors, who take no beneficial interest in it, and the question is, how the profits of that trade are to be divided amongst the persons who are pointed out by the Testator. It is, therefore, in this case important to observe, whether the Testator has pointed out in his Will how the share of his property is to go, upon the death of any one of his Sons, and also how far that direction extends. According to the Will, if one of the Sons had died, leaving a Son, the share of the Son so dying would have gone to his Son, or, in other words, the Grandson of the Testator. It is only in the event of his Son not leaving a Son that the Testator has directed that the share shall go to the survivors. This is of the more importance, because their Lordships are of opinion, that this construction is not lightly to be inferred, but that it is necessary that the Testator should express distinctly what his intention is. This they think that he has done. It was argued that a considerable distinction existed between this case and the case of *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (6 Moore's Ind. App. Cases, 526; 1 P. C. J., 583), because in that case one-fifth was given to each Son, and if one died, the fifth was given over; but their Lordships are of opinion, that the effect of this Will is to direct that the share which each Son took, and which would have gone to his heirs according to the Hindoo law, was, in the case of any one of his Sons leaving no Son, directed to go to the other Sons, if not in express words, still by a necessary inference to be drawn from the expressions used by him, and this is indeed the contention of the Respondents, and was so held in the Court below, from which decision the Appellants have not appealed. The question is, whether the share of profits made during the joint lives of the Sons which belonged to the deceased Son follows his share of the capital and goes over to the other Sons. In the first place, it is to be observed, that the Testator has given no direction to accumulate; it remains, therefore, to be seen, whether the Court can find, from the words of the Will, as was argued, an irresistible inference that such was the intention of the Testator. This is the more important, because in the case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (8 Moore's Ind. App. Cases, 66; 1 P. C. J., 721), which is relied upon as governing this case, there is an express direction to accumulate. It was there directed that the surplus was to be added to the capital. There is an absence of that in this case. It is admitted that the Testator could not dispose of the property of his Son, or prevent the heir of the Son from inheriting his property; therefore, the only question here is, whether the Testator has directed the accumulations of the property to be added to and made part of his own property, because if he has not, it was the property of the Son, and the Testator had no power of disposing of it.

In this view of the case their Lordships think that this Will, on whichever construction it is taken, shows an absence of any direction to accumulate. The first direction is, that the Sons should live joint in respect of food, and that they should carry on the trading business, and so forth. If the Will had stopped there, the only result would have been, that upon the death of this Son his heir would have taken his share in the business; but the Will goes on to give a direction, that should the Sons disagree, then, after making certain directions as to the application of the income, the surplus was to be partitioned equally amongst them. That is directly opposed to any accumulation. Nor does the Testator give any direction whatever in respect to what is to be done with the profits before they disagree and separate. It would follow, therefore, if the Will ended there, that the profits arising from the business would be the separate property of each of the five Sons in fifths, after they had provided for the carrying on of the business. We find nothing in the subsequent parts of the Will which interferes with that. The second section is the only part of the Will which relates to this subject. The Testa-

tor there directs, that if any of the Sons should die without a Son, then that the Daughters of that Son should receive Rs. 100, and his widowed Wife, if she lived, being included as a member of the family, should receive the expenses of *brito neom* acts, and the other religious acts and ceremonies which she should perform. Then he directs what is to be done, if ungovernable, and not living in his house, she should go and live elsewhere, or not wish to live in the family, then she "shall receive Rs. 2,000." Besides this, he directs that she shall not be able to make any demand or claim on his moveable and immoveable property, trading business, and estate, &c., upon the allegation of her Husband's proper share; that is to say, she is not to be at liberty to make any claim or demand upon the moveable or immoveable property of the Testator, and there it stops. This brings it round exactly to the same question, whether the Testator has in fact by these words disposed of anything more than the capital of the fund. The words he uses are: "my moveable and immoveable property, trading business, and properties, &c., she will be unable to make a claim or demand to her Husband's suitable share," that is, his share of the Testator's property; that is, the one-fifth of the trading business, which the Testator had given to him. If their Lordships are right in coming to the conclusion that the Testator has said nothing about what is to be done with the profits of the business, and has made no direction to accumulate, it necessarily follows, that those profits belonging to each of the Sons in fifths, and accordingly would be divided as such; and, therefore, upon the true construction of the Will, their Lordships are of opinion, that the Testator has not attempted to dispose of these profits, which are the property of the Son; if he had, a question might have arisen whether such a direction could have been a valid one or not, but their Lordships are of opinion, upon a fair construction of the words he has used, that it was his intention not to touch the question of profits, but to leave them to go as they would go, according to law, in case there was no disagreement between the Sons, the result of which would be that each would take a fifth of the surplus profits, that this fifth would be the property of each Son, and would go to his heirs, exactly in the same manner as any other property that he might acquire. It will be obvious, that if the Son had taken his share of the profits, and invested it in the purchase of any other property, no question could have arisen. It is a fair inference also that the view that he took in case they disagreed, viz., that they should divide the surplus profit, is a sort of guide for what he intended they should do in case they did not disagree at all.

Their Lordships also think, that this case is exceedingly close upon the case of *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (6 Moore's Ind. App. Cases, p. 526; 1 P. C. J., p. 583), and, although they would reluctantly allow, in the construction of a Will, the construction of one Will to be an imperative guide for the construction of another, where the expressions were not identical, still they think that the principles laid down in that case govern the present; and they concur with the observations made by Sir *Barnes Peacock* in delivering judgment, that the Testator has not attempted to dispose of, and, if he had, could not effectually have disposed of, the property of his Son.

There is another point relative to the property of the partnership, consisting of Company's paper. The facts of the case appear to be these: the partnership assets consisted in part of Company's paper, which were taken in the name of the deceased Son, or in his name jointly with the names of the other Brothers, and it was necessary that they should be indorsed. The result was, that he indorsed the Notes in blank, and gave them to his Brothers. This was, in their Lordships' opinion, a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership, which would not affect the right that each Son had to his share of the profits, not giving to the Son, who has died, the exclusive right to the Company's paper, which he so even indorsed, though taken in his name alone, but only making it a part of the assets of the partnership, in

which he would be entitled to his share after the expenses of partnership were duly discharged.

Their Lordships, therefore, will humbly recommend Her Majesty that the decision of the Supreme Court of Judicature at *Calcutta* be affirmed with costs.

6th, 7th, 9th, 10th and 19th December, 1867.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

On Appeal from the High Court of Judicature at Bengal.

BABOO BEER PERTAB SAHEE,* ... ... } *Appellant,*

versus

MAHARAJAH RAJENDER PERTAB SAHEE, ... } *Respondent;*

And cross appeal,

MAHARAJAH RAJENDER PERTAB SAHEE, ... } *Appellant,*

versus

BABOO BEER PERTAB SAHEE, ... } *Respondent.*

Impartible Raj, effect of regrant of, after confiscation for rebellion—Title of Rajah—Ben. Reg. XI. of 1793, not overriding descent according to family custom—Hindoo Law—Benares school—Will—Testamentary power—Nuncupative Will—Pleadings—Evidence.

Hunsapore, a large *Zemindary* and, like some other extensive *Zemindaries* in *Behar*, an impartible *Raj* descendible on the death of successive *Rajah* to his eldest male heir, had been in the family of the parties for many generations before the Company's accession to the *Dewanny*. *F.* was the *Rajah* in possession of the property in 1765, who, in consequence of his refusal to acknowledge the *quasi*-sovereign rights of the Co. or to pay revenue to them, was driven into the jungles by the Company's troops, and the property confiscated. In 1790, upwards of 20 years afterwards, this property was, however, conferred on *C.*, the next heir after extinction of *F.'s* line, as a matter of favour, in consideration of *C.'s* father and grandfather—*Held* that, the estate must be taken to have been the separate and self-acquired property of *C.*, that the fact that he was the member of a family which had so long held the estate next in succession to the line of *F.*, and the son and grandson of person who had established claims on the gratitude of the Company, might have been a motive determining the selection of him as grantee; but that it did not affect the nature of his estate or give it the character of ancestral property, and that the legal foundation of his claim was still the grant to him from those who had power to make or withhold it. The *Sivagunga* Case (9 M. I. A., p. 539; *post*, p. 25) cited and followed.

Held further that in the absence of any express intention of the grantor to alter the nature of the tenure, it must be presumed according to the policy of the Decennial Settlement that the settlement was made precisely as it would have been made, had the estate continued in the line of *F.* and that, therefore, the subject conferred on *C.* was the old *Zemindary* with all its incidents; that the selection of a member of the old family, next in succession to the excluded line, went a great way to show that the intention of Government was to restore the *Zemindary* as it had existed before the confiscation, making no further change than was involved in the forfeiture of the rights of *F.* and his descendants, and in the substitution of the person next in order of succession; and that consequently the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*.

The title of *Rajah* is not absolutely essential to the tenure of an estate as a *Raj*. (The *Tirhoot* Case, 6 M. I. A., p. 191; 1 P. C. J., p. 527) cited and followed.

Reg. XI. of 1793 does not affect the descent of large *Zemindaries* held as *Raj*, or subject to *Koolachar* or family custom.

Although the ancient Hindoo treatises make no mention of Wills, yet it is now a settled law that the testamentary power of a Hindoo exists and may be exercised within the limits which the law prescribes to alienation, by gift *inter vivos*.

Accordingly, a Hindoo without male descendants, may under the *Mitakshara* even dispose, by Will, of his separate and self-acquired property, whether moveable or immoveable; and one having male descendants may so dispose of self-acquired property, if moveable, subject, perhaps, to the restriction that he cannot perhaps wholly disinherit any one of such descendants.

If a *Raj* is granted descendible according to custom, to the eldest male heir, and the grantee a Hindoo under the *Mitakshara* leaves it by a Will to one of his great-grandsons, to the exclusion of all his grandsons, the eldest grandson consenting to it,—*Held* that the question whether according to the *Benares* school, a Hindoo can by Will make an unequal distribution of his self-acquired property among his male descendants without their consent does not arise; that the only person entitled to impeach the Will is the eldest grandson; that there are no inchoate rights of inheritance in the junior members of the family; that they do not by their birth acquire that community of interest with their grandfather in his self-acquired

* 12, Moore's I. A., p. 1

lands which is the foundation of the supposed restriction on his power; and that, *cessante ratione cessat et ipso lex.*

A party setting up a nuncupative Will and resting his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

4th March, 1868.

JUDGMENT having been reserved, was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The subject of this appeal is the right of succession to the very considerable estate of the late *Maharajah Chutterdharee Sahee*, who died at *Hutwah* in *Zillah Sarun*, on the 16th of March, 1858. He was the owner of a large *Zemindary* called *Hunsapore*, which had been in the family of which he was a member for many generations before the East India Company, under the grant of the *Dewanny* in 1765, became the virtual rulers of *Bengal*, *Behar*, and *Orissa*. Like some other extensive *Zemindaries* in *Behar*, it was during that period an impartible *Raj*, and by family custom descended on the death of each successive *Rajah* to his eldest male heir, according to the rule of primogeniture, who took the whole, subject to the obligation of making to the junior members of the family certain allowances by way of maintenance called *Babooana*. The nature of the tenure, and the custom regulating its descent, were no doubt in dispute in the Courts below, but the evidence establishing them is conclusive; and accordingly they were faintly, if at all, contested on this appeal. The *Rajah* in possession of the property when the East India Company assumed the Government of the Province was one *Futteh Sahee*. In consequence of his refusal to acknowledge the sovereign or *quasi*-sovereign rights of the Company, or to pay revenue to them, a contest ensued; and about the end of 1767 he had been driven from *Hunsapore* by the Company's troops into the jungles dividing their territories from *Goruckpore*, which then formed part of the dominions of the *Nawab Vizier* of *Oudh*.

The East India Company thereupon attached the estate of *Hunsapore*, and let it out to farmers. *Rajah Futteh Sahee*, however, from his retreat in the jungles, or in the dominions of the *Nawab Vizier*, in which he seems to have had another estate, made sundry incursions upon it, and is supposed to have killed *Govindram*, one of the farmers under the East India Company. Soon after that occurrence there was a sort of treaty of peace between him and the Company's Government; he was permitted to return to *Hunsapore*, and received an allowance by way of maintenance, but was not restored to the possession of the estate. That arrangement lasted only two months; he again withdrew from the Province, and renewed his predatory life on its borders. And in May, 1775, he attacked and murdered his own cousin, *Bissunt Sahee*, the Grandfather of *Chutterdharee Sahee*, who was then the rentor or farmer of *Hunsapore* under the East India Company. It will hereafter be necessary to consider more particularly the acts of the Government and its Officers during their possession of the estate. For the present, it is sufficient to state, that the Company retained possession of it from the date of the first expulsion of *Rajah Futteh Sahee* until 1790, either making the collections by their own Officers, or letting it out to farmers; but in either case applying the whole of the surplus revenue to their own purposes. In 1790, however, when the Decennial settlement was in contemplation, or in the course of being made, the Government of Lord *Cornwallis* granted the property to *Chutterdharee Sahee*, then a minor, under circumstances which will be more particularly considered hereafter.

Chutterdharee Sahee attained his majority in 1802. In 1837 the title of *Maharajah* was, on his application, conferred upon him by Government for the first time. He had not previously been distinguished by any title from other *Zemindars*.

The pedigree in the Appellant's case (the correctness of which is not disputed) shows that the late *Maharajah Chutterdharee Sahee* had two Sons who predeceased him. The elder of them, *Ram Sahee*, left two Sons, viz., *Ongur Pertab* and *Deoraj*,

and the other, *Pritipal Sahee*, also left two Sons, viz., *Tillukdharee* and *Baboo Beer Pertab Sahee* (the Appellant.) These four Grandsons were living at the time of the *Maharajah's* death, and were his co-heirs according to the ordinary Hindoo law of inheritance. *Ongur Pertab* is the Father of the Respondent, the *Maharajah Rajender Pertab Sahee*. Upon the death of *Maharajah Chutterdharee Sahee*, a contest arose as to the succession to his estate; *Deoraj*, *Tillukdharee*, and the Appellant, insisting that it descended as *ab intestato* to his four Grandsons in equal shares, according to the ordinary course of the Hindoo law; the Respondent setting up the exclusive title, which will be next stated, and *Ongur Pertab* favouring the pretensions of his Son, and relinquishing his own rights in his favour.

The title set up by the Respondent is, shortly, as follows:—

The late *Maharajah* had for several years before his death expressed his desire that his estate should descend, as the *Raj* of *Hunsapore* had up to the time of *Rajah Futteh Sahee* descended to a single heir; and that the Respondent, in whose favour his Father had waived whatever rights he, as the eldest male descendant of the *Maharajah*, might possess, should be that heir. Accordingly, on the 15th of March, 1858, being the day before his death, the *Maharajah* made, in the presence of some members of his family, including the Appellant, and a considerable number of his servants and dependents, what in these proceedings is called a consignment *(Tusleem)* of the *Raj* to the Respondent. On the same day he caused his servants to write out four *Arzis*, for the purpose of notifying this fact to the principal authorities in the District, viz., The Magistrate, the Judge, the Collector, and the Commissioner. All these documents were directed to be forwarded to *Chuprah*, the *Sudder* or principal station of *Zillah Sarun*. Early the next morning the *Maharajah* directed his servants to prepare a similar *Arzi* for transmission to the Deputy Magistrate, Mr. *Lynch*, who lived at *Sewan*, a place much nearer than *Chuprah* to the *Maharajah's* residence at *Hutwah*. Before this was done, Mr. *Lynch*, accompanied by Dr. *McDonnell*, the Sub-Deputy Opium Agent of the District, called to pay a visit at *Hutwah*. They had an interview with the *Maharajah*, who presented the Respondent to them as his heir; recommended him to Mr. *Lynch's* protection; and told him that an *Arzi* to his address was in course of preparation, and would be forwarded. That *Arzi* accordingly varies in form from the others by introducing the circumstance of this visit. Later in the day the *Maharajah* gave what is called "*Tilluck*" to the Respondent; and afterwards caused his servants to prepare a testamentary paper, which he executed. He died somewhat suddenly about 4 P. M. of the same day.

In these circumstances, the Respondent rests his title to succeed to the whole estate of his Great-grandfather, first, upon the several before-mentioned acts of the *Maharajah*, relying on the latest instrument as a Will, but insisting that if that be not well proven, there is *aliunde* sufficient evidence of a disposition by nuncupative Will in his favour. He contends, however, further, that the *Raj* being impartible, and descendible by custom, according to the rule of primogeniture, he, by reason of his Father's abdication in his favor, is entitled to it to the exclusion of the other members of the family, independently of any act of the late *Maharajah*. But he admits, that in either case they are entitled to have *Babooana* allowance of a proper amount assigned to them.

The contest between the parties was commenced very shortly after the death of the late *Maharajah* by those summary proceedings touching the fact of the right of possession, which are in *India* the ordinary prelude to a regular suit for the determination of a disputed title. The Respondent, on the 26th of March, instituted a proceeding before the Collector for the mutation of names, and this was opposed by the Appellant, and also by *Tilluckdharee* and *Deoraj*. The Respondent also instituted a summary suit in the Judge's Court for a certificate under Act, No. XX. of 1841, as to the whole estate of the late *Maharajah*, which was met by cross suits of the same nature by the Appellant, *Tillukdharee*,

and *Deoraj*, for certificates confined to their respective shares. The three last-mentioned parties also instituted two suits in the same Court, under Act, No. XIX. of 1841, for the appointment of a Curator. All these suits were decided in the Respondent's favour by the Judge on the 22nd of May, 1858, and his judgments were confirmed on appeal by the *Sudder* Court in the month of August, 1858. And, on the 14th of June, 1858, the Collector, proceeding in part on the decisions of the Judge in the last-mentioned suits, granted the mutation of names for which the Respondent had applied. That Order was confirmed by the Collector on the 5th of August, 1858, and again by the Commissioner on the 8th of October, 1858. The effect of these preliminary proceedings was to put the Respondent in possession of the whole of the estate under the title set up by him, and to cast upon the rival Claimants the burthen of disputing that title in a regular suit.

Deoraj did not accept this burthen, but seems to have abandoned his claim, after making an arrangement with the Respondent for his *Babooana* allowance. The Appellant, however, and his Brother, *Tillukdharee Sahee*, commenced the suit out of which this appeal has arisen on the 31st of December, 1858; but the latter, after the decrees in the Respondent's favour had been made in it, also came to an arrangement touching his allowance, and abandoned the appeal which he had contemplated. His claim, therefore, is now no longer in question; and it will be convenient to treat the suit as one between the Appellant alone and the Respondent.

The Appellant insists on his title as one of the co-heirs of the late *Maharajah*, according to the ordinary Hindoo law. He impeaches, as fraudulent fabrications in support of the Respondent's title, the Will and the several *Arzis*, or petitions, alleged to have been sent by the *Maharajah's* desire, and under his seal, to the different Civil authorities of the District; and he denies that the alleged consignment or installation of the Respondent took place. These are all questions of fact. But he further denies, as matter of law, the power of the *Maharajah* to make a Will to the prejudice of his male descendants, of whom he is one. He contends that whatever may have been the previous course of descent of the *Raj* of *Hunkapore*, according to family custom or otherwise, up to the time of *Rajah Futteh Sahee*, the law or custom determining that course of descent ceased on his expulsion; and that the grant to *Chutterdharee Sahee* was not one of an indivisible *Raj*, descendible according to a special custom, but one of a mere *Zemindary*, governed by the ordinary law. In his case he further contended, that even had the grant been one of a *Raj*, or had the *Raj* continued in the line of *Rajah Futteh Sahee*, the special rule of succession would have been abrogated by the provisions of Regulation XI. of 1793. These points, with one or two others, to which it is not necessary now to advert, seem to have been sufficiently raised by the amended issues settled in the suit.

The judgment of the *Zillah* Judge, Mr. *Wilkins*, which was given on the 24th of August, 1860, found that the family custom, according to which the estate was impartible, and descended to the eldest male heir, subsisted at and up to the time of *Rajah Futteh Sahee;* that this custom was not abrogated by his expulsion, the retention of the property by Government, and the grant of it to *Chutterdharee Sahee;* and that the estate was in his hands an impartible *Raj*, descendible to his next male heir alone, and, therefore, on the renunciation of *Ongur Pertab*, to the Respondent. The Judge made no distinction in this respect between the moveable and immoveable property, and, on the above ground, decreed in favour of the Respondent. He held, however, that the alleged consignment or transfer of the 15th of March, 1858, and the Will, were not well proven; and he decreed an allowance of Rs. 2,000 *per mensem* to each of the Plaintiffs, viz., the Appellant and his Brother.

The judgment of the High Court on appeal from this decree is dated the 28th of April, 1863. That Court also held, that the *Raj* was originally impartible, and descendible by custom to the eldest male heir alone; and that it did not lose

this character on its restoration to *Chutter-dharee Sahee*. It denied that there had been, or could have been, any confiscation in the proper sense of the term; and, in Mr. Justice *Levinge's* separate note, this point is more fully argued. But the High Court, differing therein from the *Zillah* Judge, affirmed the validity of the Will. It also reduced the allowance to each of the Plaintiffs to Rs 1,000 *per mensem*.

At the close of the argument for the Appellant, their Lordships intimated, that in their opinion the judgment of the High Court, touching the *factum* of the Will, was correct, and ought not to be disturbed. They will now state their reasons for coming to that conclusions.

That the disposition was in accordance with the *Maharajah's* general wishes and intentions is shown by the strongest and most trustworthy evidence. Upon this point the concurrent and unimpeachable testimony of the witnesses, *Dampier*, Dr. *Fleming*, *L. MacDonald*, *John Macleod*, *W. F. McDonnell*, *Tayler*, *R. Macleod*, and *Richardson*, being all of them European Gentlemen in the public service, or otherwise of respectable station, is to the effect, that from 1851 up to the time of his death, the *Maharajah* continuously entertained and constantly expressed the desire to keep his property together as a *Raj*, and his intention to make the Respondent his successor and universal heir.

That he retained that desire and intention on the morning of his death, and was then in full possession of his senses, is proved beyond all question by Mr. *Lynch* and Dr. *McDonnell*. The general intention of the alleged Testator in favour of the Respondent, and his testable capacity, are, therefore, established. It is true, that in the interview with Mr. *Lynch* and Dr. *McDonnell* the *Maharajah* did not express his intention to make a Will. It is also true, that to the *factum* of the Will there is no testimony but that of his native servants and dependents. It is, however, most improbable that the *Maharajah* should have relied on what passed between him and the two European Gentlemen when none of his family, except the Respondent, and but few of his dependents, were present. And though he might also have relied on the *Tusleem* or consignation, of the preceding day as public expression of his wishes, and the formal installation of the Respondent as the new *Rajah* (supposing that ceremony to have taken place,) yet it must be recollected that the question, whether the estate was impartible and descendible as a *Raj* was a doubtful one, and that he himself, as Mr. *Dampier* proves, had long known it to be so. There is, therefore, nothing improbable in the hypothesis that, pressed by this doubt, as well as urged by his strong desire to secure the succession to the Respondent, he may, even after his interview with Mr. *Lynch* and Dr. *McDonnell*, have conceived and executed the intention of making a Will, in order to supply by the force of that instrument any defects which his preceding acts may have left in the Respondent's title. And, if the positive testimony to the execution of the document is not of a high character, it is contradicted only by that of witnesses who, swearing to the actual incapacity of the *Maharajah*, are utterly discredited by the evidence of Mr. *Lynch* and Dr. *McDonnell*; and it is not contradicted (as it might have been contradicted) by the oath of the Appellant, whom the witnesses deposing to the *Tusleem* and to the execution of the Will state to have been present on both occasions. Their Lordships are aware that the latter inference is met, as usual, by arguments founded on the unwillingness of natives of rank to appear and be examined as witnesses in a Court of Justice. There are, however, examples, increasing, fortunately, in number, of men who disregard this prejudice; and considering the vastness of the stake, and the pointed manner in which the contradiction was challenged by the witnesses on the other side, their Lordships cannot think that the failure of the Appellant to tender himself as a witness is sufficiently accounted for by the feeling in question. In any case, the fact remains, that there is no contradiction of the Respondent's witnesses, except the testimony of witnesses wholly unworthy of belief, and that the probabilities are in favour of the truth of their story. Their Lordships must, therefore, hold, that the execution of the Will

has been proved; a conclusion which, though opposed to that of Mr. *Wilkins*, was also that of the Judge of First Instance and of the *Sudder* Court when dealing with the same question in the summary suits under Act, No. XX. of 1841, as well as that of the High Court in this suit. This being so, we have in the Will executed by the *Maharajah* a corroboration of the positive testimony as to the facts of the *Tusleem* or consignation, and of the execution and despatch of the *Arzis*, which far outweighs the arguments that have been founded on the lateness of the time at which four of the latter reached *Chuprah*. Nor do their Lordships see anything in the objection that the *Tusleem* and the execution of the Will are inconsistent acts; that if the former took place, the *Maharajah* had nothing to dispose of, and the Will was superfluous. Their Lordships look upon the events of the last two days of his life as a series of acts, of which the execution of the Will was the crowning one, all being designed by the *Maharajah* to effectuate, so far as his acts legally could, his intention to leave his estate as a *Raj*, and to make the Respondent his successor.

It is unnecessary for their Lordships to give any opinion upon the question raised in the Courts below of a disposition in favour of the Respondent by nuncupative Will. They will only remark, that they would have had much difficulty in supporting his title on that ground upon the pleadings and evidence in this suit. There was great confusion in the Courts below on this point. The Respondent seems at one time to have relied on the *Tusleem;* at another on what passed between the *Maharajah* and Mr. *Lynch* as a nuncupative Will. But if any party is bound to strictness of pleading, it is he who sets up a nuncupative Will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

Having thus determined the principal issues of fact on this appeal, their Lordships have now to consider, whether the *Maharajah* had by law the power to make the Will which he did make; and also by what law the succession to his property, and especially to that portion of it which formerly constituted the *Raj* of *Hunsapore*, is to be regulated if he had not the power to devise it.

In order to determine either of these questions, it is material to ascertain what was the nature of the estate or interest which *Chutterdharee Sahee* acquired through the acts of the East India Company's Government in 1790. And for that purpose it is necessary to go more particularly into the history of the estate after the expulsion of *Rajah Futteh Sahee*.

It has already been stated that, after that event, the property was for nearly twenty-three years held by the East India Company, who, whether they let it to Farmers, or kept it under their own management, applied the whole of the surplus revenues to their own use. During great part of that period, *Rajah Futteh Sahee* continued to wage war with them from his retreat in the jungles, or in the territories of the *Nawab Vizier*, and appears to have been consistently treated by them, at least after 1773, as a public enemy, with whom no terms should be made.

The murder of *Bishunt Sahee* took place, as before stated, in 1775. In 1778 the Revenue Council of *Patna*, on the application of *Mohesh Dutt*, the son of the murdered man, and the Father of *Chutterdharee Sahee*, proposed that *Rajah Futteh Sahee* should be declared to have forfeited his *Zemindary*, and that it should be bestowed on *Mohesh Dutt*, but the Government of *Warren Hastings* declined to comply with that proposal, or to do more at that time than hold out vague hopes of reward to *Mohesh Dutt* for his fidelity.

In 1784 the claims of *Mohesh Dutt* were again under the consideration of Mr. *Hastings'* Government. The proceedings that took place clearly show, that it was then considered that any grant to him, though he founded his claim on being the next heir to the *Zemindary* after the extinction of *Rajah Futteh Sahee's* line, was matter not of right but of favour; and that it was actually proposed to insert in the *Sunnud* by which any such grant

should be made, a condition for avoiding it in case the Grantee should, by negligence or from any cause unsatisfactory to Government, fail to deliver up the person of *Rajah Futteh Sahee* within one year. Ultimately nothing was done on this application; *Mohesh Dutt* afterwards died, and the estate remained as before in the hands of the East India Company.

In 1790, the question what should be done with it came before the Government of Lord *Cornwallis*, in consequence of the steps which were then being taken in order to effect the Decennial settlement. On the 16th of June in that year the Collector, Mr. *Montgomerie*, having received instructions for the disposal of all lands "the immediate property of the Company," wrote to inform the Board of Revenue that there were no lands within his District which answered that description, unless they were this *Zemindary* and another somewhat similarly circumstanced. On the 21st of July in the same year, the Board of Revenue submitted this Letter to Government, with a recommendation that such part of *Hunsapore* as was the property of *Rajah Futteh Sahee* should be declared confiscated, and sold subject to the interests of the existing Farmers. But on the 28th of July the Government, in answer to this communication, directed "that such part of *Hunsapore* as was stated by the Collector to have been the real property of the rebel, *Rajah Futteh Sahee*, should be conferred on the infant Son of the late *Mohesh Dutt*, after the usual publication had been made." That Letter also provided, that upon the lands being finally confirmed to the Son of *Mohesh Dutt*, he should receive the allowance fixed for disqualified landholders.

The Collector having, on the 18th of November, 1790, reported that "no admissible claim had been preferred to the lands ordered to be confirmed to *Chutterdharee Sahee*," the Board of Revenue, on 17th of January, 1791, recommended that *Chutterdharee Sahee*, the infant Son of *Mohesh Dutt*, should be "declared proprietor of the land in *Hunsapore*, which belonged to *Futteh Sahee*," and the Government, on the 21st of January, ordered accordingly.

A subsequent Letter of the Board of the 29th of April, 1791, fixes the *Malikana* allowance for the infant at S. Rs. 1,027. 7 as. 4 p. *per mensem*, and makes it payable from the 11th of October, 1790.

In October, 1802, *Chutterdharee Sahee* having come of age, entered into a formal engagement for the payment of the Government Revenue; and the revenue Officers who had managed the estate during his minority, relinquished it to him and issued a proclamation directing the *Ryots* and tenants to pay the collections to him. These documents, called respectively the *Dowl* and the *Amuldustuck*, are set out in the record, but they do not throw much light upon any of the questions raised in the suit.

It is material to observe, that during all these proceedings, *Rajah Futteh Sahee* and his line continued to exist, and that the latter exists to this day. He himself was alive in 1808, but had then become a *Fakeer*, having given up even his *Goruckpore* property to his family. In 1790 his Wife and one of his Sons appealed to Government for an allowance, but their application was rejected on the 25th of June in that year. In April, 1792, one of the Sons, and in April, 1808, four of the Sons of *Rajah Futteh Sahee* made applications for the restoration of the estate, and for allowances out of it. On the 29th of April, 1808, the latter application was rejected by Government in a Letter which stated that "the estate of *Futteh Sahee* had been forfeited to Government." *Areemurdan Sahee*, one (and apparently the eldest) of the four Sons, made similar claims by petition in 1816, and again in 1821. In both these petitions he stated, that his younger Brother had come forward before Mr. *Montgomerie* in 1790 claiming, on behalf of *Rajah Futteh Sahee's* line, to settle for the revenue. The claim, if made, was clearly treated as inadmissible. The Order indorsed on the petition of 1821 is to the effect that, "whereas the property of *Futteh Sahee* was confiscated on account of rebellion," no further proceedings on the petition are necessary. In June, 1829, the Great-grandson of *Rajah Futteh Sahee* brought a regular suit against *Chutterdharee Sahee* and the Government for the

recovery of the estate, which was dismissed on the simple ground that the claim was barred by the Regulation of Limitations. And the same persons seem to have appeared on the proceedings before the Collector of the 14th of June, 1848, which is above referred to, alleging that the grant to *Chutterdharee Sahee* was for life only, and again setting up his own title as the descendant and representative of *Rajah Futteh Sahee.*

On these facts, it is at least clear, that there was a virtual confiscation of the interest of *Rajah Futteh Sahee* and his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. The Government has not only persistently treated the estate of *Rajah Futteh Sahee* as forfeited, and refused to recognize any claim on the part of his descendants; it has for more than twenty years applied the revenue to its own purposes; it held itself at liberty either to reject (as it ultimately rejected) the applications of *Mohesh Dutt*, or to make a fresh grant of the estate to him, imposing new conditions upon the tenure; it held itself at liberty in 1790 to dispose of the property by sale, though as a matter of grace and favour it finally conferred it on *Chutterdharee Sahee.*

Their Lordships are, therefore, unable to see the force of the argument which the Judges of the High Court, and in particular Mr. Justice *Levinge*, have founded upon the supposed obligation of the East India Company to govern the Provinces which they held under the Mogul Emperor by virtue of the grant of the *Dewanny* according to Mahomedan law, and upon the doctrine of that law which denies to the ruling power the right to confiscate the property of a rebel. Such an argument might, perhaps, have been plausibly urged in the suit which the Great-grandson of *Rajah Futteh Sahee* brought against *Chutterdharee Sahee* and the Government, if that had ever come to a hearing. In this suit, however, both parties claim under *Chutterdharee Sahee;* and as between them, and for the purposes of this suit, it must be taken for granted that he derived his title (whatever may have been the nature of his estate, or the incidents to it) by grant from the East India Company, which had full dominion over the estate, and, therefore, the power to grant it.

One consequence from this conclusion (and it has a material bearing on the question of testamentary power) is, that the estate must be taken to have been the separate and self-acquired property of *Chutterdharee Sahee.* The fact that he was the member of the family which had so long held the estate, next in succession to the line of *Rajah Futteh Sahee*, and the Son and Grandson of persons who had established claims on the gratitude of the Company, may have been a motive determining the selection of him as Grantee; but it does not affect the nature of his estate, or give to it the character of ancestral property. The legal foundation of his title is still the grant to him from those who had power to make or to withhold it. This point was ruled in the *Shivagunga* case (9 Moore's I. A. Cases, 606; *post*, p. 25.)

The question remains, what was the nature of the estate granted, whether it was a fresh grant of the family *Raj* with its customary rule of descent, or a grant of the lands formerly included in that *Raj* to be held as an ordinary *Zemindary.*

There was not in this, as in the *Shivagunga* case, a new *Sunnud.* We have no evidence of the intention of the Grantors except that which is to be collected from the proceedings and correspondence already referred to, nor have we any record of the proceedings before the Governor-General, or any means of knowing the precise grounds on which Lord *Cornwallis's* Government rejected the recommendation of the Board of Revenue, and determined to confer the property on *Chutterdharee Sahee.* Again, it cannot be denied, that in these proceedings the term "*Raj*" is never used, or that in some of them the subject of the grant is spoken of as "the land in *Hunsapore* which belonged to *Rajah Futteh Sahee.*" On the other hand, there is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the Company, had never been broken up. The policy of the Decennial settlement was to form a body of landholders by ascertaining in whom the *Zemindary* interest

in the soil actually was, and making with those persons a Permanent settlement of the Government revenue, so as to give them greater fixity of tenure. Lord *Cornwallis's* Government determined to set up *Chutterdharee Sahee* as the *Zemindar* with whom the Settlement in respect of this property should be made. But the estate of a *Zemindar* was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent *Talookdars*, or other under-tenants, *Ryots* of various classes, and others; and the Decennial settlement, as a reference to the Rules re-enacted by Regulation VIII. of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed, that the Settlement was made precisely as it would have been made had the estate continued in the line of *Rajah Futteh Sahee;* and, therefore, that the subject conferred on *Chutterdharee Sahee* was the old *Zemindary* with all its incidents, excepting, at most, its descendible quality. It seems to follow, that the intention to alter that quality, if it existed, would have been expressed. Again, the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favour of the hypothesis, that the intention of Government was to restore the *Zemindary* as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of *Rajah Futteh Sahee* and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*.

The circumstance that the grant was in the first instance of the *Zemindary* without the title of *Rajah*, has been urged as a strong argument in favour of the Appellant's view of the case. But that the title was not absolutely essential to the tenure of the estate as a *Raj* is shown by the *Tirhoot* case (6 Moore's I. A. Cases, p. 191; 1 P. C. J., p. 527,) and in 1837 the title was conferred on *Chutterdharee Sahee* upon his application, founded on the fact, that it had been enjoyed by his predecessors, and annexed to the *Zemindary*. This act of the Government in 1837 could not alter the legal effect of what was actually done in 1790; but the grant of the title on this representation at least shows that the Government of 1837 did not dissent from the construction which *Chutterdharee Sahee* then put upon the acts of their predecessors in 1790.

Another argument for the Appellant is founded on Regulation XI. of 1793. Mr. *Field* does not contend, in the face of the authorities cited by Mr. *Leith*, that if the estate granted to *Chutterdharee Sahee* in 1790 was a *Raj*, descendible by family custom, according to the rule of primogeniture, it lost that character on the passing of the Regulation in question; but he insists on that Regulation as evidence of intention. He argues that, inasmuch as it was passed to reduce the number of estates descendible by special custom, the intention of Lord *Cornwallis's* Government was, presumably, to make the property restored to *Chutterdharee Sahee* subject to the ordinary law of succession.

Their Lordships, however, are of opinion, that they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790, from the passing in 1793 of a general law which, confessedly, does not affect the descent of the large *Zemindaries* held as *Raj*, or subject to *Koolachar*, or family custom.

Upon the whole, then, their Lordships have come to the conclusion, that the Courts below were right in holding that the estate granted to *Chutterdharee Sahee* in 1790 was the *Raj* of *Hunsapore*, and that the right of succession to it from him was to be governed by the law or custom which regulated its descent in the time of his ancestors.

This view of the case removes many of the objections to the testamentary power of the late *Maharajah*, which it is nevertheless necessary to consider, since the title of the Respondent to at least part of *Chutterdharee Sahee's* estate may depend on the Will.

It is too late to contend that, because the ancient Hindoo Treatises make no mention of Wills, a Hindoo cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation, by gift *inter vivos*. Accordingly, it has been settled that even in those parts of *India* which are governed by the stricter law of the *Mitácshará*, a Hindoo without male descendants may dispose, by Will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. It is, however, objected that a Hindoo in those Provinces who has Sons or other male descendants must, on the application of the doctrine in question, be held to be incapable of making by Will an unequal distribution amongst them of immoveable property, whether self-acquired or ancestral; because by the law of the *Mitácshará* his Sons in both cases take, on their birth, an interest in the property, which their Father without their consent cannot displace.

For the Respondent it is contended, that this question is concluded by the *Bithoor* Case (9 Moore's Ind. App. Cases, p. 96; 1 P. C. J., p. 843). It cannot be denied that in that case, the Testator being a *Mahratta*, domiciled at *Cawnpore*, and having real as well as personal estate, made by Will an unequal distribution of both amongst his Sons; and that his legal power to do so was affirmed by this Committee, and by both the Courts below. The Appellant, however, insists, that this decision is opposed to the law of the school of *Benares*, and relies on the texts of the *Mitácshará*, which show, that a Father cannot alienate his self-acquired estate, or make an unequal distribution of them by partition, without the consent of his Sons; and also upon passages in *Strange's* "Hindoo Law," and other authorities. Mr. *Leith*, on the other hand, has argued, that all these authorities are to be reconciled with the decision in the *Bithoor* Case, by holding, that they relate to property acquired by the Father, with the use or by the aid of ancestral estate; and that they have no application to separate any self-acquired property in the strict sense of the term. Their Lordships are relieved from the necessity of determining whether this distinction is well founded, or whether, if it be not so, the present case must be governed by the *Bithoor* Case. For if they are right in holding, that the grant was of a *Raj* descendible, according to custom, to the eldest male heir, the question, whether, according to the law of the *Benares* school, a Hindoo can by Will make an unequal distribution of his self-acqured immoveable property amongst his male descendants without their consent, does not in this case arise. The only person entitled to impeach the disposition by Will is *Ongur Pertab*, the eldest Grandson, who is a consenting party to it: There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their Grandfather in his self-acquired lands which is the foundation of the supposed restriction on his power. And, *cessante ratione cessat et ipsa lex*. (See the remarks of Sir *William Macnaghten* on the case of *Esanchund Rai* v. *Esheercund Rai* (1 Ben. Sud. Dew. Ad. Rep. 2.) 1 *W. H. Macnaghten's* "Hindu Law," p. 7.)

It follows, then, that either by the special law of inheritance, or by the Will, the Respondent was entitled to the estate of *Hunsapore*, and to whatever other wealth the late *Maharajah* could dispose of by his Will.

Mr. *Field* has objected, that this ruling does not cover that portion of the estate (if any) which came to *Chutterdharee Sahee* from his Father, *Mohesh Dutt*. This may be true, but their Lordships are of opinion, that the pleadings and evidence in this suit do not properly raise such a case, and utterly fail to show what that property (if any) was. And the Respondent being in possession of the whole, it was for the Appellant, if he failed to establish his title to share in the whole, to show in what part he was entitled to share.

With respect to the questions raised by either appeal touching the amount of the *Baboana* allowance, and the costs of the proceedings in the Courts below, their Lordships have only to say, that they see no sufficient ground for interfering with the discretion exercised on those points by the High Court. The result is, that their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross appeal with costs. The Appellant and the Respondent will each bear the costs of his appeal (*a*).

(*a*) Upon the nature of the tenure and right to succession to *Hunsapore*, whether it constituted, according to family custom and usage, at the date of *Maharajah Chutterdharee Sahee's* death, a *Raj*, impartible and indivisible, descending to a single male heir, as recognized by Hindoo law, the following cases and authorities were referred to :—*Urjim Manic Thakoor* v. *Ramgunga Deo*, 2 Ben. Sud. Dew. Ad. Rep., 139 ; *Ranee Soomitra* v. *Ramgunga Manik*, 3 Ben. Sud Dew. Ad. Rep , 40 ; *Maharajah Gurunarain Deo* v. *Anund Lal Singh*, 6 Ben. Sud. Dew. Ad. Rep., 282 ; *Anund Lal Singh Deo* v. *Maharajah Dheraj Gurroo Narayun Deo*, 5 Moore's Ind. App. Cases, 82 ; *Thakoorai Chutterdharee Singh* v. *Thakoorai Telukdharee Singh*, 6 Ben. Sud. Dew. Ad. Rep., 260 ; *Rawut Urjun Singh* v. *Rawut Ghunisiam Singh*, 5 Moore's Ind. App. Cases, 169 ; *Katama Natchier* v. *The Rajah of Shivagunga*, 9 Moore's Ind. App. Cases, 539 ; *Muha Raj Kowur Basdeo Singh* v. *Muha Rajah Boodur Singh Buhadur*, 7 Ben. Sud. Dew. Ad Rep., 228 ; *Baboo Gunesh Dutt Singh* v. *Maharajah Moheshur Singh*, 6 Moore's Ind. App. Cases, 164 ; *The Secretary of State in Council* v. *Kamachee Boye Sahaba*, 7 Moore's Ind. App. Cases, 476 ; *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhary*, 10 Moore's Ind. App. Cases, 279 ; *Koonwur Bodh Singh* v. *Seonath Singh*, 2 Ben. Sud. Dew. Ad. Rep., 92 ; *Ben. Reg.* XI., 1793 ; *W. H. Macnaghten's* "Hindu Law," Vol. I. p. 18, note ; *Strange's* "Hindu Law," Vol. I., p. 198, note 3 (2nd Edit.), *ib.*, p. 208, *ib.* Vol. II., p. 328 ; Institute of *Menu.*, ch. VIII. par. 41 ; *Elberling* on Inheritance, p. 69.

Or, whether, upon the grant and transfer by the Government to *Maharajah Chutterdharee Sahee*, the estate became a self-aquired *Zemindary*, and on his death divisible by the ordinary Hindoo law, *The East India Company* v. *Syed Ally*, 7 Moore's Ind. App. Cases, 555 were cited.

24th February, 1868.

PRESENT :

Members of the *Judicial Committee*,—The Right Hon. Sir William Erle, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Petition from the High Court of Judicature at Bengal.

NOGENDER CHUNDER GHOSE and MOHUNDER CHUNDER GHOSE,* ... } *Appellants*,

versus

MAHOMED ENSUFF and others, ... } *Respondents*.

Practice—Special leave to appeal—Review of Judgment.

In the particular circumstances disclosed in the petition, special leave to appeal from the decree of the High Court of the 1st of December, 1865 and the judgment or Order, on review of that decision, of the 1st of April, 1867 allowed, it having been laid down by the High Court in previous cases that if there is decision upon a review of judgment that decision is to be considered the final decree.

THIS was an application for special leave to appeal from a decree of the High Court, and a judgment or Order made on review of judgment, under the following circumstances :—

The petition set forth, that in the year 1861 the Petitioners, *Nogender Chunder Ghose* and *Mohunder Chunder Ghose*,

* 12, Moore's I. A., p. 107.

With respect to the capacity of Hindoo by the ordinary Hindoo law, to make a Will, assuming the property self-acquired, and the custom of descent to the *Raj* to a single heir not to prevail, *Nana Narain Deo* v. *Huree Punth Bhao*, 9 Moore's Ind. App. Cases, 96 ; and cases cited, p. 98 ; *Mulraz Lachmia* v. *Chalekany Vencata Rama Jaganodha Row*, 2 Moore's Ind. App. Cases, 54 ; *Rewun Persad* v. *Mussumat Radha Beeby*, 4 Moore's Ind. App. Cases, 137 ; *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 Moore's Ind. App. Cases, 72 ; *Morley's* Dig. tit. "Will," p. 676 ; *F. Macnaghten's* "Cons. on Hindu Law," p. 319 ; *Strange's* "Hindu

instituted a suit to establish their rights as *Zemindars* to certain alluvial lands which had been taken possession of by the Defendants on a claim of right thereto as proprietors of other land in the vicinity: that a plea of limitation was put in by the Defendants in bar of the suit, and a decree made by the Judge of the *Zillah Chittagong*, in favour of the Defendants, which decree having been appealed from by the Petitioners to the High Court of Judicature in *Bengal* was reversed, and an Order made remanding the case to the *Zillah* Court for re-trial on the merits: that the suit was accordingly re-tried by the Judge, who, on the merits decreed in favour of the Petitioners, giving them possession of the alluvial lands: that the Defendants being dissatisfied with this last-mentioned decree, appealed against the same to the High Court: that the hearing of the appeal took place before a divisional Bench of the Court, on the 1st of December, 1865, when a decree was made, reversing the decree of the *Zillah* Judge, and dismissing the Petitioner's suit: that the Petitioners, within the ninety days prescribed for that purpose, filed a petition in the High Court, praying for a review of the decree of that Court, instead of filing a petition in the Court for leave to appeal to Her Majesty in Council against the decree, the Petitioners being advised that, according to the prevailing practice of the Court, they would have six months to file such a petition of appeal, should it become necessary, from the date on which the Order on the petition of review might be pronounced, such practice having been established by a decision of the High Court, made on the 8th of July, 1864; that the petition for review came on for hearing before Mr. *Seton Karr*, on the 17th of May, 1866, who, by his Order of that date, directed the case to be re-argued on one of the points taken. That accordingly, a re-hearing of the appeal on a review of judgment came on before Messrs. *Seton Karr* and *Kemp*, two of the Puisne Judges of the Court, on the 1st of April, 1867, when the Court, by its decree affirmed the former decree of the High Court of the 1st of December, 1865; that on the unsuccessful result of the re-hearing on review being communicated to the Petitioners, they directed a petition to be filed in the High Court for leave to appeal to Her Majesty in Council: that the Petitioners were then informed, that the practice had been altered by a decision of the High Court on the 11th of September, 1866, and passed while the above proceedings on review were pending: that the Petitioners presented a petition to the High Court, stating the principal facts above-mentioned, and the change of practice, and further stating, that inasmuch as a period of six months allowed by law for filing Privy Council appeals against the decision of the Court had expired, from the original judgment of the 1st of December 1865, and as the above delay could not in the least be attributed to the Petitioners, who had acted on the full belief that their appeal to *England* would be in time under the former precedents of the Court, and as it would be very hard and unjust to bind parties by subsequent decision, over which they had no control, and whose effects they could not possibly foresee; therefore, under these peculiar circumstances, the Petitioners prayed to be allowed to file their appeal to *England*. That the petition came on for hearing before Mr. *Jackson*, one of the Puisne Judges of the High

Law," Vol. I., pp. 254, 262, *ib.* Vol. II., p. 16 [2nd Edit.]; *W. H. Macnaghten's* "Hindu Law," Vol. I., p. 3, and cases in note, *ib.*, were cited. And, as to the distinction of and exceptive restrictions by the *Benares* school of Hindoo law upon a Hindoo giving or devising to one heir ancestral estate in unequal shares, *Sham Singh* v. *Mussumaut Umraotee*, 2 Ben. Sud. Dew. Ad. Rep., 74; *The Mitácshará*, ch. I., sec. I, paras. 27, 30; *Strange's* "Hindu Law," Vol. I., pp. 261-2, [2nd Edit.]; *W. H. Macnaghten's* "Hindu Law," Vol. II., p. 147; *F. Macnaghten's* "Cons. on Hindu Law," pp. 317-18, were relied on by the Appellant.

Upon the validity of a nuncupative Will, or gift by the Hindu law, the case of *Crinnasammah* v. *Vijaayammah*, 2 Mad. H. C. Rep., 37 was referred to.

As to the allowance for maintenance out of the estate to the younger branches of the family, *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*, 7 Moore's Ind. App. Cases, pp. 18, 52 was relied on.—12 *M. I. A.*, *pp.* 15—17.

Court, on the 29th of June, 1867, when he recorded the following minute or Order:—"I am unable to grant this application. The Petitioner must apply to the Privy Council direct;" that the Petitioners had, under the abve circumstances, been obliged to present their petition to Her Majesty in order that justice might not miscarry, and that the Petitioners might not be prejudiced by losing their right of appeal by reason of the alteration in the practice of the High Court; and the Petitioners submitted, that they ought to be allowed to appeal against the decree of the High Court of the 1st of December, 1865, the time intervening having been occupied by the proceedings in the review of judgment, as the Petitioners would have obtained leave of the High Court so to appeal on the termination of such proceedings as a matter of course, if the then established practice of the Court had continued, inasmuch as the decision changing the practice was not passed until after the expiration of six months, calculated from the date of the decree, so that the Petitioners had no opportunity of presenting their petition for leave within that period; and the Petitioners submitted that, the judgment and decree of the High Court, dated the 1st of April, 1867, was a full and complete hearing of the appeal, on a review of judgment previously granted, and that although it in terms affirmed the former decree of the 1st of December, 1865, yet it ought to have been considered and treated as the final judgment or decree of the High Court made in the appeal, and from such a judgment or decree Her Majesty's Charter, establishing and constituting the High Court, ordained that any person or persons might appeal to Her Majesty's Privy Council, provided that leave be applied for to the High Court within six months from the date of such judgment or decree, and that with that proviso the Petitioners had substantially complied by filing in the High Court, and within such prescribed time, their petition; and they prayed for special leave to appeal against the decree of the High Court bearing date the 1st of December, 1865, and also against the other judgment or decree affirming the same and bearing date the 1st of April, 1867.

Mr. *Leith*, for the Petitioners.

The six months allowed by Order in Council of the 16th April, 1838, for appealing from the decree of the 1st of December, 1865, expired pending the proceedings for review. There is no question of the right of the Petitioners to appeal from the decree of the High Court, but for the alteration in the practice by the decision of the 11th of September, 1866, which took the Petitioners by surprise and operated, in the circumstances, as a denial of justice. This change in the practice of the Court took place after the expiration of the six months from the date of the decree. The Court, I submit, was wrong in refusing leave to appeal from the judgment on review, and such decision was in opposition to decided cases. Thus in *Nuzeer Ali Khan* v. *Rajah Ojoodharam Khan* (a), it was held, that an Order of the High Court refusing an application for a review was a final Order from which an appeal lies. So in the *Maharajah* of *Burdwan's* case (b), it was laid down, that where an application for a review is admitted, the decision upon the re-hearing is a final decree from which an appeal will lie, and which dates from that time.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

Their Lordships think, that in the circumstances disclosed in the petition, special leave to appeal from the decree of the High Court of the 1st of December, 1865, and the judgment or order of the 1st of April, 1867, ought to be allowed. In the cases referred to, the Court have laid it down, that if there is a decision upon a review of judgment, that decision is to be considered the final decree.

(a) 1 Cal. W. R., 14 (Miss. Appeals).
(b) 2 Rev. Civil & Crim. Rep., 260.

26th, 27th, 28th and 29th February, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Lord Romilly (Master of the Rolls,) the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

First appeal.

THE COLLECTOR OF MADURA,* ... ... } *Appellant,*

versus

MOOTTOO RAMALINGA SATHUPATHY, ... } *Respondent.*

Second appeal.

ANANDAI, *alias* RANEE KUNJARA NACHEAR & MANGALASWARA NACHEAR, } *Appellants,*

versus

RANEE PARVATA VARDANI NACHEAR, MOOTTOO RAMALINGA TAVER, and THE COLLECTOR OF MADURA, ... } *Respondents.*

Third appeal.

RANEE PARVATA VARDANI NACHEAR, ... } *Appellant,*

versus

ANANDAI, *alias* RANEE KUNJARA NACHEAR & MANGALASWARA NACHEAR. ... ... } *Respondents.*

Hindu Law—Adoption without husband's permission, but with kinsmen's assent, validity of,—Gifts improperly made to receive assent of husband's kinsmen, not rendering adoption invalid—Doctrines regarding adoption contained in Treatises received in different parts of India, discussed—Veerapermall Pillay v. Narrain Pillay examined and questioned—Rajah Haimunchull Sing, v. Koomar Gunsheam Sing, held inapplicable to Southern India—Custom, administration of Hindu Law to be according to,—Pundits, opinions of, how far a part of the customary law—Adoptive Father's no other wife than the adoptive mother, entitled to inherit—Maintenance, quantum of.

According to the Hindu law prevalent in the *Dravada* country, and particularly in that part of it wherein the *Ramnad Zemindary* is situate, a Hindu widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him.

Where the husband's family is in the normal condition of a Hindu family—*i. e.*, undivided, the father-in-law, if alive, is, as the head of the family, and the natural guardian of the widow, competent by his sole assent to authorize an adoption by her, but if he is dead, the consent of all the brothers is necessary. Where, however, the widow has taken by inheritance the separate estate of her husband, the father-in-law's assent would be sufficient and in his absence, such assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ-fide* performance of the religious duty; and neither capriciously nor from a corrupt motive.

The rights of an adopted son are not prejudiced by an unauthorized alienation of the widow, which precedes the adoption she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves, go to the root of the legality of an adoption.

The doctrines regarding a Hindu widow's right to adopt a son to her husband, without his express authority, contained in the Treatises, the *Mitacshara* received in Southern *India*, the *Mayucha* and *Koustubha* in the *Mahratta* country, and *Daya-bhaga* in *Bengal*, as laid down by commentators and received as the governing law in *India*, discussed.

The ruling in the case of *Veerapermall Pillay* v. *Narrain Pillay* (1 *Strange's* Madras Cases, p. 121) that it is indispensable that the widow should have the authority of her husband to adopt, examined and questioned.

Rajah Haimunchull Sing v. *Koomar Gunsheam Sing* (2 *Knapp's* P. C. Cases, p. 203; *vide post*, Vol. I. p. 37)—*Held* not intended to govern a case arising in the South of *India*.

The duty of a Judge administering Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible fom the earliest authorities as to ascertain wheher it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage; as under the Hindu system of Law, clear proof of usage will outweigh the written text of the law

* 12, Moore's I. A., p. 397.

The opinion of a *pundit*, which is found to be in conflict with the translator's works of authority, may reasonably be rejected; but, those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country.

R., being unanimously adopted by *A.*, and *V.*, *A.'s* wife, *K.*, *A.'s* another wife, held to stand only in relation of step-mother to *R.*, and therefore not entitled to inherit his estate.

The *quantum* of maintenance is a question with which the Courts of *India*, having local knowledge, and being conversant with the habits of native families, are peculiarly competent to deal with; and strong grounds should be shown to justify any interference by the Judicial Committee with their discretion in that matter.

21st May, 1868.

THEIR Lordships reserved judgment, which was now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The principal question raised by these appeals is the validity of an adoption made by the Widow of the last male *Zemindar* of *Ramnad*.

His title to that *Zemindary*, which is of great extent, and, like many of the large *Zemindaries* in the south of *India*, in the nature of a *Raj*, or Principality, descendible to a single heir, was thus derived. In 1795 the then *Zemindar*, *Moottoo Ramalinga Sathupathy*, having rebelled against the Government of the East India Company, was deprived of his *Zemindary*, which in the month of July in that year was granted to his Sister, *Ranee Mangalaswara Nachear*. Her title was confirmed by a formal *Sunnud*, executed on the 22nd of April, 1803, by Lord *Clive*, the then Governor of *Madras*, which granted the *Zemindary* to her, her heirs, successors, and assigns. She was married to *Ramasamy Taver*, who died some time between 1797 and 1804; and in the latter year *Ranee Mangalaswara Nachear*, then a Widow, and professing to act under a written agreement between her and her late Husband, adopted one *Annasamy*, his Nephew, whose title he afterwards confirmed by a Will executed on the 11th of April, 1807. She died in that year, and was succeeded by *Annasamy*. He had seven Wives, of whom only his chief Wife, *Mootoo Veroyee Nachear*, and the Appellant, *Ranee Kunjara*, need be mentioned, but had no male issue by any of them. And on the 26th of January, 1820, he adopted a Son, *Ramasamy*, who was the natural Brother of *Mootoo Veroyee Nachear*, and, by a testamentary instrument of that date, confirmed that adoption, stating it to have been made "by himself and his chief Wife, *Mootoo Veroyee Nachear* unanimously." He died in February, 1820, and was succeeded by *Ramasamy*, who died in 1830, without male issue, but leaving a Widow, the Respondent, *Ranee Parvata Nachear*, and two infant Daughters, *Mangalaswara* and *Dorarajah*, surviving him. It is unnecessary to notice the unsuccessful suits by which the titles of *Annasamy* and *Ramasamy* were impeached during their lives, though some of the proceedings in them help to swell the voluminous record before their Lordships. The title of *Ramasamy* to the *Zemindary*, as stated above, is the common ground of all the parties to this litigation, and, on the consideration of these appeals, must be taken to be incontestable.

On the death of *Ramasamy*, without male issue, his successor in the *Zemindary*, according to the course of succession *ab intestato*, was his Widow. He had, however, two days before his death, addressed to the Collector, as the representative of Government, the *arzi* of the 19th of April, 1830. In that document, after stating that he was suffering from small-pox, and that the issue of his illness was uncertain, he expressed himself as follows: "I have made an arrangement that my Mother, *Ranee Mootoo Veroyee*, who is my Guardian in every respect, and who holds chief right to this *Zemindary*, should enjoy this *Zemindary* and all other things; pay *peishkist* to the *Cirkar*; maintain my royal Wife, my Daughter, *Mangalaswara*, of five years old, and her younger Sister, a small child; and when these children shall attain their proper age, to make an arrangement with regard to their right to the *Zemindary*, and continue the same; that my natural Brother, *Moottoo Chella Taver*, should manage the affairs of the *Zemindary* until my children shall attain their proper age; and I have issued neces-

sary orders for the strict observance of the above arrangement."

The affairs of the *Zemindary* seem to have been managed under this arrangement between 1830 and 1840. The Respondent, *Ranee Parvata Nachear*, is said to have been herself very young at the date of her Husband's death; her children were infants; and the Mother-in-law was probably the only member of the family with any capacity for business. In 1840, *Mangalaswara*, the Daughter of *Ramasamy*, who had previously been married, died after giving birth to a male child, who did not survive her. About that time differences arose between *Ranee Parvata Nachear* and her Mother-in-law, who appears to have set up some claim to the *Zemindary* in her own right. The Board of Revenue, acting as Court of Wards, intervened; appointed, in April, 1840, *Ranee Parvata Nachear* Guardian of *Dorarajah*, her infant Daughter, in the place of *Mootoo Veroyee;* and assumed the management of the estate, treating apparently *Dorarajah* as *de facto Zemindar*, either by virtue of the *arzi* executed by *Ramasamy*, or by reason of *Ranee Parvata Nachear's* waiver of her rights in favour of her infant Daughter.

Dorarajah died on the 24th of September, 1845. She had previously been married, and having no children, attempted, on the day before her death, to adopt as a Son a child named *Anandai*. By the document, called her Will, she declared, however, that this person would only be entitled to the *Zemindary* in succession to her Mother, *Ranee Parvata Nachear*, whom she calls "the chief heiress to the *Zemindary*." This adoption was communicated to the Collector by a Letter of the 23rd of September, 1845, but was treated by him as invalid under the 25th section of *Mad.* Reg. V. of 1804, because made by a disqualified landholder without the consent of the Court of Wards. The right of *Ranee Parvata Nachear* to the *Zemindary*, as heiress either to her Husband or to her Daughter, was, therefore, recognized by the Revenue authorities, who, in April, 1840, put her in possession of it as a qualified proprietor, and relinquished the management of it to her.

In the meantime, and ever since 1840, *Mootoo Veroyee* had been engaged in active litigation with *Ranee Parvata Nachear* and others for the enforcement of her alleged rights to the *Zemindary*. The proceedings in her last suit are set forth in the record. For the most part they have no bearing upon any of the questions which their Lordships have now to determine; and it is unnecessary to notice any of them, except the supplemental rejoinder, which was filed by *Ranee Parvata Nachear* on the 6th of March, 1846; and the *Razenamah*, or agreement of compromise, by which this litigation was terminated on the 26th of February, 1847. In the former *Ranee Parvata Nachear* asserted, apparently for the first time, a right to adopt a Son to her Husband, either under an alleged authority from him, in the event, which had happened, of both his Daughters dying without issue, or under the more general power of adoption which is disputed on these appeals. By the latter, *Mootoo Veroyee*, in consideration of the provision made for her and her Fostersson, *Sevasamy*, declared that *Ranee Parvata Nachear* might thenceforward enjoy the *Zemindary* for ever; and, besides, might adopt a Son at her pleasure, as specified in the supplemental rejoinder.

It is clear, therefore, that whatever obscurity and confusion there may be in the history of the *Zemindary* and its management between the death of *Ramasamy* in 1830, and the month of May, 1847, *Ranee Parvata Nachear* was at the last-mentioned date in undisputed possession as *Zemindar* of *Ramnad*.

In that state of things she made the adoption which is the subject of the present dispute. On the 19th of May, 1847, she gave notice to the Collector of her intention to adopt her Sister's younger Son, and invited him to be present at the ceremony. On the 24th of the same month she formally adopted the Respondent, *Ramalinga*. It is admitted that all the requisite ceremonies were duly performed, and that the adoption cannot be impeached, except on the ground of the insufficiency of her power to make one. The Board of Revenue, by an Order, dated the 10th of March, 1849, declared that the adoption was invalid, and

that on the death of *Ranee Parvata Nachear* the *Zemindary* would escheat to Government. On the 23rd of July, 1855, the *Madras* Government set aside this Order, and determined to recognize the adoption until it should be declared invalid by a decree of a Civil Court. But on the 29th of October, 1855, the same Government cancelled its former Order, and confirmed the Order of the Board of Revenue of the 10th of March, 1849; and caused this, its final determination, to be intimated to *Ranee Parvata Nachear* through the Collector, by a Letter dated the 15th of November, 1855.

The first of the suits out of which these appeals arise (No. 3 of 1856) was instituted in that year by *Ranee Kunjara*, claiming, as the last surviving Wife of *Annasamy*, and her Daughter, *Mangalaswara*, against *Ranee Parvata Nachear* alone. They impeached the validity of the adoption, insisted that on the *Ranee Parvata Nachear's* death *Ranee Kunjara*, as the next in succession, would be entitled to the *Zemindary*, and claimed maintenance in the meantime. *Ranee Parvata Nachear*, by her answer, alleged that *Ranee Kunjara* was not the Wife but the Concubine of *Annasamy* and could have no title to the *Zemindary*. Various persons afterwards intervened under different titles, and were all, by supplemental plaint, made parties Defendants to this suit. But none of them, except the Respondent, *Ramalinga*, and the Collector, are parties to these appeals, or have any interest therein.

The second of the two suits (No. 1 of 1860) was brought, in February of that year, by the Respondent, *Ramalinga*, who had then attained his majority, against *Ranee Parvata Nachear* and the Collector. Against the latter it sought to have the before-mentioned Order of intimation of the 15th of November, 1855, set aside as illegal; and against the former it prayed that immediate possession of the *Zemindary* might be adjudged to the Respondent, *Ramalinga*.

The second suit was the first heard, and by his decree, dated the 18th of March, 1861, the Civil Judge ordered, that the Order of the Collector of the 15th of November, 1855, and his Orders to certain subordinate Officers therein referred to, should be cancelled; and that, as he had failed to establish any right to the estate, or to invalidate the acts of *Ranee Parvata Nachear* in respect to it, he should abstain from all further interference; and that *Ranee Parvata Nachear*, subject to the provisions of Hindoo law, and sections 8 of *Mad.* Reg. XXV. of 1802, might, without the previous consent of the Collector, or of any other authority, assign and transfer to the Plaintiff (the Respondent, *Ramalinga*), or whomsoever she might think proper, by sale, gift, or otherwise, her proprietary right in the *Ramnad Zemindary*. The decree further declared, that it was to be without prejudice to the Collector's right to bring a regular suit for the estate, if he conceived that the Government had a superior title to the party in possession, but it prohibited him from summarily seizing it as an escheat whilst there were heirs.

The decree made by the same Judge in the first suit bore date the 12th of April, 1861. It found that *Ranee Kunjara Nachear* was one of the Wives of *Annasamy*, but that as such she had no right to succeed to the estate after *Ranee Parvata Nachear*, being only her step-mother, and, therefore, excluded from inheriting; it further decreed, that the *Zemindar* of *Ramnad*, for the time being, should pay to the Plaintiffs (the Appellants, *Ranee Kunjara Nachear* and her Daughter) maintenance at the rate of Rs. 400 *per mensem*, with the arrears of such maintenance from the date of the institution of the suit.

Against the first of these decrees the Collector, and against the second *Ranee Kunjara* and her Daughter, appealed to the High Court of *Madras;* and on the 26th of March, 1863, that Court made an Order on both appeals, whereby it directed the Civil Judge to try the following issue: "Was the adoption made with the authority of *Mooloo Veroyee*, Widow of *Annasamy*, or with that of any others of the kindred of the late *Zemindar*, *Ramasamy*, in whose behalf the said adoption was made?" It further gave certain directions as to the evidence to be produced on the trial of the issue.

This issue was accordingly tried on the 1st of September, 1863; and the findings of the Civil Judge were in effect, that the consent of *Mootoo Veroyee*, and of all the then surviving kindred of *Ramasamy*, had been obtained to the adoption. Against this finding the Collector, as well as *Ranee Kunjara* and her Daughter, again appealed to the High Court, which Court, on the 17th of November, 1864, after two hearings, pronounced an elaborate judgment in favour of *Ranee Parvata Nachear's* right to adopt, and her exercise of it in the particular case, and in doing so the Court came to the following conclusions:—

First, that the Widow of the late *Zemindar* had made a valid adoption; that there was no doubt that it was made with the assent of the majority of her Husband's *Sapindas;* and that though it might be doubtful, whether the Civil Judge was right, there were not sufficient grounds for saying that he was wrong, in thinking that all the *Sapindas* then living had been proved to have assented.

Second, that, considering the extent of the property and the fact that she was the last surviving Widow of the *Zemindar Annasamy*, *Ranee Kunjara* was entitled to a more liberal maintenance than that awarded by the Civil Judge; and that such maintenance should be at the rate of Rs. 10,000 *per annum*. Subject to that modification, the decrees below were affirmed, and the appeals dismissed without costs.

From the decrees drawn up in conformity with this judgment, the following appeals have been presented, viz.:—

First, an appeal by the Collector, impeaching the validity of the adoption, and also objecting to so much of the decree of the 18th of March, 1861, as declared, or implied, that *Ranee Parvata Nachear* had power to alienate or affect the *Zemindary* beyond her life-interest.

Secondly, an appeal by *Ranee Kunjara* and her Daughter, also impeaching the adoption; and further objecting to the decree of the 12th of April, 1861, in so far as it declared that *Ranee Kunjara* had no right of succession to the *Zemindary*.

Thirdly, a cross appeal by *Ranee Parvata Nachear* and *Ramalinga*, objecting to the maintenance awarded by the High Court as exorbitant; and insisting that the decree of the Civil Judge ought not to have been varied in that respect.

All these appeals have been heard together; and their Lordships have now to dispose of them.

The principal contest has been upon the broad and general question, whether by the Hindoo law, as current in what is known as the *Drávada* Country (wherein *Ramnad* is situate), a Widow can adopt a Son to her Husband without his express authority? and if so, by whose assent that defect of authority must be supplied.

Their Lordships think it will be convenient to consider in the first place how this question really stands, upon the authority of Mr. *Colebrooke* and Sir *Thomas Strange*.

Mr. *Colebrooke's* note on the *Mitácshará* (chap. I. sec. XI., art. 9,) which has been much discussed, clearly involves three propositions: First, that the Widow's power to receive a Son in adoption, subject to some conditions, is now admitted by all the Schools of Hindoo law except that of *Mithila*. Second, that the *Bengal* (or *Gaura*) School insists, that the Widow must have the formal permission of her Husband in his life-time. Third, that some at least of the other Schools admit the adoption to be valid, if made by the Widow with the assent of her Husband's kindred. The first two propositions are admitted; but it has been argued for the Appellants, that on the true construction of this note, Mr. *Colebrooke's* authority for the last proposition is limited to the *Mahratta* School, in which the treatise called "The *Muyookhu*" is the predominant authority. *Balam-Bhatta*, however, whom he cites as an authority for a power of adoption in the Widow wider even than that expressed in the third proposition, was a Commentator of the *Benares* School. And the several notes of Mr. *Colebrooke*, at pp. 92, 96, and 115 of the second volume of *Strange's* "Hindoo Law," seem to their Lordships to show conclusively, that he considered the doctrine embodied in the third proposition to be common to the followers of the *Mitácshará* in the *Benares* as well as in the *Mahratta* School,

and as such to be receivable as the law current in the *Zillah Vizagapatam*, which lies within the northern, or *Andra* division of the *Drávada* Country.

Again, Sir *Thomas Strange's* statement of the law in his work, Vol. I. p. 79, is clear and unambiguous. He says: "Equally loose is the reason alleged against adoption by a Widow, since the assent of the Husband may be given, to take effect (like a Will) after his death; and, according to the doctrine of the *Benares* and *Maharashtra* Schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural Guardians; but it is otherwise by the law that governs the *Bengal* Provinces."

Their Lordships entertain no doubt, that the term "the Peninsula," as used here, and other passages by the same Author, denotes that part of *India* which is south of the line drawn from *Ganjam* to the Gulf of *Cambay*, and includes the whole of the *Drávada* District. The learned Counsel for the Appellants, however, appeal from Sir *Thomas Strange* as a text writer to Sir *Thomas Strange* as a Judge, and cite his *dictum* in *Veerapermall Pillay* v. *Narrain Pillay* (1 *Strange's* Mad. Cases, pp. 103 & 121), as opposed to this passage. In that case, Sir *Thomas Strange*, after citing the text of *Vasishta*, says: "Hence it may be inferred, what appears confirmed by opinions of living Hindoo Lawyers, and by every case of the kind we are acquainted with, that the consent of the Husband is indispensable to adoption into his family." But this passage does not alter the view which their Lordships have already expressed as to the effect of the matured authority of Sir *Thomas Strange*. The precise question which is now under consideration, was not in issue in that case, where there was a written authority from the Husband, and where the real issue was, whether the Widow could adopt a boy not designated in that written authority. Again, the case was decided in 1801, at a time when the ancient authorities of Hindu law were far less accessible to an European Judge than they have since become. And Sir *Thomas Strange*, in his work composed twenty years later, says of this very case of *Veerapermall Pillay* v. *Narrain Pillay*, that it was discussed on comparatively imperfect materials; that the public was not then possessed of the extensive information contained in Mr. *Colebrooke's* translation on the law of inheritance, and the Treatises on adoption since translated by Mr. *Sutherland*, to say nothing of the MSS. materials that came subsequently to his own hands, and which had contributed largely to every chapter of his work. There can, therefore, be no doubt but that the passage in his Book contains the matured opinion of Sir *Thomas Strange*, and that it must be treated as an authoritative declaration of that opinion controlling his *dictum* in *Veerapermall Pillay* v. *Narrain Pillay*.

Having thus ascertained what was the opinion of two of the highest European authorities upon this question of the Hindoo law current in the South of *India*, their Lordships have next to consider, whether any sufficient reason has been assigned for treating that opinion as unfounded.

The remoter sources of the Hindoo Law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent Commentaries. The Commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of *India*; Schools with conflicting doctrines arose. Thus the *Mitacshara*, which is universally accepted by all the Schools, except that of *Bengal*, as of the highest authority, and which in *Bengal* is received also as of high authority, yielding only to the *Daya Bhaga* in those points where they differ, was a commentary on the Institutes of *Yajnawalcya*; and the *Daya Bhaga*, which, wherever it differs from the *Mitácshará*, prevails in *Bengal*, and is the foundation of the principal divergences between that and the other Schools, equally admits and relies on the authority of *Yajnawalcya*. In like manner there are glosses and commentaries upon the *Mitácshará* which are received by some of the Schools that acknowledge the supreme

authority of that Treatise, but are not received by all. This very point of the Widow's right to adopt is an instance of the process in question. All the Schools accept as authoritative the text of *Vasishta*, which says, "Nor let a woman give or accept a Son unless with the assent of her Lord." But the *Mithila* School apparently takes this to mean that the assent of the Husband must be given at the time of the adoption, and, therefore, that a Widow cannot receive a Son in adoption, according to the *Dattaka* form at all. The *Bengal* School interprets the text as requiring an express permission given by the Husband in his life-time, but capable of taking effect after his death; whilst the *Muyookhu* and *Koustubha*, Treatises which govern the *Mahratta* School, explain the text away by saying, that it applies only to an adoption made in the Husband's life-time, and is not to be taken to restrict the Widow's power to do that which the general law prescribes as beneficial to her Husband's soul. Thus upon a careful review of all these Writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the Husband, than to the authority to adopt being independent of the Husband.

The duty, therefore, of an European Judge who is under the obligation to administer Hindoo Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindoo system of law, clear proof of usage will outweigh the written text of the law. The Respondent, *Ramalinga*, insists that, tried by either test, the proposition for which he contends, will be found to be correct.

The industry and research of the Counsel in the Courts below have brought together a *catena* of texts, of which many have been taken from Works little known, and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these. But the highest European authorities, Mr. *Colebrooke*, Sir *Thomas Strange*, and Sir *William Macnaghten*, all concur in treating as works of unquestionable authority in the South of *India* the *Mitácshará*, the *Smriti Chandrika*, and the *Madhavyam*, the two latter being, as it were, the peculiar Treatises of the Southern or *Dravada* School. Again, of the *Dattaka Mimansa* of *Nanda Pandita*, and the *Dattaka Chandrika* of *Davanda Bhatta*, two Treatises on the particular subject of adoption, Sir *William Macnaghten* says, that they are respected all over *India*; but that when they differ the doctrine of the latter is adhered to in *Bengal* and by the Southern Jurists, while the former is held to be the infallible guide in the Provinces of *Mithila* and *Benares*. The *Dattaka Mimansa*, by the author of the *Madhavyam*, is also recognized as of high authority in the South of *India* by Mr. *Ellis* in his note at page 168 of the second volume of *Strange's* "Hindoo Law."

Of these Treatises, the *Mitácshará* is silent on the point in question. The *Dattaka Mimansa* of *Nanda Pandita* (sec. 1, Articles 15 to 18, and Articles 27 and 28) is opposed to the Respondent's view of it; but it seems equally opposed to an adoption by a Widow, under any circumstances. The *Dattaka Chandrika* (sec. 1, Articles 31 and 32) allows a Widow to give a Son in adoption where her Husband has not forbidden her to do so, implying his assent from the absence of prohibition. The *Smriti Chandrika* also permits a Mother to give her Son, if she be authorized to do so by an independent male. And it is argued, that what these last two authorities lay down concerning a Widow's right to give, must, by parity of reasoning, be taken to be laid down concerning her right to receive a Son in adoption. The *Madhavyam* (if that term is confined to the *Parasara Madhaviya*, and does not embrace all the works of *Vidya Naráinsamy*) seems also to contain no direct determination of the point in question; but the *Dattaca Mimansa* of that Author clearly and explicitly declares the right of the Widow to adopt with the authority of her Father-in-law, and whatever other kinsmen of her

Husband may be comprehended under the *et cætera*. It cannot, therefore, be said, that the proposition laid down by Mr. *Colebrooke*, and adopted by Sir *Thomas Strange*, is not supported by at least one of the original Treatises of undoubted authority in *Drávada*. The *Dattaca Mimansa* of *Sri Rama Pundita*, who is stated by the Judges of the High Court to be an authority very generally cited in the South of *India*, also confirms the proposition.

Their Lordships have excluded from their consideration of what is the positive law of the *Drávada* Country the peculiarly Mahratta Treatises (the *Muyookhu* and *Koustubha*), and also the *Viromitrodayá*, which is a Treatise of especial authority at *Benares*. It must, however, be admitted, that the fact of the reception of the doctrine in question by Schools so closely allied to that of *Drávada* is in favour of the hypothesis that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis.

The evidence that the doctrine for which the Respondents contend has been sanctioned by usage in the South of *India* consists partly of the opinions of *Pundits*, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed, and long directed to be taken by the Courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindoo law in various parts of British *India*. Upon such materials the earlier works of European writers on the Hindoo law, and the earlier decisions of our Courts, were mainly founded. The opinion of a *Pundit* which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the Country. A considerable body of these *futwas*, or opinions, is collected in the third part of what has been called throughout the argument in this case the "Green Book." It is not necessary to consider, whether they can all of them be supported to the full extent of what they affirm. But they show a considerable concurrence of opinion, to the effect that, where the authority of her Husband is wanting, a Widow may adopt a Son with the assent of his kindred in the *Drávada* Country.

The decided cases, exclusive of those in the *Bombay* Presidency, which may be taken to be governed by the *Muyookhu*, are certainly not many. But there is at least the case G. (*a*), decided by the late *Sudder* Court of *Madras*, and there are the French cases, which ought not, their Lordships think, to be wholly disregarded as recognitions of the law prevailing in the South of *India*. They are to be relied on in this case as affording evidence of a long continued series of opinions officially given, and judicially received, which were adopted as the grounds of decision, showing a continued and recognized existence of a doctrine, which suffices to remove from the opinions of the *Pundits* in this case every suspicion of being opinions given to support the interests of judgments of others. Against these authorities the Appellants have invoked that of the case of *Rajah Haimun Chull Singh* v. *Koomar Gunsheam Singh* (2 Knapp's P. C. Cases, p. 203; 1 P. C. J., p. 37). But what was, in fact, decided by the very guarded judgment delivered by the late Lord *Wensleydale* in that case? It was that, according to the native text-writers—including probably *Vasishta*, certainly including the *Dattaca Mimansa* of *Nanda Pundita*—the authority of the Husband was a requisite to a valid adoption; that the strictness of the law had been in many districts, and particularly in the *Mahratta* States, relaxed or modified by local usage, but that it had not been established to their Lordships' satisfaction that that relaxation had extended to the particular District of *Etawah*, in Upper *India*. Disclaiming, therefore, the intention to decide what was the law in other parts of *India*, their Lordships held, that they could not say that the law in that District did not require the direction of the Husband in order to the validity of

(a) *Appaniengar* v. *Alemaloo Amma*, Mad. Sud. Dec., for 1858, pp. 5, 6.

an adoption, which it was necessary for them to do in order to reverse the judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern, a case arising in the South of *India*.

Upon the whole, then, their Lordships are of opinion, that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the *Drávada* Country, and particularly in that part of it wherein the *Ramnad Zemindary* is situate, a Hindoo Widow, not having her Husband's permission, may, if duly authorized by his kindred, adopt a Son to him. And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindoo law, or upon analogies, real or supposed, between adoptions according to the *Dattaca* form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased Husband by carnal intercourse with the Widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient Treatises above referred to, and in particular by the *Dattaca Mimansa* of *Vidya Narainsamy*, the Author of the *Madhavyam;* but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.

It must, however, be admitted that the doctrine is stated in the old Treatises, and even by Mr. *Colebrooke*, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question who are the kinsmen whose assent will supply the want of positive authority from the deceased Husband, is the first to suggest itself. Where the Husband's family is in the normal condition of a Hindoo family—*i. e.* undivided—that question is of comparatively easy solution. In such a case the Widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her Husband's share of the joint estate, except a right to maintenance. And though the Father of the Husband, if alive, might, as the head of the family and the natural Guardian of the Widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no Father, the consent of all the Brothers, who, in default of adoption, would take the Husband's share, would probably be required, since it would be unjust to allow the Widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the Widow has taken by inheritance the separate estate of her Husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the Husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the Father-in-law, to whom the law points as the natural Guardian and "venerable protector" of the Widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no Father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the Widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question, that the consents were purchased, and not *bonâ fide* attained. The rights of an adopted Son are not prejudiced by any unauthorized alienation by the Widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go

to the root of the legality of an adoption.

Again, it appears to their Lordships that, inasmuch as the authorities in favour of the Widow's power to adopt with the assent of her Husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the Husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supercession of heirs on the ground of religious obligation to adopt a Son in order to complete or fulfil defective religious rites.

Their Lordships having thus stated the conclusions to which they have come upon the general question of law involved in these appeals, will now consider whether the High Court of *Madras* has correctly applied that law to the facts of the present case.

They are of opinion, that both the Courts below were right in holding that the collateral kinsmen of *Ramasamy* were to be found in the *Taver* family, of which the printed pedigree forms part of the record. According to Hindu law, *Ramasamy* was the Son, though by adoption, of *Annasamy;* and he again was the Son, though by adoption, of the first *Ramasamy*, who was a *Taver;* and the heirs of *Ramasamy*, in the absence of descendants, were traceable upwards through these two persons, as if they had been his natural Father and Grandfather. There is no ground for saying that this, the legal consequence of the successive adoptions, was affected by the assumption of the name of *Sathupathy*, the family name of the ancient *Zemindars* of *Ramnad* and of *Mangalaswara*, the Grantee of the *Zemindary*. It is to be observed, however, that this line affords none but very remote kinsmen, if their relationship to *Ramasamy* be calculated on the principle just stated. The nearest of them, *Mootoosamy*, would on that principle stand in a degree of relationship to *Ramasamy* which, according to the rule of the *Mitácshará* (cap. 2, sec. v., art. 6,) would exclude him from the category of *Sapindas*, and place him in that of *Samánádacas*, or those connected only by a libation of water and a common family name. He was, however, the natural Brother of *Annasamy*, and that circumstance might strengthen his title to be considered, in the absence of nearer connections, the natural male protector of *Ramasamy's* Widow. Again, the person who really filled the office of Protector, and that by the express appointment of *Ramasamy*, was, up to the time of her quarrel with her Daughter-in-law, *Mootoo Veroyee*. Nor is it by any means unusual in a Hindoo family to find the Mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to *Ranee Parvata Nachear*, after the failure of *Ramasamy's* descendants. It, therefore, appears to their Lordships, that in this state of the family the assent of *Mootoo Verogee*, of *Mootoosamy*, and of the other persons who are proved beyond all question to have assented, was sufficient to legitimate the adoption, even if the evidence has failed to prove the consent of the yet remoter kinsman, *Ramrajah Taver*.

It has been argued, however, that even if this adoption would have been regular had *Ramasamy* died childness and intestato, his *arzi* relating to the management and descent of the *Zemindary* contains an indication of his intention that his Daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his Widow. Their Lordships cannot accede to this argument. *Ramasamy*, no doubt, intended to be represented by his Daughters' line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt, when on a new and unforeseen occasion the religious duty arises. His Widow has not claimed a power to adopt, except on the happening of the contingency for which

her Husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law.

Another argument for the Appellants was founded on the attempted adoption of a Son, *Annasamy*, by *Dorarajah*. That person is not a party to either of these suits; he has not impeached the adoption of the Respondent, *Ramalinga;* he has, on the contrary, supported it as a witness. Nothing decided by the decrees under appeal can prejudice his rights, if he has any, under an adoption which the Revenue authorities at the date of it seem to have treated as illegal. Their Lordships have not before them the necessary materials for determining, whether that adoption was in fact valid or invalid; or whether, if valid, it would have any, and what effect on the title of the Respondent, *Ramalinga*. In that state of things neither of the present Appellants can be allowed to insist on this supposed *jus tertii* as an objection to the decrees which they impeach.

Their Lordships have, therefore, come to the conclusion, that these decrees, and the judgment on which they proceed, are substantially right, in so far as they affirm, as between the parties to this litigation, the validity of the adoption by *Ranee Parvata Nachear* of the Respondent, *Ramalinga*.

They also think that there is no foundation for the other and minor objection taken by the Collector to the decree of the 18th of March, 1861, on the ground that it asserts a power in *Ranee Parvata Nachear* to alienate or affect the *Zemindary* beyond her life interest. Her power of alienation is expressly stated to be "subject to the provisions of Hindoo law;" and the only object of that part of the decree was to affirm her right to exercise that power within the limits prescribed by the Hindoo law, free from the control of the Government or its Revenue Officers.

Their Lordships are further of opinion, that there are no grounds for impeaching the decree of the 12th of April, 1861, in so far as it found that the Appellant, *Ranee Kunjara*, stood in the relation only of stepmother to *Ramasamy*, and, therefore, could have no right to inherit his estate. They think, that this conclusion is supported by the Will of *Ranee Mootoo Veroyee*, dated the 20th of January, 1820, which expressly states that *Ramasamy* was adopted by *Annasamy* and *Ranee Mootoo Veroyee* unanimously.

Upon the cross appeal their Lordships have only to observe, that the *quantum* of maintenance is a question with which the Courts of *India*, having local knowledge, and being conversant with the habits of native families, are peculiarly competent to deal with; and that strong grounds should be shown to justify any interference by this Committee with their discretion in that matter. And their Lordships see no reason for questioning the soundness of the discretion exercised by the High Court of *Madras* in the present case.

Being, therefore, of opinion, that the decrees under appeal are correct, and ought to be affirmed, their Lordships will humbly recommend to Her Majesty that the two appeals and the cross appeal be each dismissed, with costs(*a*).

(*a*) As to the power of a Widow by the Hindu Law and custom current in the *Drávada* Country to adopt a Son to her deceased Husband without his authority, either express or implied, given to her in his life-time, though with the consent of his kindred, and the authorities received in Southern *India*, the Respondents cited *Morley's* Dig., Vol. I. pp. clxxxix. cciii; *Colebrooke* on Inheritance, Intro. p. iv.; *Datta Madharinga*, or the *Dattaka Mimansa* of *Madhavacharya; Datta-Mimansa* of *Nanda Pandita;* Note by Mr. *Ellis* in *Strange's* "Hindu Law," Vol. II. p. 162 [2nd Ed.]; *W. H. Macnaghten's* "Hindu Law," Vol. I. Pref. xxii.; *Elberling* on Inheritance, ch. III. secs. 32. 3, 4, p. 16. They also referred to the decrees transmitted with the record, of the French appellate Court at *Pondicherry*, respectively dated the 15th of March, 1826; the 15th of June, 1844; the 2nd of December, 1848. A decree of the Court at *Trichinopoly*, dated 21st of June, 1850; of the Court at *Pondicherry*, dated the 7th of December, 1850. A decree of the Court at *Pondicherry*, dated the 4th of November, 1856, and of the Court at *Tanjore*, dated the 19th of March, 1864, allowing a Widow to adopt a Son without the authority of her Husband.

18th and 19th June, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Wood, the Right Hon. the Lord Justice Selwyn, and the Right Hon. Sir James William Colvile.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

SOORENDRANATH ROY,* ... *Appellant*,

versus

MUSSAMUT HEERAMONEE BURMONEAH, ... *Respondent*.

Proof of Will—Mitákshara—Dayabhaga—Family Custom.

A., a Hindoo, died leaving two grandsons, B. and C., to whom his estate descended. They were joint in food, worship, and estate. The property was wholly situate in *Bengal*, and the family, who originally came from the Western Provinces, had long been resident there. C. died, leaving his Widow, D., and his brother B. surviving him. B., who was manager, died 2½ years after C. After B.'s death, D. brought her suit to establish her right as widow of C. to a moiety of the family property. The representatives of B. set up an instrument, which they alleged to be the Will of C., whereby he dequeathed his share to B., reserving maintenance to D.

The Judge of the *Zillah* Court of *Nuddea* held, that the alleged Will of C. was genuine, and dismissed D.'s suit. The High Court, on appeal, held (1) that D. ought firstly to have shewn her title to sue, *i. e.*, she having admitted that the family came from *Mithila*; she ought to have shewn that they were no longer governed by the *Mitakshara*; (2) that for several generations, the rule of inheritance had been according to the *Dayabhaga*; (3) that the alleged Will was not proved—(there was evidence before the Court of the *factum* of the Will adequate to the proof of an ordinary Will, but the Court held, that this evidence was outweighed by the internal improbabilities;) (4) that if the rule of inheritance was not according to the *Dayabhaga*, the Will was inofficious.

On appeal to the Privy Council, held—1*st*.—It would be a rash conclusion on the state of the evidence in the case to suppose a preference of the law of Bengal likely to be operative on the mind of the testator; and, therefore, there was no foundation for treating the Will as inofficious.

2*nd*.—It was not necessary to decide whether the rule of inheritance was according to the *Dayabhaga* or the *Mitakshara*.

3*rd*.—The evidence was adequate to the proof of an ordinary Will, and there was no internal improbability of the Will sufficient to discredit it. Hindoo law is in the nature of a personal usage or custom, and probably migratory families or tribes would retain their own usages. The presumption is in favour of the continuance of the ancient family custom.

The decision of the High Court reversed, and the decision of the Court of *Nuddea* restored and affirmed.

2nd July, 1868.

JUDGMENT having been reserved, was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The suit which is to determine the right of succession between the respresentatives

* 12, Moore's I. A., p. 81; 1 B. L. R., P. C., p. 26.

On the general law of adoption the following native authorities and Text writers were cited and relied on by both sides:—The *Parasara Madhaviya*; the *Vyavahara Madhavya* by *Madhavacharya*, referred to in *Strange's* Manual of Hindu Law, pars. 72, 73, 353; *Mahabharata*, ch 103; the *Viramitrodáya*, referred to in *Sutherland* on Adoption, Synopsis, note vi. p. 235; *Vyavahara Mayookhu*, [Trans. by *Borradaile*,] ch. IV. sec. V. pl. 17; *Vyavahara Koustoova*, referred to in *Morley's* Dig., Vol. I. Intro. p. ccvii.; *Strange's* "Hindu Law," Vol. I. p 79; *ib.* Vol. II., p. 92, 3, 9, 96, 115, 168. The *Mitácshará* of *Vijnyaneswara* by *Colebrooke*, ch. I. sec. xi. pl. 9, note; *ib. Stoke's* "Hindu Law," p. 415; *Subodhini*, a commentary on the *Mitacshara*, by *Visveswara Bhatta*, *Colebrooke*, ch. I. sec xi. pl. 9; *Morley's* Dig., Vol. I, Intro. p. ccxvii.; *Ward's* "View of the History, &c., of the Hindus," Vol. I. p. 447; *Balam Bhatta's* Comm. on the *Mitácshará* of *Vijayaneswara*; *Sutherland* on Adoption, Synopsis, note, p. 236; *Colebrooke* on Inheritance, Pref., p. ix; *W. H. Macnaghten's* "Hindu Law," Vol. I. p. 66; *Datta Mimansa*, by *Sri Rama Pandita*; *ib.* sec. I. pl. 15, 18, sec. IV. pl. 10; *Stoke's* "Hindu Law," pp. 415, 534-5, 573; *Dattaka-Chandrika* of *Devanda Bhatta*, sec. I. pl. 31, 32 [Trans. by *Sutherland*]; *Dattaka-Mimansa* of *Nanda Pandita*, secs. 15, 16, *ib.*, *Sutherland*, Note x. p. 236; *Vyavahara Durpanum*; *Datta Mohodadhi*; *Datta Grahana Deepeka* by *Narayana Choodamony Deetchita*; *Datta Pootra Vidhi*; *Datta Ratnakara*, by *Dharma Raja Deekshita*; *Datta Chandrica*, by *Pattara Achariya* cited in

of each of two joint owners, *Paresnauth* and *Batooknauth*, Hindoos, to the succession of one of them, *Batooknauth*, was brought to recover a moiety of a family estate consisting of landed and of moveable property which had belonged to one *Khoderam Roy*, the Grandfather of both *Paresnauth* and *Batooknauth*. The property of *Khoderam Roy* descended from him, by inheritance, to his two surviving Grandsons, *Paresnauth* and *Batooknauth*, the Sons respectively of his two Sons, *Jai Singh Roy* and *Prag Singh Roy*, who had predeceased their Father. These Grandsons, who were first cousins, formed a joint undivided Hindoo family, joint in food, worship, and estate. During their joint lives they resided continually together.

Paresnauth was the Manager. He survived *Batooknauth* about two and a-half years. *Batooknauth* left no children. The Plaintiff was his childless Widow. She was very young at the time of her Husband's death; certainly under fourteen years of age, and perhaps younger. She had, however, near relations, members of her own family, competent to the protection of her rights, her Father, and two other persons: and the Sister of *Batooknauth* had a Son, a minor, in the line of succession to his deceased Uncle under the Law of *Bengal*, and whose Father was competent to the protection of his rights also. The Widow, if entitled, might have been placed under the protection of the Courts of Wards in the case of any probable invasion of her rights.

Paresnauth, on the 18th *Bysack*, 1260, that is, thirteen days after the death of *Batooknauth*, which took place on the 5th *Bysack*, 1260, corresponding to the 16th April, 1853, propounded and proved before the Civil Court of *Nuddea*, under Act, No. XX. of 1841, an alleged Will of *Batooknauth*, the cancellation of which instrument is also sought by the Plaintiffs' suit. By this Will, which bore date the 2nd *Bysack*, 1260, three days before his death, the whole of *Batooknauth's* property was given to *Paresnauth*. It contained a provision for maintenance of the Widow; but in case of her quitting the family Rs. 25 per month only were to be allowed her for her maintenance. The usual notifications were issued by the Court; no person appeared to oppose, witnesses were examined, the Will was proved, and the ordinary certificate obtained, and under that title *Paresnauth* enjoyed the property unopposed and undisturbed during the remainder of his life, a period of about two and a-half years. The Will was not registered, but two days only elapsed between the date of it and the death of *Batooknauth*.

Paresnauth left a Will, or testamentary trust deed, by which he appointed his Mother and Wife guardians of his infant Son. It contained a provision for adoption by his Widow in case the infant died, and some directions as to religious rites and usages.

Shortly after *Paresnauth's* death, the Widow of *Batooknauth* asserted her title to a moiety of the property jointly owned

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Sudder Court, Dec., 1854, pp. 42—5; *Daya-Krama Sangraha*. And, in addition to the above ancient authorities collected and used in the High Court, the following cases and authorities from English and Indian reports were also cited:—*Veerapermall Pillay* v. *Narrain Pillay*, 1 Strange's Mad. Cases, 91; *Raja Haimun Chull Sing* v. *Koomer Gunsheam Sing*, 2 Knapp's P. C. Cases, 203; *Janki Dibeh* v. *Suda Sheo Rai*, 1 Sud. Dew. Ad Rep. 197; *Raja Shumshere Mull* v. *Ranee Dilraj Konwur*, 2 Sud. Dew. Ad. Rep. 169; *Atchema* v. *Rungama*, 4 Moore's Ind. App. Cases, 1; *Sreenarain Rai* v. *Bhya Jha*, 2 Sud. Dew. Ad. Rep., 27; *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*, 10 Moore's Ind. App. Cases, 279; *Sree Brijbhookunjee Muharaj* v. *Sree Gokoolootsoojee*, ; 1 Borr. Bom. Rep. 193; *Huebut Rao Mankur* v. *Govind Rao Bulwunt Rao Mankur*, 2 Borr. Bom. Rep. 75; *Appaniengar* v. *Alemaloo Ammal*, Mad. Sud. Dec. 1858, pp. 5, 6; *Virbudro Hurrybudru* v. *Baee Ranee*, 2 Morris, Bom. Rep. 1.

As to the effect to be given to the *Futwas* of the *Pundits*, as authority where they are apparently irreconcilable with the opinions of approved Text Writers on Hindu law, the cases of *Myna Boyee* v. *Ootaram*, 8 Moore's Ind. App. Cases, 400; and *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 Moore's Ind. App. Cases, 529 were referred to.

With respect to discretion of the Court in awarding the *quantum* of maintenance to the Widow, *Exp. Janaky Unmah*, 2 Strange's Mad. Cases, 285, 288 was referred to.

and enjoyed by her Husband and *Paresnauth*. Upon her application to the proper authorities to be admitted to her share, she was, in consequence of the certificate before-mentioned having been obtained and being in force, directed or advised to proceed by regular suit, and she instituted the suit accordingly out of which this appeal arises. She was the sole Plaintiff, and the Defendants were the Mother and Widow of *Paresnauth*, as Trustees and Guardians of the infant Son of *Paresnauth*, who was also named a party. The suit proceeded in that form until the Son attained majority, when he applied for leave, and was permitted to defend in his own person without guardians. He is the Appellant in this appeal. The property being situate wholly in *Bengal*, and the family having been long resident there, the Plaintiff was certainly entitled to rely on her *primâ facie* title, as heiress under the general Hindoo Law as administered in that part of *India*.

It was incumbent on the Defendants to allege and prove a title displacing this *primâ facie* title. They accordingly pleaded their title, which embraced two separate answers of the Plaintiff's title. They alleged that the title to the property was, by reason of the retention by their family of its ancient Law, that of the *Mitácshará*, to be governed by that authority, under which *Paresnauth*, and not the Widow, was heir to *Batooknauth*; and besides this, they alleged that *Batooknauth* had bequeathed his whole property to *Paresnauth*. If this last title prevail, it displaces equally a descent *ab intestato*, under either system of law, viz., that of the *Mitacshara*, or that of the *Daya-bhaga*.

Some doubt was raised by Mr. *Cave*, in his argument of this case, as to the original acquisition of this property, whether the whole was acquired by *Khoderam Roy*, as a large part certainly was, or whether a part was not ancestral property which had descended to him. It is not necessary to inquire into this subject, because the prevalence in any part of *India* of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family. It must have had a legal origin, and have continuance (see *Abraham* v. *Abraham*, 9 Moore's Ind. App. Cases, pp. 242 and 243; *post*, pp. 16-17;) and whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both. A legal foundation for this family usage was laid sufficiently by the evidence. The family came into *Bengal* from a distant part of *India* where the *Mitacshara* prevails. The High Court did not decide more on this issue than that the family had adopted the law of *Bengal* for some generations: that is consistent with a discontinuance of a former usage. It appears further from the evidence of the *Purohit*, that his was an hereditary office, as it very frequently is, and that his ancestors, Officers of the priesthood, and of the family, had followed the *Mitacshara* constantly.

On the evidence, it seems clear, that the family came attended by Priests of their own persuasion; and since Orientals are commonly tenacious of their usages and customs, and more especially of their family and religious observances, therefore, on the ordinary principles of viewing evidence, a continuance of this state of things is presumable, and the *onus* would then lie on the party alleging an interruption or cessation of it to prove such allegation. In this case, therefore, the *onus* of proving such a cessation seems to have been properly declared by the High Court as incumbent on the Plaintiff, in consequence of the admissions in the pleadings.

The Plaintiff originally advanced a title which she did not maintain throughout her suit. She alleged originally that her Husband had given her authority to adopt a Son, and had constituted her heiress, *ad interim*, by a written instrument, of which she alleged the spoliation and destruction by *Paresnauth*. Such an authority is one not unlikely to be conferred. The Will of *Paresnauth* himself evidences the strong desire of a Hindoo to be succeeded by a Son. Why the allegation, if untrue, was made, or why, if true, it was abandoned, it is difficult to say. It is the great misfortune of Hindoo litigants that their cases often fall, in the earlier stages of

litigation, into the hands of incompetent Advisers, who, by the mixture of falsehood with truth, or by the suppression or abandonment of part of a true case, from some mistaken views of policy, or difficulty, create often impediments to its success from which the true story, if revealed, would have been free. If, for instance, it should seem expedient to exaggerate the illness, weakness, or incapacity of an alleged Testator, and to tutor witnesses to such proof, it may be thought politic to drop that part of a case, which necessarily supposes during the same interval a disposing capacity in the Testator; and in Indian cases it is scarcely safe or just to make against the suitor himself the ordinary presumptions from the conduct of a suit, which would be made in our own Courts under the like circumstances.

It has, therefore, been very properly urged in the able arguments on behalf of the Plaintiff, that her youth, ignorance, sex, and dependent state must all be weighed, and have due importance given to them, when her supposed acquiescence in the title of *Paresnauth* is urged against her. As respects herself, personally, the force of these arguments may be admitted so far as they regard acquiescence alone; but her ignorance of *Paresnauth's* proceedings and claim to the whole succession which she alleges, cannot so readily be conceded, and the weight of presumptive proof arising from the conduct both of herself and of other persons competent to the protection of her interests, cannot be excluded from the consideration of their Lordships when deciding whether such ignorance is established in any of them.

The Plaintiff denied in her replication each title pleaded by the Defendants. The Will she alleged to be a forgery, and insisted that the *Daya-bhaga* was the authority to be applied to the question of her title to the succession.

The issues of fact, which are stated in the Appellant's case, comprise these two points, the only ones before their Lordships on appeal:—

First, whether *Batooknauth* executed a Will, dated 2nd *Bysack*, 1260, in favour of *Paresnauth*, or not.

Secondly, whether the question of inheritance in this suit is determinable by the *Shastras* of *Bengal*, or of the *Western Provinces*.

The Judge of the Court at *Nuddea* found the first issue, that on the Will, in favour of the Defendants. He expressed no opinion on the second, which, in consequence of his finding on the first, he judged to be then an immaterial issue. On appeal to the High Court, that Court consisting of three Judges, Mr. *Trevor*, Mr. *Seton-Karr*, and Mr. *Jackson*, found unanimously the issues in favour of the Plaintiff, the now Respondent, and reversed the decree of the Civil Court.

In the view which that Court of appeal took, it was necessary to decide both issues; for a decision on the Will alone, unless it had established the Will, would not have decided the case. In the view taken of the Will, in the Civil Court of *Nuddea*, the contention as to which law, whether the *Mitácshará* or the *Daya-bhaga*, should prevail was a needless one, except as it tended to disprove the Will by showing it to be an inofficious disposition.

If, however, the evidence afford ground enough for believing, that the ancient family usage, whether legally obsolete or not, might yet be operative enough in the mind of a male member of his family to lead him to prefer the sole ownership of a male, his conjoint owner and co-heir, with whom he had been associated in the enjoyment, and with whom the entire management had been, to what he might consider the risk of female ownership, then no sound argument derived from the mere presumed inofficiousness of the disposition, according to the general law, could be used to weaken adequate evidence as to the *factum* of the Will. In the opinion of their Lordships, it would be a rash conclusion, on the state of the evidence in this cause, to suppose that a preference of the law of *Bengal* was likely to be operative in the mind of the Testator, and without a belief in the probable existence of such a preference, where is the foundation for treating the Will as inofficious?

It is not necessary for their Lordships to decide the second issue in the view

which they take of this case, which is substantially the same as that taken by the Civil Court of *Nuddeá*. It is, however, necessary for them to review the evidence on this issue to some extent, in order to support the opinion already expressed by their Lordships as to the probability of a continuing attachment by the Testator, *Batooknauth*, to his original family usages.

From the admissions in the pleading, referred to by the High Court in their judgment, and from the evidence, it may be safely concluded that this family came from a part of *India* where the *Mitácshará* was and is the prevailing authority; that it came not unattended by Ministers of religion, and that it originally continued in *Bengal* its ancient law. As, at the time of that migration, the Mahomedan was the governing power, and as the Hindoos were rather connived at than sanctioned by the governing power in the exercise of their religion, their law was in the nature of a personal usage or custom, and it is probable that migratory families or tribes amongst Hindoos would retain their own usages.

There seems to be no reasonable ground for doubting that the office of Priest was hereditary, and derived to the existing family Priest by successors in the mode stated by the *Purohit*, whose evidence was rather laid aside by the High Court, on the ground that he might be swayed by interest, than rejected by it as untrustworthy. An adherence to family usages is a strong Oriental habit; it is in most places not a weak one, and since, generally, the love of them increases with their long prevalence, it requires no effort to believe that the retention of religious usages and customs spoken to by the Defendant's witnesses did prevail in that particular branch of the family, to which point, indeed, the *Purohit's* evidence in a most important particular, that of the performance of the *Shradh* of *Batooknauth*, is clear and direct, and on that point not contradicted by proof, for though the Plaintiff alleges, she does not prove that she performed her Husband's *Shradh*.

This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rites, and yet acquiesce in a devolution of property in the common course of descent of property in that district, amongst persons of the same race. But still there is in the Hindoo law so close a connection between their religion and their succession to property, that the preferable right to perform the *Shradh* is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union. Now, it is proved by the *Purohit*, the proper witness to be adduced for the purpose, that *Paresnauth* performed the *Shradh* of *Batooknauth*, and that proof is not opposed by counter-proof.

It is a fact, which, unexplained, bears strongly on the question of the right to the succession being under the *Mitácshará*. The High Court considered the evidence to be nearly balanced, so far as the evidence, exclusive of the judicial proceedings hereafter to be referred to went; but it is to be observed, that the High Court, without any sufficient reason assigned, set aside the evidence of the *Purohit*, which, if it be regarded as the uncontradicted evidence of the appropriate and ordinarily adequate witness to the performance of a *Shradh*, by establishing the performance of the ceremony by *Paresnauth*, should have inclined the scale in favour of that side, especially when it is remembered that a presumption existed in favour of the continuance of the ancient family custom.

Their Lordships are relieved from the necessity of considering, whether the High Court did, or did not, attach undue weight to the proofs on which they mainly rested their judgment on this point; since the question now to be considered by their Lordships is only, whether the Will was inofficious. The High Court proceeded on the ground, that the judicial proceedings which they rely on, and state in their judgment, and which are set forth in the Respondent's case, show that the family had for some generations recognized the law prevalent in *Bengal* as that of their succession. The High Court had no explanation given to it of these proceedings. It certainly lay on the Defendants

to give that explanation. Possibly *Paresnauth* might have been able to show that no actual enjoyment according to such title by record had ever obtained in his branch of his family; and might have shown that he, as a party to the suit, had not advised or suggested that form of procedure and joinder of parties, and was not conscious of the effect of it, as evidence to rebut the continuance of a family custom; but whatever weight may attach to such suggestions when made and established by proofs, it is not the duty of a Court to suppose them. It suffices to say, that the decision on this issue of the High Court, on the evidence in the cause, may be correct; yet, their Lordships cannot derive from such evidence, viewed in connection with the other evidence in the cause, that belief which would justify them in treating the Will as *primâ facie* improbable, because inofficious, and inofficious because regardless of the ordinary preferences of Hindoos of the *Bengal* Schools.

Their Lordships proceed now to the consideration of the evidence as to the *factum* of the Will itself. It must be remembered that *Paresnauth* is dead, and that imputations are cast on him after his death, which he might have been able, and which his representatives in this suit may be unable, to reject, at least with equal success. Therefore, a Court of Justice should be careful to see that no inference be raised against the title which he asserted, and proved, and under which he obtained and retained possession during his life unopposed, unless it be such as the evidence in the cause clearly warrants. The evidence as to the *factum* itself in the judgment of both Courts appeared satisfactory. It is declared by the High Court to have been "precise enough on the main points of execution and signature, and to exhibit no signal discrepancies." In an ordinary case, even on proof of a Hindoo Will, such evidence would be deemed adequate; and it must be remembered, that this Will was very soon after its execution publicly exhibited in Court, and submitted to some investigation and proof, and was proved; and that, though proved *ex parte*, yet such proof followed on the notifications which ordinarily must be taken to give due notice of a claim under a Will.

If, then, no discrepancy of any material character be found between the proof which was given on the application for a certificate in 1853, and that given on the trial of the cause in 1859, the witnesses being native witnesses, and speaking again to the same fact after so long an interval, the absence of such discrepancy, and the precision of the statements as to the execution and signature, are some arguments in themselves in support of the truth of that to which those of the witnesses who were examined on both trials depose. One discrepancy, however, is noticed in the Respondent's case on which much stress was laid by Mr. *Cave* in his able argument for the Respondent.

The witnesses at the earlier judicial investigation described the Will as having been immediately dictated by the Testator to *Denonauth*, the Writer; whereas at the trial of this cause, they depose that *Taruckanauth* made the draft from the dictation of the Testator, and that *Denonauth* made a fair copy from it. This discrepancy certainly exists, but it is one which might be found in many a case free from suspicion. It may have proceeded from mere inaccuracy of recollection; and sometimes in native statements an intermediate agency is passed over, and an action ascribed to an immediate source, which in truth proceeded from a derivative one. The reason assigned by the Respondent's Counsel for this variation of story is little probable. Had the witnesses for the Will recollected the evidence which they gave on the first trial, they, if false witnesses, would have adhered to it. They are not likely on the trial to have made intentionally their evidence conformable to that of the Respondent's witnesses who were examined before them, for no draft was produced at all; nothing was shown to which they were likely to desire to make their account conformable. The transaction to which they deposed, and that to which the Plaintiff's witnesses were deposing, were utterly irreconcilable, and no motive could have existed for injuring their own story by taking up a part of that of the rival witnesses. Their Lordships, there-

fore, concur in the view taken of the evidence as to the *factum* of the Will by both Courts, that it was in itself adequate to the proof of an ordinary Will. Was the internal evidence against it, and was the internal improbability of the Will sufficient to discredit it?

No inherent improbability can be stated as to this Will, or its provisions, unless by assuming either that the law of the *Mitácshará* was known to the Testator to be clearly applicable, or that a preference in the female line of descent was likely to be influential in his name. Their Lordships, therefore, put aside these speculations and apply themselves to the consideration of the evidence in the cause. The grounds upon which the judgment of the High Court proceeds as to the Will are, that the witnesses to it are not such as they would have expected to find attesting his Will; that the hand-writing of the Testator seems too firm for one suffering from such a sickness; and that if the *Mitácshará* prevailed, the Will would be needless; that Rs. 25 per month was an absurdly small allowance for the Widow; that there was no hint of any disagreement between him and his Wife; and they conclude by observations derived from these matters as to the improbability of the case. But to these reasons it may be answered, that the Rs. 25 which are given only in case of the Widow leaving the family house, may not have been mean to measure her maintenance whilst resident; that it may have been designed *in pœnam* to enforce residence in the family house; that there was much conflict of evidence, and may have been room to doubt whether the *Mitácshará* did or did not prevail in the family as the authoritative exposition of their law; that there had been that compliance with the rules of procedure in the Courts of the District, and such apparent admissions on record, inconsistent with the prevalence of the *Mitácshará* as an authority, which might, unless explained, altogether destroy a custom by breaking in upon its continuance; and that these things might suggest to his own mind, or the minds of those about the Testator, the wisdom of not relying on the usage alone; that the Testator's imputed neglect of the pecuniary interests of his Widow, is no greater than that which belongs to any follower of the *Mitácshará* school, who, having the power to separate from an united family, and so to qualify his Widow as an heiress, prefers to let the law of his class take its course. And, as to the strength of the signature; that two days and part of a third intervened between the execution of the Will and the death; that though weakened by illness, the Testator may have relied his strength to the performance of that short act of signature. As to the character of the witnesses; that the family Priest was an attesting witness to the Will, and that such an attesting witness might well be supposed, by those at least who placed confidence in him, to be sufficient to save the Will from the objection of being attested only by persons unconnected with the family, or too low to give support to such an instrument, whilst the known aversion of persons of respectable position to be connected with cases likely to be the subject of litigation may be one reason why attesting witnesses to Hindoo Wills are seldom found to be of a class from which it would be most desirable to select them.

The case of the Defendants certainly derives some support from the failure of the case made as to the forgery of the Will.

Though the youth and dependent state of the Plaintiff herself may be admitted to afford very cogent reasons for not pressing against her those presumptions of acquiescence which similar conduct in a competent adult would give rise to, yet presumptions from the conduct of others cannot, as it has been said, be excluded from the consideration of this case, when the probabilities on either side are weighed.

During the whole of *Paresnauth's* life, no attempt was made by any one to question the validity of this Will. Is this consistent with a belief in the family that the Widow was the heiress of her Husband? It is not alleged that he shared the proceeds with the Widow. Could it have been unknown generally to the family and inmates of the house, and those most conversant with the family business, that he was dealing with the property as sole beneficial owner? According to the case of

the Widow, she immediately on her Husband's death became entitled to the usufruct for her life of a considerable estate. Could that be a matter of slight moment to her immediate family? Would there not have been a considerable difference in the estimation of her by others as an heiress, instead of being one entitled merely to a moderate maintenance out of the wealth of another? Yet, according to the statement of herself, two and a half years of silence and uncomplaining, non-participation in profits, ensue, not only on her own part, but also on the part of her Father and others, who, knowing her youth and incompetence to the management of business, would be naturally expected to be on the alert to watch over her interests, and to share, in some degree, it may be, in the fruits of her succession. The Will was proved in the ordinary mode; there is no proof of any alteration in the ordinary mode of notification, which must be viewed as ordinarily adequate to give knowledge where knowledge is proper to be given. The notification is said to have been on the house and on the property, yet the whole of the Plaintiff's own family, including herself, is in ignorance until after the lapse of two and a half years from the date of an ordinarily sufficing notification.

Is it reasonable to suppose that *Paresnauth* could stifle all inquiry, and keep secret from the family, that he had proved a Will publicly, inofficious as it is alleged, and disinheriting a Wife, an expectant heiress, between whom and her Husband the ordinary friendly relations existed? Such an entire state of ignorance, so improbable, and of such long duration, it is most difficult to suppose possible. We find it asserted stongly for the Plaintiff, but, unfortunately, her case is not free from statements, some of which, as to the violence designed against her, seem to be most improbable, one of which, the instrument with the power of adoption, has been abandoned, and another, viz., the proof of the forgery, discredited. She herself, young and inexperienced, is probably not in any way answerable for the management of her own case; but the case, as pleaded, relative to the forgery of the Will, is discredited by both Courts, and contains such improbable statements as fully to justify their rejection of it. Again, the statement of the Plaintiff as to the instrument which accompanied the permission to adopt a Son, which she alleges that she received, though not improbable in itself, bears still the semblance of an invented story. Her conduct in this matter is not in the least degree consistent with probability nor with duty. If that instrument was prepared, why was it suffered to remain unacted on? If destroyed, as she alleges, by *Paresnauth*, why should that destruction have prevented proofs of its existence and of the spoliation? Was it not her duty to make the adoption, according to her so urgently recommended, that the permission provided for five acts of adoption in succession on failure of each preceding one? If, then, the Court finds itself compelled to discredit these allegations, what rational ground has it for reposing confidence even on the story of her own continued ignorance, during the lifetime of *Paresanuth*, of any title adverse to her own? In a suit not instituted by *Paresnauth*, but which was instituted hostilely to him, to set aside a certain *Putnee* tenure, which suit affords not the slightest ground for a supposition that there was any collusion with him in it, he is found pleading the Will, and she repeating that title and praying, therefore, to be dismissed from that suit. *Primâ facie*, at least, credit must be given to that pleading, that it proceeds from one who was qualified to represent her. Is the contrary proved? Is any one called to show how that answer came to be filed? *Paresnauth* is dead; and, after his death, is it to be presumed that he put her answer, without her authority, on record; that is, that he committed a fraud on the Court, and continued a fraud on her? A Court should not impute fraud; and, after the death of *Paresnauth*, nothing should be supposed to his prejudice for which there is not a legal foundation.

Their Lordships, therefore, on a review of the grounds on which the High Court has held this Will not proved, are compelled to say, that they think that Court laid no foundation for treating the Will as inofficious in itself, for disregarding the

evidence of the *Purohit*, or for ascribing the answer of the Widow to the deceased *Paresnauth*. The Will had been proved, though *ex parte*; it had been acted on very recently after the Testator's death, and possession held for a considerable time under it. There appears to have been no desire on the part of *Paresnauth* to escape from the publicity and responsibility attending the proof of such a document. In fact, it was not drawn into question so long as *Paresnauth* himself lived. That apparent acquiescence is attempted to be ascribed to a general and enduring ignorance, which is in itself eminently improbable. The Will is met by distinct allegations of fraud and forgery, the witnesses to which are discredited by both Courts. Besides this, the case of the Plaintiff does, in the several parts of it before commented on, bear the appearance not simply of exaggeration, but of conscious untruth. Whatever might have been the result of this case, had these presumptions in support of the case for the Will been wanting, the ordinary support which the failure of an opposing case lends to the case which it impeaches, with the presumptions arising against the opposing case from the introduction into it of matters too grossly improbable for belief, and not the subject of innocent mistake, must be applied, on a review of the whole evidence in the cause, to support the *factum* of this Will. Their Lordships think, therefore, that the decision of the High Court must be reversed with costs, and that the decision of the Civil Court of *Nuddea* should be restored and affirmed, and that the Appellants should have the costs of this appeal; and they will humbly certify their opinion to Her Majesty to the above effect.

29th June, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly (The Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir FitzRoy Kelly (The Lord Chief Baron of the Exchequer).

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

FATIMA KHATOON CHOWDRAIN and NUSEEBA BEBEE CHOWDRAIN,* — *Appellants*,

versus

MAHOMED JAN CHOWDRY, *alias* KUFEELUDDEEN MAHOMED AHSAN CHOWDRY and others, — *Respondents*.

Execution—Payment to stay Sale—Voluntary Payment.

A. was in possession of certain lands in lieu of dower. B. puts up to sale, in execution of a decree against C., (A.'s husband,) C.'s rights and interests in those lands. A., under protest, deposited in Court the amount claimed, in order to stop the sale, and consented that it should be paid over to B., until the rights of the parties could be settled in a regular suit. A. then sued B. for a refund of the money, on the ground that at the time of B.'s attaching the property, his decree against C. had been already satisfied. The *Zillah* Court gave a decree for A. upon the merits. The High Court, on appeal, held, that the payment into Court was a voluntary payment, and therefore A. had no right of action against B. *Held* (reversing the decision of the High Court), that the payment was not a voluntary payment.

THE RIGHT HON. LORD ROMILLY:

THIS case, when divested of all that which is not material to the question before this Board, may be stated as follows:—The Appellants, two sisters, who had married individuals of the same family, became entitled, under what we should in this country call a marriage settlement, to dower in the form of a charge on an estate

* 12, Moore's I. A., p. 65; 1 B. L. R., P. C., p. 21.

or property which had belonged to a person of the name of *Nyum Chowdry*. He having died in debt, his heirs or representatives were sued by various persons, and, among others, by those whom the Respondents now represent, to recover some very considerable debts alleged to have been due by him; in which suit they obtained judgment. Under that judgment certain other properties were attached and sold, and the judgment was in part satisfied. If it were necessary to look into the particulars of these numerous and somewhat complicated proceedings, it would probably appear (and that alone would be a ground upon which the Respondents must be held disentitled to retain the money they have received) that this judgment was in effect satisfied; that all that the decree of the Court had entitled the Respondents to take out of the different properties in question had been paid and satisfied in one way or another; and was received by them so as to disentitle them to institute or to continue any further proceedings against these properties in respect of the claim now in question. However, they did, in fact, obtain an authority, under one of the many proceedings that have taken place, to sell the estate upon which the dower of the Appellants was charged.

In order to prevent that sale, which would have been mischievous and prejudicial in the highest degree to the rights of the now Appellants, they, upon a proceeding which they instituted, and under the authority of the Court, not voluntarily, but under protest, and because they were compelled to take that step in order to prevent the sale of the estate, paid the sum of between Rs. 59,000 and Rs. 60,000 into Court; and it appears that that payment into Court having taken place in order to prevent a sale of the property, under which the rights of all parties, and, among others, of the Appellants, were expressly reserved, the question arose, and arose in rather a singular form, whether the money should remain in Court, or whether it might not be paid over to the Respondents. Undoubtedly the Appellants' Pleader consented at once that the money should be paid over to them.

The money that had been paid into Court, not voluntarily, but under this species of compulsion, and for the purpose of preventing this injurious sale of the property, was paid over accordingly; the only voluntary act which was done being the consent given by the Appellants, that the money, instead of remaining in Court, should, in the meantime, and until the rights of the parties could be settled by the final decree of the Court, be paid over to the Respondents. Afterwards, when all these circumstances came before the *Zillah* Court, and all the questions were raised which either party thought fit to raise, or had the power to raise, in the then state of the suits, the Appellants obtained a decree, dated the 8th of June, 1860, in their favour against the Respondents, for the sum of Rs. 59,281 and a fraction, being the amount paid by them into Court as before-mentioned. Against this decree an appeal was lodged, which was carried before the High Court of Judicature at *Fort William* in *Bengal*. The High Court, having considered the whole case, did not in any way enter into the merits of the case itself, or of the decision of the Court below, at least upon the grounds upon which the case had been decided, but took the point for themselves, that by law the payment to the Respondents of the money of the Appellants, under the circumstances in which it was made, constituted a voluntary payment with the full knowledge of the facts, and, therefore, that the money could not be recovered back. If it had been such a payment, no doubt such is the law; but when we look at the circumstances of the petition of the Appellants, dated the 17th of May, 1849, when the money was paid into Court, we find, in the first place, it was not a payment at all. It was originally a mere deposit in Court of the full amount recoverable by the decree-holder. It was deposited, under protest, for the purpose of preventing an injurious sale of the whole property. Then it appears that upon the reading of the petition, the Pleader for the Petitioners was asked, whether his Clients had any objection to the payment to the decree-holder of the amount which had been so deposited; and the answer was, "I will bring a regular suit for setting aside the

summary Order rejecting the claim, but the sale cannot be stayed unless the amount recoverable by the decree-holder is deposited: I, therefore, deposit the amount for the purpose of its being paid to the decree-holder, and pray that the said sum be paid to the decree-holder and the sale be stayed."

Those were the circumstances under which the money was paid, the payment being clearly no voluntary payment; and the suit having been determined on its merits in favour of the Appellants, they are clearly entitled to recover this money back again. Therefore, the Order that we shall advise Her Majesty to make is, that the decree of the High Court of Judicature, reversing the decree of the *Zillah* Court, be reversed, and that the decree of the *Zillah* Court be confirmed; and that the Appellants be held entitled to recover Rs. 59,821 and a fraction, as decreed by the judgment of the 8th of June, 1860. It is satisfactory to feel, as their Lordships have not entered into the merits of the case on the many points argued in the *Zillah* Court and in the High Court, that substantial justice will be done by the Order which they will now advise Her Majesty to pronounce; for it is perfectly clear, on the one hand, that the Respondents had no right to this money out of that estate at all, they having been satisfied to the extent that the former decrees of any Court or Courts entitled them to recovery out of that property; and, on the other hand, it appears perfectly clear, that the Appellants paid this money merely for the purpose of preventing a sale of the property, so that they are, in justice as well as in law, entitled to recover. The Appellants must also be held entitled to the costs of the appeal, and of the reversal of the decree, and to the usual interest, at the current Court rate, upon the sum to which they are so entitled.

29th and 30th June, 1868.

PRESENT:

Members of the *Judicial Committee*,—Lord Romilly (the Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir FitzRoy Kelly (the Lord Chief Baron of the Exchequer).

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GRIDHARI LALL ROY,* ... *Appellant*,

versus

THE BENGAL GOVERNMENT, *Respondent*.

Mitákshará—Escheat—Onus.

The enumeration of *Bandhus*, or cognate kindred given in *Mitákshará, II.*, section 6, art. *i.* (*a*) is not exhaustive. The maternal uncle and the father's maternal uncle will take as heirs in preference to the Crown.

In a suit by the Crown claiming lands as an escheat, which are admittedly in the possession of the party claiming as heir, the *onus* is on the Crown to show that the last proprietor died without heirs. It is open to the Defendant in such a suit to set up any *justertii* to bar the claim of the Crown.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, (with whom was Mr. *E. P. Wood*,) for the Appellant, and

Mr. *Forsyth*, Q. C., and Mr. *Merivale*, for the *Bengal* Government

ON the opening of the appeal a preliminary objection was taken by the Appellant to the right of the Government to sue. It was submitted, that the suit being in the nature of ejectment, the *onus* was upon the Government, to establish a clear title by escheat by showing an entire failure of legal heirs of the late *Woopendro Chunder Roy*, the *Zemindar* last seised, according to Hindoo Law, and a consequent vacant succession, which, it was contended, the Government failed to do, and was not entitled to rely on the weakness of the title

* 12, Moore's I. A., p. 448.

(*a*) In connection with this case, see that of V. C. Gomin *v.* V. Gomin, in 2 Wyman's Rep., 177.

of the Appellant, who had been put in possession by the Government.

The *Lord Chief Baron*:—In this Country in a Writ of intrusion, or Ejectment, the Crown must, to take lands by escheat, prove that there was an entire failure of heirs, and so also a Lord of a Manor with respect to Copyholds on the death of a Tenant without heirs, and cannot rely upon the want of title of the party in possession. The Government must show a good title. Here they have shown none.

For the Bengal Government it was contended, first, that by the Hindoo Law, the Appellant, the maternal Uncle of the Father of the party last seised, had no title as heir, and that the Government was not bound to prove a negative that there were no heirs; and secondly, that there were other parties claiming as heirs, citing *The Collector* of *Masulipatan* v. *Cavaly Vencata Narainappah* (a) [Sir *Lawrence Peel*: The Crown has not under the Statute, 21st and 22nd *Vict.* c. 106, transferring the Government of *India* to the Crown, a higher title than the late East India Company had. If the East India Company had claimed lands upon the ground of the extinction of the immediate tenantry, they must have proved their title in the same manner as a party claiming under a remote remainder would have to prove extinction of the previous heirs. There appears to be other parties who are entitled.] A judgment against the Appellant would not operate as a bar to a party who claimed, showing a title as heir. It is admitted that the Government had not given affirmative evidence of the non-existence of heirs.

LORD ROMILLY:

Their Lordships wish to ask the Appellant's Counsel, whether they have anything to say to the judgment they are prepared to pronounce, namely, that without deciding the rights of the parties, to dismiss the appeal from the *Zillah* Court and to reverse the judgment of the High Court at *Calcutta*, liberty being given to the Respondent to institute fresh proceedings for the purpose of establishing the right of the Crown by escheat.

Sir *R. Palmer* declined to accede to the proposed judgment, and claimed the right to be heard on the merits.

Upon the question, whether by the Hindoo law received in the *Benares* school, the Appellant, as Father's maternal Uncle, was entitled as a *Bandhoo* to succeed as heir to *Woopendro Chunder Roy*, in preference to the claim of the Crown by escheat; the following authorities were cited: The *Mitácshará* (Trans. by *Colebrooke*,) ch. II. sec. vi.; *Stokes'* "Hindu Law," p. 448; The *Viromitrodáya*(a); *Stokes'* "Hindu Law," pp. 176-8; The *Daya-Bhagá*, ch. XI. sec. vi. pl. 12; *Stokes'* "Hindu Law," p. 346, 352-3; The *Dáya-Krama-Sangraha*, ch. II. sec. vi.; *Stokes'* "Hindu Law," p. 499; *Strange's* "Hindu Law," Vol. I., pp. 147-8, 317

(a) 8 Moore's I. A., p. 500.

(a) The passage quoted from the *Viromitrodáya*, p. 209, is translated in Mr. Justice *Bayley's* judgment, in the case of *Amreto Kumari* v. *Lukhynarayan Chukurbutty* (9 Sevestre's Sel. Cases, 547—552,) as follows:—"In default of *Samanodakas*, *Bandhoos* (cognates) are heirs. Cognates are of three kinds,—related to the person himself, to his Father, or to his Mother. According to the following text: 'The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his maternal Uncle, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned his Mother's cognate kindred. Then, by reason of near affinity, the cognate kindred of the deceased himself, in the first instance; then the Father's cognate kindred, and next his Mother's cognate kindred, succeed.' This is the order of succession. In the text of *Menu*: 'Then the distant kinsman shall be the heir, or the spiritual preceptor, or the pupil;' the term *Sakulya* comprehends the persons descended from the same family (*Sagatra*,) and the kinsman allied by common libation of water (*Samanodaka*;) the maternal Uncles and the rest; and the three kinds of cognates. The term cognate (*Bandhoos*) in the text of *Jageshwara* or *Jagyavalkya* must comprehend also the maternal Uncles, and the rest; otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to

[2nd Ed.]; *Dattaka Mimansa* of *Nanda Pandita*, sec. II. p. 29 (Trans. by *Sutherland)*; *Morley's* Dig., Vol. I. Pref. cexxi.; *Elberling* on Inheritance, pp. 81, 2, 3; and an English translation of the principal maxims of *Mitácshará Grunthoo (a)*; *Amreto Kumari* v. *Lukhynarayan Chukurbutty*, 9 Sev. Rep., p. 547; referring to a passage in the *Mitácshará (b)* not translated by *Colebrooke; The Collector of Masulipatam* v. *Cavaly Vencata Narainappah*, 8 Moore's Ind. App. Cases, 525;

inherit and not they themselves, though nearer in the degree of affinity. A doctrine highly objectionable."

(*a*) This document, described as an English translation of the principal maxims of the *Mitácshará Grunthoo*, was put in evidence by the Defendant, and received and acted upon by the Courts in *India* and on appeal. As it differs in some respects from the translation by *Colebrooke*, it is set out entire:—

"The Wife and the Daughters also, both Parents, Brothers likewise, and their Sons, gentiles, a pupil, and fellow-student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven (died,) leaving no male issue. This rule extends to all persons and classes. (See *Colebrooke's* 'Translation of the *Mitacshara*,' ch. II. sec. i. pl. 1. p. 324.)

"On failure of gentiles, the cognates (*Bandhoos*) are heirs. Cognates are of three kinds,—related to the person himself, to his Father, or to his Mother, as is declared by the following text:—'The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncle must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned his Mother's cognate kindred.'—(*Colebrooke's* 'Translation of the *Mitacshara*,' ch. II. sec. vi. pl. 1. p. 352.)

"Here, by reason of near affinity, the cognate kindred (of the deceased himself) are his successors, in the first instance; on the failure of them, his Father's cognate kindred; in default of them, his Mother's cognate kindred. This is the order of succession. (Translation of the annexed passage of the *Viromitrodaya*, copied from the Book which is in the library of the Government Sanscrit College.)

"The term *Sakulya* (distant kinsman) used in the following text of *Menu*.—'Then the distant kinsman shall be the heir, or spiritual preceptor, or the pupil,' comprehends the persons descended from the same ancient sage (*Sa Gutra.*) and the kinsmen, allied by common libation of water; the maternal Uncles and the rest, and the three kinds of cognates. The term 'cognate' (*Bandhoo*) in the text of *Jagishwara* or *Jagyavalkya*, must comprehend also the maternal Uncles and the rest; otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit, and then they themselves, though nearer in the degree of affinity; a doctrine highly objectionable.—*Viromitrodaya*, (Translation of the annexed passage of the *Viromitrodaya*, copied from the Book which is in the library of the Government Sanscrit College.)

"Therefore, the summary of the abovementioned heirs is this:—First, the Son; on failure of him, the Grandson; in his absence, the Grandson's Son; on failure of him, a chaste Wife; in her default, the Daughters; in their absence, the Mother; in her default, the Father; and in his default, the Daughter's Son; and in default of him, the Brother; in his default, the Brother's Son; and on his death, the nearest kinsmen; in default of them, the remotest kindred, according to their order; in default of all these, the nearest *Sakulya*; on failure of them, the remotest *Sakulya*; in their absence, Maternal Uncles and others.

"But on failure of all these heirs, the King inherits, except the property of a *Brahmana*, which goes to another *Brahmana*.—*Vivada Chintamani*—(*Vide Baboo Prossonno Coomar Tagore's* translation of the *Vivada Chintamani*, p. 299.)

"A true translation of the annexed Sanscrit paper.

"(Signed) *Shama Churn Sircar*,
'Chief Interpreter and Translator,
High Court."

(*b*) This passage was as follows: "When one having gone to a Foreign country dies, let the descendants, cognates (*Bandhoos*), gentiles, or his companions take the goods. In their default, the King. When of those who are associated in trade, any one, having gone to a Foreign country dies, then his share shall be taken by his heirs, *i. e.* the Son and other descendants, cognates, *Bondhava*, *i. e.* the Mother's side relatives, the

The Collector of Madura v. *Moottoo Ramalinga Sathupathy*, 12 Moore's I. A., p. 397; *Venayeck Anundrow* v. *Luxumeebaee*, 9 Moore's Ind. App. Cases, 516; *Nagalinga Pillia* v. *Vardilinga Pillia*, Dec. of Sudder Court, 1860, p. 245; *Surja Kumari* v. *Gandhrap Singh*, 6 Ben. Sud. Dew. Ad. Rep. 142; and *Lakhi Priya* v. *Bhairab Chandra Chawdhuri*, 5 Ben. Sud. Dew. Ad. Rep. 315.

17th July, 1868.

Their Lordships reserved the consideration of their judgment, which was now pronounced, as follows, by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The facts on which the determination of this appeal depends are few and undisputed. *Woopendro Chunder Roy*, the owner of the *Zemindary* and other property in dispute, died on the 7th of August, 1860, an infant, and unmarried. He was of a family which had formerly come from the Upper Provinces, and, though settled in Lower *Bengal*, where the *Zemindary* is situated, is admitted to have retained the ceremonial and other law of its original habitat. There is, therefore, no dispute that any question touching the succession to *Woopendro Chunder Roy* is determinable by the law of inheritance current at *Benares*.

On *Woopendro Chunder Roy's* death the Appellant, as the nearest male relative surviving him, performed his *Stradh*, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the *zemindary* on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the Brother of his Grandmother *ex parte paternâ*, or, to use the phraseology of the *Mitácshará*, his Father's maternal Uncle. And accordingly, at the time of this application for mutation of names, some question, whether the Appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a *Pundit* which he had procured through the Registrar of the High Court, determined to recognize the title of the Appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the *zemindary* in the Collector's Books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

In 1863, the Government authorities appear to have changed, for reasons which have not been explained, their view of the Appellant's title; and on the 3rd of August in that year the suit out of which this appeal has arisen was commenced against him in the name of the Government of *Bengal*, as representing the Crown, for the recovery of the real and personal property of *Woopendro Chunder Roy*, on the allegation, that upon his death it had escheated, for want of heirs, to the Crown.

By a decree, dated the 28th of September, 1864, the *Zillah* Judge dismissed the suit, holding that the Government was not entitled to oust the Appellant. The precise grounds of his judgment it is unnecessary to examine.

On appeal to the High Court, this decision was reversed by two of the Judges of that Court, and the presen appeal has been preferred against their decree.

The points ruled by the judgment of the High Court were,—

First, that the Government was not estopped by the acts of its Officer in 1861, when the Appellant applied for and obtain

maternal Uncles and others, the Gentiles, *i. e.* the *Sapindas*, besides the Son and other descendants, and those who are come, *i. e.* those associated in trade who come from a foreign country. In their default, *i. e.* in default of descendants, &c., let the King take. By the word *ba*, (or) [the Sage] shows their right severally. The rule as to the order contained in [the text] the Wife, Daughters, &c., is also understood for this place. The necessity for the text is to exclude the Pupil, the fellow Students, the Brahmin, and to include the Trader."—(*Mitácshará*, p. 322, Ed. 1829.) This translation is taken from the judgment of Mr. Justice *Bayley*, in the case of *Amreto Kumari* v. *Lukhynarayan Chukurbutty*, 9 Sevestre's Sel. Cases, p. 531.

ed the mutation of names, from bringing this suit.

Second, that upon the true construction of the section in the *Mitácshará*, which will be hereafter considered, the Appellant, as the maternal Uncle of the Father of the deceased, was excluded from the class of *Bandhoos* capable of inheriting; and that consequently, as between him and the Government, he had no title to the property sued for.

Upon these findings the Court decreed, that the Government should obtain possession of all the real property admittedly in the Appellant's possession, with a certain specified exception, but that, for want of proof as to its value, their claim to the moveable property should be dismissed; and the judgment then proceeded as follows:—"This decree of the Government against *Gridhari* is final, but it does not become absolute until the claim of *Sohun Lall* and *Mohun Lall*, who represent themselves to be maternal Grandmother's Sister's Sons, and that of *Harro Bhoja Misser*, the spiritual preceptor of the deceased, have been inquired into. The last-named person has filed no evidence, but his claim cannot be determined until that of *Sohun Lall* and *Mohun Lall* has been set at rest, and they have filed no evidence at all. They, as well as the *Acharjee*, or spiritual preceptor, do not oppose the Defendant, *Gridhari's* claim, but only prefer a claim in case his is declared to be invalid; and if they prove themselves to be what they allege that they are, they are undoubtedly entitled to succeed as enumerated *Bandhoos*. The case must, therefore, be remitted to the Judge, with instructions that he will, without delay, take up the case, and call on these parties and any others who may appear to claim the property of the deceased minor, within a reasonable time to file their evidence. He will then examine it thoroughly, and, guided by his estimate of it, and by Hindoo Law, he will either confirm the present Order in favour of Government as against them also, or pass in their favour whatever decree the law of the case seems to require."

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, viz. whether under the law current at *Benares* the Appellant has not a title to inherit the property preferable to the claim of the Government by escheat; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth section of the second chapter of the *Mitácshará*. The absolute exclusion of the Father's maternal Uncle from the list of possible heirs, for which the Respondent contends, can rest on no other ground.

Mr. *Forsyth*, indeed, argued strongly against the right of the Appellant to inherit, on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well founded? There is evidence, the uncontradicted evidence of the family Priest and others, that the Appellant did, in point of fact, perform the *Stradh* of *Woopendro Chunder Roy*, and he seems, in the judgment of the Priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the Appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of *Woopendro Chunder Roy* at the time of his death had been, not the Appellant but a natural-born Son of the Appellant. It is admitted that, on the strictest interpretations of the *Mitácshará*, such a person is a *Bandhoo*; that the three classes of *Bandhoos* must be exhausted before the King can take for want of heirs; and, therefore, that the title of the Appellant's Son would prevail against the Crown. Now, such a *Bandhoo* either is competent to perform the *Stradh* of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows *à fortiori*, that his Father, who would have been one degree nearer akin to the deceased, would

also have been competent; and that his exclusion from the line of inheritance, if it exists, depends upon some other principle.

It is impossible to read the second chapter of the *Mitácshará* without remarking the extreme jealousy with which the Hindoo law regarded the right of the King to take on a failure of heirs. The seventh section refuses altogether to recognize that right where the property was that of a Brahmin. Admitting it as to the property of the other castes or classes, it expressly says, "if there be no relations of the deceased, the Preceptor, or, on failure of him, the Pupil;" and again, "if there be no Pupil, the fellow student is the successor." It thus exhausts the relatives and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the King is afterwards stated in pl. 6 affirmatively, thus, "The King, and not a Priest, may take the estate of a *Cshatriya*, or other person of an inferior tribe, on failure of heirs down to the fellow-student." So *Menu* ordains: "But the wealth of the other classes, on failure of all (heirs), the King may take." So far, then, the law would seem to be clear that the King cannot take the property to the prejudice either of a maternal Uncle, or a maternal Grand-uncle, each of whom is obviously "a relation" of the deceased. What grounds, then, does the sixth section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs? The sixth section begins by stating broadly, "On failure of gentiles, the *Bandhoos* (rendered by Mr. *Colebrooke* 'cognates') are heirs." Much has been said about this word "*Bandhoo*." It seems (see note at page 350 of *Colebrooke's* translation of the *Mitácshará*) to be sometimes used as equivalent to "kinsmen" generally. But in this particular section it may be taken, as defined elsewhere by the *Mitácshará* itself, to import kinsmen springing from a different family (and therefore opposed to "*gotraya*" or "gentiles") and connected by funeral oblations. From this class the maternal Uncle, or the Father's maternal Uncle (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. Such a definition the Respondents contend is found in the passage which immediately follows the last citation from the *Mitácshará*. But is that necessarily so? The Author of that Treatise goes on to state, in sec. VI., "Cognates (*Bandhoo*) are of three kinds; related to the person himself, to his Father, or to his Mother, as is declared by the following text." And then follows, as a quotation, a more ancient text, the authorship of which seems, from Mr. *Colebrooke's* note, to be uncertain, which says, "The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncle, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned amongst his Mother's cognate kindred."

This sub-division of *Bandhoos* into three classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations. It may be, that the *Bandhoos* of the parent, though connected with him by funeral obligations, would, by reason of remoteness of kinsmanship, not be so connected with the Son.

If, for the determination of the question under consideration, their Lordships were confined to the four corners of the *Mitácshará*, they would feel great difficulty in inferring, from the omission of "the maternal Uncle" and "the Father's maternal Uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindu in preference of the King. Such an inference, in the teeth of the passages which say that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all

Bandhoos who are capable of inheriting, nor is it cited as such, or for that purpose, by the Author of the *Mitácshará*,—it is used simply as a proof or illustration of his proposition, that there are three kinds or classes of *Bandhoo;* and all that he states further upon it is, the order in which the three classes take, viz., that the *Bandhoos* of the deceased himself must be exhausted before any of his Father's *Bandhoos* can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the *Mitácshará*, which is not found in that portion of the Treatise which was translated by *Colebrooke*, but has been translated for the purposes of this suit, and is stated in the record(*a*). The general effect of that passage is to introduce, in the case of a Trader dying abroad, a new class of remote heirs, viz., his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes among *Bandhoos* the maternal Uncle. Here, then, is a passage, written by the Author of the *Mitácshará* himself, which treats the maternal Uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal Uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the Trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the *Mitácshará* the question under consideration is at least uncertain. That question, however, is not to be governed by the *Mitácshará* alone. Adhering to the principles which this Board lately laid down in the case of *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(*b*,) their Lordships have no doubt that the *Viromitrodáya*, which by Mr. *Colebrooke* and others is stated to be a Treatise of high authority at *Benares*, is properly receivable as an exposition of what may have been left doubtful by the *Mitácshará*, and declaratory of the law of the *Benares* school.

The passage cited from that Commentary in the record, and more fully in *Amreto Kumari* v. *Lukhynarayan Chukurbutty*, (9 Sevestre's Reports of Cases in the High Court, p. 552), is explicit. After stating that the term *Sakulya*, or distant kinsman, found in the text of *Menu*, comprehends the three kinds of cognates, the Commentator goes on to say,—"The term cognates (*Bandhoos*) in the text of *Jagushwara*, or *Jagyawalkya*, must comprehend also the maternal Uncles and the rest, otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity: a doctrine highly objectionable." The passage, as translated in the record, has "then they themselves" in place of "not they themselves." If this be the correct reading, it would follow that even if the exclusion of the maternal Uncle and others not mentioned in the text relied upon by the Respondent from the list of *Bandhoos* were established, they would still, as relations, be heirs, whose title would be preferable to that of the King. But the passage on either view of it declares that they are not so excluded; and it is, therefore, unnecessary to consider whether the title of any remote relation who could not be brought within the category of *Bandhoos*, or other class of heirs specified by the *Mitácshará* would prevail against that of the Crown. The learned Counsel for the Respondent remarked that this passage of the *Viromitrodáya* goes no further than to affirm the right of a maternal Uncle, and that it says nothing of a maternal Grand-uncle. But to say nothing of the use of the term "and the rest," the text is at least an authority for the proposition that a maternal Uncle is a *Bandhoo*. The maternal Uncle of the Father is, therefore, a *Bandhoo* of the Father, and it is admitted that, failing the *Bandhoos* of the deceased, the *Bandhoos* of the Father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted *Pundits;* it seems also to make the law of the *Benares* school consistent on the point in question with that of *Bengal;* and the concurrence of opinions of *Mitra-misra*, the Author of the *Viromitrodáya*, with *Jimuta Va-*

(*a*) See 12 M. I. A., p. 450.
(*b*) 12 M. I. A., pp. 397 and 438.

hana, the author of the *Daya Bhaga*, is not unimportant, since they are stated by Mr. *Colebrooke* (Pref. viii.) to differ on almost every disputed point of Hindu law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of *Bandhoo*, in the text quoted in the *Mitácshará*, is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of *Bengal* in the case of *Amreto Kumari* v. *Lukhynarayan Chukurbutty* (7 Sevestre, Sel. Cases, 547.*) The question under consideration must, therefore, be held to be an open one even in the Courts of *India*.

Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the Appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and therefore, without adopting the reasons given for his judgment, they think that the *Zillah* Judge did right in dismissing the suit. This conclusion necessarily disposes of this appeal. Their Lordships, however, deem it right to add that, even had they agreed with the learned Judges of the High Court in their view of the law of inheritance, they could not have concurred in the decree under appeal. Their Lordships do not impugn the correctness of the conclusion to which both the Courts below came on the question, whether the proceedings in 1861 estopped the Government from bringing this suit. But the effect of these proceedings was to determine, if it were previously doubtful, the fact of possession. The Respondent, therefore, was in the position of a Plaintiff in an ordinary suit in the nature of an ejectment. The Government could only recover by the strength of their own title. Accordingly, it lay upon the Plaintiff to prove, at least *primâ facie*, that *Woopendro Chunder Roy* died without heirs; and, on the other hand, the Appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the Respondent's suit; and the title of those persons who, he says, are, failing himself, the heirs to *Woopendro Chunder Roy*, has never yet been determined. The decree under appeal would remit the cause to the Judge, in order to allow those persons who, according to the practice in *India*, have intervened as Objectors, to litigate their title with Government, casting, apparently, the burden of proof on them. But it seems to deprive the Appellant of his right to defend his possession, on the ground of an existing *jus tertii*.

It is unnecessary, however, to say more on this point, since the conclusion to which their Lordships have come on the Appellant's own title obliges them humbly to recommend to Her Majesty, that the decree of the High Court be reversed, and that in lieu thereof it be ordered, that the appeal to the High Court from the decree of the *Zillah* Judge be dismissed with costs. The Respondent must pay the costs of this appeal.

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* 9 Sev. Rep., p. 552.

2nd and 3rd July, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly (The Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir FitzRoy Kelly (The Lord Chief Baron of the Exchequer).

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

PESTONJEE NUSSERWANJEE,* *Appellant,*

versus

MANOCKJEE & Co., ... *Respondents.*

Code of Civil Procedure—Act No. VIII. of 1859, section 326, construction of—Arbitration—Award of Arbitrators partly acted upon—Revocation of agreement to submit to arbitration.

P. N., and D. M. and Co., two partners, agreed to the arbitration of certain persons, subject to the decision of an Umpire on the points where they differed, by an agreement in writing with a memorandum at the foot which contained these words —"We the undersigned, P. N. and D. M. and Co., have executed this power under and in conformity with the provisions of sec. 327 of Act VIII. of 1859; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within-mentioned duly empowered arbitrators may give under the aforesaid Act." The arbitrators agreed in certain points and expresses their decisions thereon in two intermediate awards. Shortly after the second intermediate award, the Appellant wrote to the arbitrators to make their award in ten days, or, if they were unable to do so, to appoint an umpire, which was not done. The Appellant, thereupon wanted to withdraw from the arbitrators and cancel the award; while the civil Court ordered the submission to be filed under sec. 326 of Act VIII. of 1859, at the instance of the Respondent:—*Held*, on appeal,

I. That, upon proper construction of the secs. of the Procedure Code relating to the subject, the civil Court had jurisdiction under sec. 326 to direct the submission to arbitration to be filed:

II. That although sec. 326 was not expressly referred to in the submission to arbitration, still that submission was under and subject to the sections contained in the Code relative to that subject, that the memorandum at the foot was introduced for that purpose; that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them, that it was to be subject to the Act; and that the special notice of sec. 327 was introduced only *ex majori cautela*:

III. That when persons have agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause, and that a mere revocation of the authority is not permitted; and

IV. That, considering the prevailing tendency of the Indian and the English Legislature to put an end to the distinction between the agreement to refer and the authority thereby conferred, it was not in the power of the Appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he has concurred.

The Code of Civil Procedure in *India* must be construed with reference to the constitution of the Indian Courts, and the abiding direction to them to proceed in all cases according to equity and good conscience.

17th July, 1868.

THEIR Lordships' judgment having been reserved, was now pronounced by

THE RIGHT HON. LORD ROMILLY:

This is an appeal from three Orders of the High Court of Judicature at *Madras*. The question, in substance, is, whether the Award of Mr. *Schlunk* settling matters in difference between the Appellant and the Respondent is valid and binding on the parties. The facts which raise the question may be stated very shortly.

On the 29th of October, 1863, the Appellant and Respondent entered into a partnership in certain farms, of taxes imposed on spirituous liquors within certain Districts in the Presidency of Madras. The Appellant was to supply the capital required, and the Respondent was to manage the business. Certain differences arose between them; and they agreed that Arbitrators should be appointed to settle these differences. Accordingly, this was done by an agreement in writing for submission to arbitration, bearing date the 10th of June, 1864. Originally, Mr. *Pierce* and Mr. *Bates* were appointed Arbitrators, but Mr. *Pierce* refusing to act, Mr. *Punnett* was appointed in his place. The terms of the agreement are to this effect:—

"Know all men by these presents, that we the undersigned, *Pestonjee Nusser-*

* 12, Moore's I. A., p. 112.

wanjee, of the firm of *Framjee Nusserwanjee* & Co., and *D. Manockjee* & Co., do make, constitute, and appoint *R. H. Pierce*, Esq., and *W. Bates*, Esq., Gentlemen, as Arbitrators, chosen by our mutual consent, to inquire into certain controversies and differences existing between us in regard to our copartnery in the transactions of the *Abkary* Farms of the *Calicut*, *Kurumbranad*, *Palghaut*, and *Ponany Taluqs*, and *Mannur* and *Payenjanur Amshoons*, of the *Ernad Taluq*, rented from Government, giving, and by these presents granting, unto the above-said *R. H. Pierce*, Esq., and *W. Bates*, Esq., full power to substitute or appoint one or more Arbitrator or Arbitrators, as well as, if necessary, an Umpire; and further, to call for and examine the Books and papers of the said copartnership, as also any party or parties connected with the farms and others, and otherwise to take all and every lawful means to arrive at a fair and impartial decision, to which we hereby mutually agree and bind ourselves to abide fully and entirely."

It contains the following Memorandum at the foot:—"N. B.—We the Undersigned, *Pestonjee Nusserwanjee*, of the firm of *Framjee Nusserwanjee* & Co., and *D. Manockjee* & Co., have executed this power under and in conformity with the provisions of section 327 of Act VIII. of 1859; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within-mentioned duly empowered Arbitrators may give under the aforesaid Act."

On the 15th of July, 1864, the Arbitrators made an intermediate award, dissolving the partnership, and giving the business to the Appellant. On the same day a notice, signed by both parties, was publicly given of this fact, and which stated, that all debts due to them by the *Abkary* Farm were to be received and paid by *Framjee Nusserwanjee* & Co., and that the Respondent had no longer any interest therein.

On the 3rd of October, 1864, the Appellant wrote to the Arbitrators, complaining of the conduct of the Respondents relative to the making up of the accounts.

On the 13th of May, 1865, the Arbitrators came to a resolution, which was a second intermediate award, directing that the farm outstandings due from the *Ponany*, *Chowghaut*, and *Betatanad* divisions should be taken by the Defendant at 50 *per cent.* discount; it is in these words:—"Resolved, that the farm outstandings, due from the *Ponany*, *Chowghaut* and *Betatanad* divisions, as they stood in the farm Books on the 30th of June, 1864, as *per* balance-sheet, be taken over by Messrs. *Dhunjeebhoy Maneckjee* & Co., or their nominee, at 50 *per cent.* discount, they receiving credit for all sums since recovered, less any regular expenses, and paying the amount as may be hereafter decided by us."

On the 6th of July, 1865, Mr. *Punnett*, one of the Arbitrators, published a long written opinion on the subject of the points remaining to be disposed of by the Arbitrators under the submission to arbitration.

On the 24th of July, the Appellant wrote to the Arbitrators, and requested them to make their award in ten days, or that, if they were unable to do so, they would nominate an Umpire.

This was not done, and, on the 5th of August, 1865, the Solicitor of the Appellant wrote a Letter to the Solicitor of the Respondents, purporting to cancel the award; and he also sent in similar Letters to the Arbitrators. On the same day Mr. *Bates*, the other Arbitrator, gave his written opinion on the remaining points referred to therein, stating, in substance, his differences from Mr. *Punnett*.

On the 12th of August, 1865, a further notice was given by the Appellant, requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. *Punnett*, and another by Mr. *Bates*, the last on the 7th of September, 1865; and Mr. *Schlunk* (who was afterwards appointed Umpire, but who seems to have been already selected for that purpose by the Arbitrators,) on the 12th of September, 1865, made some written observations founded upon the written opinions of Mr. *Punnett* and Mr. *Bates*, the two Arbitrators.

On the 22nd of September, 1865, the Civil Court ordered the submission to arbitration to be filed under the provisions

of 326th section of Civil Procedure Code of *India*.

The Appellant insists, that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under the section 326 of the Civil Procedure Code, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd of September, the day on which this decision was pronounced, Mr. *Schlunk* was appointed Umpire by the Arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th of October, 1868, and, on the 17th of the same month Mr. *Schlunk* made his final award in favour of the Respondents. The Order of the Civil Judge, of the 22nd of September, was appealed from and confirmed by the Order of the High Court of Judicature on the 15th of January, 1866. The Appellant then presented a petition to set aside the Award on the ground of irregularity and misconduct, which was dismissed as being too late; and the final Award of Mr. *Schlunk* was confirmed and carried into execution by the Decree of the Civil Judge on the 9th of October, 1866. The Appellant petitioned for leave to appeal from the decision, which petition was dismissed by an Order of the High Court on the 7th of January, 1867. On the same day, the High Court of Judicature at Madras, affirmed the decision of the Civil Judge of the 6th of October, 1865, confirming the appointment of Mr. *Schlunk* as Umpire. The present appeal is brought from all these three decisions of the High Court of Judicature.

The first question is, whether the Civil Court of *Calicut* had jurisdiction under section 326 of the Code of Civil Procedure in *India*, to direct the submission to arbitration to be filed. Their Lordships are of opinion, that upon a proper construction of the sections of that Code relating to this subject, the Civil Court had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of those Courts, and the abiding direction to them to proceed in all cases, according to equity and good conscience.

The 326th section is to this effect:—[His Lordship read it, see Vol. 12, Moore's I. A., p. 113, and proceeded].

Although this section is not expressly referred to in the submission to arbitration, still their Lordships are of opinion, that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion, that this submission to arbitration was entered into subject to the provisions of this Code, and that the Memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them, that it was to be subject to the Act, and that this special notice of section 327, as to the enforcement of the decision of the Arbitrators, was introduced only *ex majori cautela* for the purpose of expressing what, without such expression, would nevertheless have been implied.

Their Lordships are of opinion, that according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out, that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from

which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are, therefore, of opinion, that it was not in the power of the Appellant simply, at his own mere will and pleasure, to revoke the authority of the Arbitrators in whose appointment he had concurred.

It remains to be considered, whether the circumstances of this case justified the Appellant in doing so, and sending the Letter of the 5th of August, 1865.

This is founded solely on the delay.

On the 24th of July, 1865, the Appellant wrote to the Arbitrators, and required that in ten days from that date they should make their Award, or in the event of not doing so, should nominate and appoint an Umpire, and this not having been done after waiting for ten clear days, he sent the notice of the 5th of August, 1865. If nothing whatever had occurred since the appointment of the Arbitrators in June, 1864, and all matters between the Appellant and the Respondents had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think, that this delay of the Arbitrators would have justified the course which the Appellant adopted. But in truth the facts disclose a very different course of proceeding. In July, 1864, the Arbitrators made their Award in a very important part of the matter in difference. They dissolved the partnership, and delivered up the business to the Appellant, who has, since that time, carried it on alone, and had done so for a year prior to the Letter of the 24th of July, 1865.

A second decision of the Arbitrators relative to the *Ponany* farms was made in May, 1865, and acquiesced in by both parties, the Appellant and the Respondents.

A notice to the Arbitrators to make their Award and to appoint an Umpire in ten days, does not appear to their Lordships to be sufficient time given to entitle the Appellant to stop all further proceedings, and to cancel all further proceedings.

It is to be observed, that a most important part of the matters referred, namely, the determination of the person who was to have the business in future, had already and speedily been determined. After the two decisions of the Arbitrators there appears to have been little that remained to be done, except to determine matters of account between the parties. What the intricacy or difficulty of settling them was does not appear, and on a question of time this is a matter of importance. It might well be, that the time occupied for that purpose was not excessive. On this point, even if it could be availing, their Lordships have no evidence. It might also well be, that ten days might be usefully and properly employed by the Arbitrators in an endeavour to remove the points of disagreement between them, and only when this was found to be impossible, that it would become necessary to refer the matter to an Umpire. On the 6th of July, 1865, Mr. *Punnett* stated his views in a long written opinion. Mr. *Bates* also stated his in a similar document on the 5th of August in that year. This was answered by Mr. *Punnett* on the 25th of August, and on the 7th of September, Mr. *Bates* replied. Before this Mr. *Schlunk* had been selected, though not appointed, to act as Umpire, his appointment having been delayed, as it seems, in consequence of the civil proceedings instituted in the Civil Court on the 23rd of August, 1865.

Mr. *Schlunk* took and considered the expressed opinion of the two Arbitrators, and made observation thereon on the 12th of September, 1865. The decision of the Civil Court asserting the jurisdiction of the Civil Procedure Code over this matter was pronounced on the 22nd of September, 1865. On the same day, Mr. *Schlunk* was appointed Umpire, and he made his Award between the parties on the 17th of October following. No error is pointed out in the Award itself; a complaint is made, that Mr. *Schlunk* did not open up the whole matter from the beginning. It is said that he appointed no meeting, that he heard no Counsel, that he took no evidence; their Lordships are of opinion, that it was not necessary for him to do so. The parties had agreed to the arbitration

of Mr. *Punnett* and Mr. *Bates*, subject to the decision of an Umpire on the points where they differed. They agreed on some important points; they expressed their decision in the first Award of the 15th of July, 1864, and in the second Award of the 13th of May, 1865. They differed as to other points. They expressed this difference in writing, and they appointed Mr. *Schlunk* to be the Umpire to decide these points between them. This he did after, as it appears, weighing and considering the facts and arguments adduced by both the Arbitrators in the documents laid before him.

Their Lordships are of opinion, that the course so adopted was correct, and that the Courts below have acted rightly in upholding the decision of the Umpire. Their Lordships do not mean to lay down, that in cases of this description, where no time is originally fixed within which the Award was to be made, it would not be open to either party to hasten the proceedings by giving notice to the Arbitrators, that the Award must be made, and an Umpire appointed within a reasonable time. But it is to be observed, that here the time which elapsed from the period when the Appellant gave the notice of the 24th of July, 1865, was actively employed. It was obviously of no use to appoint an Umpire until the points on which the Arbitrators differed were clearly defined. This was done by four papers:—First, the opinion of Mr. *Punnett*; second, the opinion of Mr. *Bates*, delivered on the same day that the notice to cancel the submission were given; third, the further opinion of Mr. *Punnett*, on the 25th of August, 1865; and fourth, the final opinion of Mr. *Bates*, on the 7th of September, 1865, and these were adjudicated upon by Mr. *Schlunk*, the Umpire, in his Award made on the 17th of October, 1865, but delayed apparently by reason of the civil proceedings and the necessity of obtaining the sanction of the Court to the confirmation of the Order appointing him Umpire.

If the object of the Appellant was to accelerate the proceedings by his notice of the 24th of July, 1865, he certainly succeeded in doing so; but their Lordships are of opinion, that he cannot recede from the submission by reason of that notice, followed by the notice of the 5th of August, 1865, when, in fact, he has for above a year enjoyed the fruits of the Award on various points, and when it is impossible to restore the parties to the position they were in, if all the acts of the Arbitrators were to be considered null and void.

On the whole, therefore, their Lordships, without thinking it necessary to relate in detail the proceedings in the Courts in *India*, approve of the decisions there pronounced, viz., the Order of the 22nd of September, 1865, of the Civil Court, directing the submission to be filed; the Order of the Civil Judge of the 6th of October, 1865, confirming the appointment of the Umpire; the Order of the High Court of the 15th of January, 1866, dismissing the appeal of the present Appellant from these Orders; and the final decree of the Civil Judge of the 8th of February, 1866, confirming the Award of Mr. *Schlunk*, and directing the same to be carried into execution; and also the Order of the High Court of Judicature of *Madras* of the 7th of January, 1867, dismissing the petition of the Appellant: and consequently they will humbly recommend to Her Majesty, that this appeal be dismissed, with costs.

2nd December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Wood, and the Right Hon. the Lord Justice Selwyn.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

MUTTUSAWMY JAGAVERA YETTAPPA NAICKER, ZEMINDAR OF YETTEYAPOORAM,* ... } *Appellant*,

versus

VENCATASWARA YETTAYA, *Respondent*.

Madras—Illegitimate Son—Maintenance.

In a suit for maintenance brought by an illegitimate son of a Hindu *Zemindar*, deceased, *held* that it was established that the Plaintiff was the natural son of such *Zemindar*, and recognized by him as such, it having been not essential to the Plaintiff's title to maintenance that he should be shown to have been born in the house of his father, or of a concubine possessing a peculiar *status* therein

Case remanded for the Courts in *India* to try whether such maintenance can be a charge upon an impartible *Zemindary*, or if not, out of what property or fund, if any, the son was entitled to be paid.

23rd December, 1868.

THEIR Lordships, at the conclusion of the arguments, expressed their opinion, that the decree appealed from ought to be varied, but reserved their judgment, which was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The suit out of which this appeal has arisen was brought by the Respondent, claiming to be an illegitimate Son of a former *Zemindar* of *Yetteyapooram*, against the Appellant, the present *Zemindar*, for maintenance out of the income of the *zemindary*.

The suit was brought in the Court of the Principal *Sudder Ameen* of *Tinnevelly*, although that Court has no jurisdiction where the matter in dispute is of a value exceeding Rs. 10,000. The Appellant, however, did not plead to the jurisdiction; and the parties proceeded to try the right in that Court, treating the suit as one for the sum of Rs. 8,400, the amount claimed for one year's maintenance. The consequences of this procedure were, that an appeal lay from the Court of the Principal *Sudder Ameen* to the *Zillah* Judge; that the judgment of the latter upon any issue of fact was final, in *India*, and could only be brought before the High Court at *Madras*, by special appeal, on some alleged error upon a point of law or procedure.

The issues in the cause were, first, whether the Plaintiff's Mother was in the exclusive and permanent keeping of the former *Zemindar* of *Yetteyapooram* as his Mistress; and, secondly, whether or not the Plaintiff was the illegitimate issue of the said *Zemindar* by that woman, and, as such, entitled to maintenance.

The Principal *Sudder Ameen* held, that the Plaintiff (the Respondent) had failed to prove his title, and dismissed the suit with costs. The Civil Judge, on appeal, by his decree of the 31st of March, 1864, determined both the above issues in the Respondent's favour, declared him entitled to maintenance at the rate of Rs. 2,500 *per annum*, and decreed that this amount should be paid annually by the Appellant "from the villages forming the private property of the present *Zemindar's* (the Appellant's) family." This decree was brought by special appeal, upon grounds, some of which will be hereafter considered, before the High Court of *Madras*—which, on the 3rd of January, 1865, dismissed such appeal; and, on the 27th of March in the same year, rejected an application for review of judgment, with costs. The Appellant, having obtained Her Majesty's special leave to appeal, has brought this appeal against the decree of the High Court and that of the *Zillah* Court of *Tinnevelly*; and all questions in the cause,

12, Moore's I. A., p. 203; 2 B. L. R., P. C., p. 15.

whether of fact or of law, are, of course, open to him upon it.

Their Lordships, at the close of the argument for the Appellant, intimated that, in their opinion, the second issue had been properly found in favour of the Respondent. They will now state their reasons for coming to that conclusion, and, in so doing, will briefly recapitulate the facts of the case.

The Appellant's Father, the then *Zemindar* of *Yetteyapooram*, died in 1840, leaving three Sons, namely, *Kumara Naicker*, the alleged Father of the Respondent, *Vencataswara*, and the Appellant. The *zemindary*, which is impartible, descended in the first instance to *Kumara Naicker* alone; and he shortly afterwards, but certainly before the 25th of December, 1840, brought into his *zenana*, as his Concubine, *Avudai Jangam*, the Mother of the Respondent. She was the daughter of a *Dasi*, or *Nautch* girl, attached to a *Pagoda*, which seems to be one of the appurtenances of the *zemindary*, and if she had not then begun to follow, would no doubt, but for her introduction into the *Zemindar's zenana*, have followed, her Mother's profession, with its ordinary incident, prostitution.

On the 25th of December, 1840, the *Zemindar* executed in her favour an instrument which will be afterwards considered. He built her a House within the precincts of his Palace, and up to the time of his death, which took place in May, 1853, she continued to be his favourite Mistress. So far the parties were agreed; but whilst the Respondent contends that he is the Son of the *Zemindar* by *Avudai*, and born after her introduction into the *zenana*, the Appellant insists, that at that time, and when her connection with the *Zemindar* began, she had for some years been a public dancing girl attached to the *Pagoda*, and that she brought with her into the Palace the Respondent, who was then at least twelve months old, and her child by an uncertain Father.

On the death of *Kumara Naicker*, his next Brother, *Vencataswara*, succeeded to the *zemindary*. He lost little time in turning out *Avudai* and her Son; for in November, 1854, we find that the latter had brought a criminal charge in the Magistrate's Court against the *Zemindar* and his retainers for an alleged forcible entry, and the abstraction of jewels of considerable value. This charge ended in the *Razinamah*, or instrument of compromise, and the Magistrate's Order thereon, both bearing date the 6th of November, 1854. In this *Razinamah*, the Respondent is described as the Son of the late *Zemindar* of *Yetteyapooram*, and in the body of the instrument *Vencataswara* is spoken of as "the paternal junior Uncle of the Complainant;" and in the Magistrate's Order the fact of the Complainant being "the natural Son of the first Defendant's elder Brother" is expressly assigned as a reason for admitting the compromise.

Three years after this, and in November, 1857, the Respondent commenced a suit for the recovery of the property which was the subject of the *Pooroopu* grant of the 25th of December, 1840, from which, with his Mother, he had been ejected by *Vencataswara*. In his plaint he described himself as the Son of *Kumara Naickar*, the late *Zemindar* of *Zetteyapooram*. The answer of the *Zemindar* impeached the validity of the grant by his predecessor of a village forming part of the *zemindary*. The reply of the Respondent on this point was, in effect, that his Mother, being of parallel grade with the Wife of his Father, the *Zemindar*, he, as the illegitimate son of a *Soodra* by a *Soodra* woman, was in the class capable of inheriting the *zemindary*, and, therefore, that the grant was good. In his rejoinder, *Vencataswara* said, that "the mere allegation that the second Plaintiff was of parallel grade with the Wife, was sufficient to show that she was not a legal wife, but a woman as represented in the answer; and that no one would think the Plaintiffs were heirs to the *zemindary*." But he did not then controvert the Respondent's title by a direct denial that he was the Son of *Kumara Naicker*, the course which, though the fact was not necessarily in issue in that suit, we should have expected the *Zemindar* to take, had the case touching the Respondent's birth which is now set up by the Appellant been that which was then received by the family. The earliest asser-

tion of that case of which there is any evidence, is to be found in the answer made in this suit by *Vencataswara* some time in or about the year 1859, to the ground of appeal filed by the Respondent on his appeal to the *Zillah* Court against the decree of the Principal *Sudder Ameen*, dismissing his claim to this village. In one paragraph of that answer it is stated, that "the records show, that the first Plaintiff was born before the second Plaintiff was kept by the late *Zemindar*, and the statement that they are blood relations is incorrect." In these proceedings, therefore, their Lordships find strong grounds for coming to the conclusion, that the Respondent, for several years after the death of *Kumara*, continued to be reputed, and admitted to be, the natural Son of that *Zemindar*.

The decision of the suit for the village which, in the *Zillah* Court, as well as in that of the Principal *Sudder Ameen*, and on a special appeal to the *Sudder Dewanny Adawlut*, was adverse to the Respondent, did not touch the question of his birth. It proceeded entirely on the ground, that the grant having been made without the previous consent of Government, and not having been registered in the Collector's office, was not valid as against the successor to the *zemindary*.

The final decision in the last-mentioned suit was in September, 1860, and the present suit was brought in September, 1863, against the Appellant, who, on the death of his Brother during the interval, had succeeded to the *zemindary*. The oral evidence upon the issue, whether the Respondent was the illegitimate Son of *Kumara*, was certainly not very strong on either side. But if the case of the Appellant were true, we should have expected that he, a powerful *Zemindar*, in possession of the estate, with all the family records, and influencing the *Zillah* family dependants, would have been able to produce better evidence in support of his case than that which he has produced. The testimony of the Brahmins and women attached to the *Pagoda*, seems to their Lordships to be especially unworthy of credit. It has been argued, that the non-mention of the Respondent in the *Pooroopu* grant of the 25th of December, 1840, affords an inference that he was not the Son of the *Zemindar*, nor, at that time, so recognized by him. This may be true, if it be assumed that the child was then in existence: whilst, on the other hand, the mere fact that the Respondent is not mentioned in the deed, taken by itself, might afford an inference in support of the theory, that he was not then born. But if it be assumed that he was, as the Appellant alleges, then in existence, and known not to be the child of the *Zemindar*, it is highly improbable that the deed should have provided for her male issue generally, without, at least, postponing the Respondent to any male issue to be thereafter born to the *Zemindar*. And, again, if the deed were, as it has been argued, to have been a gift to the woman in the nature of a settlement made upon taking her from the *Pagoda* into the exclusive keeping of the *Zemindar*, there was no absolute necessity for the mention of her Son, if then in existence, whether he was or was not then the Son of the *Zemindar*. Upon the whole case their Lordships think, that the evidence for the Respondent, confirmed as it was by the *razinamah*, and other evidence of recognition by the family after the death of *Kumara*, outweighed that on the Appellant's side, and justified the finding of the *Zillah* Judge of the second issue in his favour. They are satisfied that *Kumara Naicker* in his life-time recognized the Respondent as his Son; and they see no sufficient grounds for doubting that the Appellant was in fact his natural Son. They would have felt greater difficulty in coming, upon the evidence before them, to a conclusion upon the question, whether the Respondent was born after or before the introduction of his Mother into the *zenana*. The admissson, in his reply, as to his Mother's age, is of more weight than any of the evidence to the contrary, and that is consistent with the theory of his birth, at least a year before she became an inmate of the *Zemindar's zenanah*; and the receipts for rent in his name, which are dated as early as February, 1841, also tend to support that theory. It appears, however, to their

Lordships, that if it be established that the Respondent was the natural Son of this Hindoo Father, and recognized by him as such, it is not essential to his title to maintenance that he should be shown to have been born in the house of his Father, or of a Concubine possessing a peculiar *status* therein. They concur in the judgment of the High Court upon this point, against which little, if anything, has been urged at the Bar.

Their Lordships further think, that, subject to the observations hereafter to be made, the amount of maintenance awarded by the *Zillah* Judge is reasonable. And this being so, they would have recommeded Her Majesty to dismiss the appeal and confirm the decree below *simpliciter*, but for the point which remains to be considered.

The decree of the *Zillah* Court directed, that the amount awarded as maintenance be paid annually to the Plaintiff (the present Respondent) by the Defendant (the present Appellant) from the villages forming the private property of the present *Zemindar's* (the Appellant's) family. The first ground of appeal insisted upon by the Counsel for the Appellant, on the special appeal to the High Court of Madras, is stated to have been, "that there was no appearance of any other property than that of the *zemindary*, and the fastening of a life-rent on that was illegal."

The High Court has sought to dispose of this objection by saying, "The fact that the judgment of the Civil Judge indicates the possession of private property by the *Zemindar* in possession, who has inherited the whole property of the Plaintiff's Father, renders this objection, even if tenable, wholly inapplicable." And it proceeds to remark, that the question, whether maintenance in such a case could be charged on a *zemindary*, was still an open one.

The objection involved two distinct propositions. First, that there was no proof of property other than the *zemindary*; and, secondly, that the maintenance could not be charged on the *zemindary*. And the High Court has avoided the decision of the latter question, by assuming that there was a conclusive finding on the other. It may have thought, that it was bound to make that assumption by the rule which excludes questions of fact from the province of a special appeal. Their Lordships, however, are disposed to think that the question, which is more pointedly raised by the first of the points stated in the application for a review, was one which, on the strictest construction of that rule, the High Court was competent to entertain on a special appeal. But, be that as it may, their Lordships, who are not subject to the rule, are bound to see, whether that part of the decree of the *Zillah* Judge, which directed the payment of the maintenance from the villages forming the private property of the *Zemindar*, was warranted by the pleadings and evidence before him. They are of opinion that it was not. The plaint sought for payment of maintenance "out of the income of the *zemindary*." There is no trace in the printed record of any evidence of the existence of property other than the *zemindary*, or of the nature of such property, supposing that any does exist. It is obvious that the nature, as well as the existence, of any such property is a material question. The Respondent may have a right to be maintained out of private property which descended from his Father to the present *Zemindar;* yet he may have none to be maintained out of private property which the *Zemindar* has acquired in any other way.

If the decree be erroneous as it stands, there remains the question, whether it ought not to be simply varied, by directing payment of the maintenance out of the income of the *zemindary*. But the High Court has failed to determine the question whether the *zemindary* is so chargeable; and the parties have declined, in the present state of the record, to argue that question before their Lordships. In this state of things their Lordships, however unwilling to prolong this litigation, can but remit the cause to *India*, with a declaration of the Respondent's *status* as an illegitimate son of the *Zemindar*, *Kumara Naicker*, and of his consequent right to maintenance.

It will be for the High Court to determine, whether the decree should be varied

by directing the maintenance to be paid out of the income of the *zemindary*, or whether it shall direct any further inquiry in order to ascertain whether there is any other property upon which it can be charged. If that Court shall find that it can be properly charged on the income of the *zemindary*, their Lordships are of opinion that the amount awarded by the *Zillah* Judge, having regard to the Respondent's *status*, is reasonable and ought to be decreed. But if it cannot be so charged, then, in the absence of information as to the other property on which it may be chargeable, their Lordships cannot pronounce an opinion as to the reasonableness of its amount, and they must leave that question also to be determined by the High Court on further inquiry. They trust, however, that the Respondent's title to maintenance being now conclusively ascertained, the parties will be wise enough to settle the questions that remain open by private arrangement and without further litigation. The Order which their Lordships will humbly recommend Her Majesty to make is, to reverse the decree of the *Zillah* Court of the 31st of March, 1864, and the decree of the High Court of the 3rd of January, 1865, and in lieu thereof to declare, that the Respondent is the illegitimate Son of the former *Zemindar*, *Kumara Naicker*, and, as such, is entitled to maintenance; and to remit the cause to the High Court of *Madras*, in order that such Court may determine whether, regard being had to the above declaration, the Respondent is entitled to receive maintenance out of the income of the *zemindary* (in which case such maintenance is to be decreed at the rate of Rs. 2,500 *per annum)*; and if not so entitled, whether he is entitled, as against the Appellant, to any and what amount of maintenance, and if so, out of what property and fund; and that for the purposes aforesaid the said High Court shall be at liberty to make and direct any further inquiry that to them may seem just. Their Lordships will give no costs of this appeal.

By an Order in Council it was ordered, that the decree of the Civil Court of *Tinnevelly*, of the 31st of March, 1864, and the decree of the High Court of *Madras*, of the 3rd of January, 1865, be, and the same were thereby respectively reversed, and in lieu thereof that it be declared, that the Respondent is the illegitimate son of the former *Zemindar*, *Kumara Naicker*, and as such is entitled to maintenance, and that the cause be remitted to the High Court of *Madras*, in order that that Court might determine whether, regard being had to the above declaration, the Respondent is entitled to receive maintenance out of the income of the *zemindary* (in which case such maintenance is to be decreed at the rate of Rs. 2,500 *per annum)*; and if not so entitled, whether he is entitled, as against the Appellant, to any and what amount of maintenance, and if so, out of what property and fund; and for the purposes aforesaid the said High Court is to be at liberty to make and direct any further inquiry that to them may seem just.

7th, 8th and 9th December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

SREE ECKOWRIE SING & others,* ... ... } *Appellants*,

versus

HEERALOLL SEAL and others, ... } *Respondents*.

Chur Lands—Proof of Title by Claimant.

The re-formation of land in the bed of a navigable river is not *primâ facie* to be ascribed to a loss from any particular riparian estate, nor is the land which has been removed from an estate by sudden avulsion reclaimable, unless the circumstances supply evidence of identity. A title by accretion is not established by mere proof of general inclusive boundaries at a time preceding

12, Moore's I. A., p. 136; 2 B. L. R., P. C., p. 5.

the formation of the *chur*, but there must be proof of the nucleus of accretion. The land gained will follow the title of the particular land forming the nucleus.

The cultivation of *chur* lands, like that of waste or jungle lands, carries no *primâ facie* character of usurpation or wrong; and the claimant against a purchaser, *bonâ fide* and without notice, in possession, must strictly prove his title.

14th December, 1868.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. LORD CHELMSFORD:

This suit is brought to recover about 1,000 *beegahs* of land, claimed as alluvial, and contained within the boundaries given in a map annexed to the plaint. The Plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil; which defence, as is apparent from the frame of *Ben.* Reg XI. of 1825, would admit of variation with varying circumstances of inundations, identification, and accretion. The cause was tried before the Principal *Sudder Ameen*, who decided in the Plaintiffs' favour. On appeal to the High Court, that decision was reversed, and from that decree of reversal the present appeal has been preferred. The High Court simply decided, that the proofs adduced by the Plaintiffs were insufficient to justify a decree in their favour.

Had this been a case of ordinary claim to lands, wherein a Plaintiff might advance, prove, and recover on a *primâ facie* title, calling for some answer of title in a Defendant, and entitling him to a decree in default of such an answer being made and proved, the propriety of the decision of the High Court might have been assailed with more prospect of success. But this is a case of a claim to land washed away and re-formed in the bed of a navigable river, the ownership of the soil of which is not commonly in the riparian proprietors of its banks, and which is not proved in this case to have belonged to the predecessor in title of either disputant. The re-forming of land in such a stream, after a considerable interval and frequent floods, is not *primâ facie* to be ascribed to a loss from any particular portion of territory, nor is the land which has been removed by a sudden avulsion reclaimable unless the circumstances supply evidence of identity, which is wanting in the case before us. This re-formed land is not ascribed to avulsion, and several years elapsed between the loss of the Plaintiffs' land and the appearance of this *chur*. The title by accretion to a new formation generally, is not founded on equity of compensation, but on a gradual accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will then follow the title to that parcel to which it adheres. It is obvious, therefore, that such a title is not established by mere proof of general inclusive boundaries of land, at a time long preceding the actual formation of the *chur*, since the lands that have such a fluctuating boundary as a tidal river, and which are themselves subject to loss and gain of quantity by acts independent of the owners' concurrence, and which may pass from side to side of the river boundary, have not the ordinary element of fixedness which belongs to immoveable estate, in the common course of things. A detached *chur*, independent of usage, in such a stream would belong to neither riparian proprietor; and the circumstance that it was subtended by the land of one would not be enough to entitle him to it. The decision of this case in the Court below seems to have proceeded on the mere presumptions which would have regulated the decision of a question of parcel or no parcel in an ordinary boundary dispute; for no evidence whatever was given by the Plaintiffs of the nature of the original formation of the *chur*, where it first appeared, to what it first adhered, and the case even now affords no ground for concluding any-

thing with reasonable certainty, as to the original title to it.

The Defendants, it was conceded by their able Counsel, might be unable to sustain a title to the *chur*, as Plaintiffs; but it was urged with force and reason, that by reason of their long enjoyment and being innocent purchasers for value, they were entitled to put every Claimant to strict proof of title. They are purchasers for value without notice of any prior or superior claim. Acquisitions of the nature of this *chur* are often doubtful in their origin; they must depend much on oral testimony, which time is constantly destroying or impairing, and it is often hard to say who is the person to whom the law would ascribe the legel ownership of them. The mere cultivation of them, like that of waste or jungle lands, carries with it no *primâ facie* character of usurpation or wrong. An undisputed possession and cultivation, even though for a few years only, would the more readily induce a purchase, and a purchaser *bonâ fide* and without notice might with perfect honesty, and even with the favourable construction by a Court of Justice of his acts, defend his possession by insisting on strict legal proof of an adverse title.

The High Court appears to have acted upon this principle, though the Judges have ascribed too long a possession to the Defendants, and may have erred in their view of portions of the evidence. The grounds of their decisions seem to their Lordships correct; the *ratio decidendi* is not a mistaken one, though it is supported in part by mistaken reasons. They have acted, in requiring adequate documentary proof in a conflict of oral proof, in accordance with the course adopted by the Judicial Committee itself on this point, in a somewhat similar case, *Mussumat Imam Bandi* v. *Hurgovind Ghose* (4 Moore's I. A., p. 403; 1 P. C. J., p. 371). They were dissatisfied with the documentary proof exhibited; they have said, that better might have been brought forward had the case of the Plaintiffs been well founded. Their Lordships are not prepared to dissent from either expression of opinion. To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chittahs* which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in documents not legally admissible in proof against them. The document put in evidence and relied on by the Appellants appears to be only a copy of a *chittah* of resumed land, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the *chittahs* in general in questions between the *Zemindar* and his tenants or *Ryots*, to receive them as evidence of boundary, against a rival proprietor, without further account, introduction, or verification, would, if it obtained as a practice,—and each relaxation is apt to become a precedent for another,—tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it. Their Lordships, therefore, are unable to ascribe any error to the way in which the High Court has dealt with the documentary evidence in this cause.

It has not unfrequently happened, that their Lordships, in a conflict of decisions on questions of fact between the Judge who heard the evidence and the Court which reviewed it, have followed the finding of him who saw the witnesses and heard them give their evidence; but in this case the Judge below appears not to have sufficiently regarded the nature of the claim and the proof it should receive. He appears further to have acted mainly on the report of the *Ameen*, and that report, like the judgment which was founded upon it, appears to their Lordships to proceed upon a mistaken view of the issue between the parties and of the burthen of proof which the Plaintiffs in this suit had to support. The conclusions of both are founded more upon the want of proof to support the title alleged by the Defendants than upon proof of that title which it was necessary for the Plaintiffs to establish in order to disturb the possession of the Defendants.

The map of the *Ameen* itself shows, that there were lands of other owners than the Plaintiffs so situated; that they might have been, in the course of things, a nucleus to the increment, and, therefore, an inquiry into its origin and direction was one that ought not to have been neglected. The case itself is one turning on views of evidence on which their Lordships would be reluctant to differ from the opinion of a Court more likely to know than their Lordships can be, what weight of proof would satisfy there the just expectations of a Court of Justice.

Their Lordships, therefore, agreeing with the High Court in their disregard of the *chittahs*, and with their conclusion that the case was not sufficiently proved, will humbly recommend to Her Majesty, that the appeal be dismissed with costs.

10th December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

RAJAH BURDACANT ROY,* *Appellant*,

versus

BABOO CHUNDER COOMAR ROY and others, ... } *Respondents.*

Possession—Title—Act IV. of 1840—Julkur.

A originally owned two *Zemindaries* between which lay a *Bheel*, or marsh, of which he also owned the fisheries. One of the *Zemindaries* was sold and purchased by B, but the *Bheel* fisheries still continued with the remaining *Zemindary* held by A. After the sale, certain lands reclaimed from the *Bheel* were, for some years, held by B as part of his purchased *Zemindary*. A instituted a summary suit under Act IV. of 1840, and was by an order of the Magistrate put in possession of these lands. B brought a regular suit against A to recover the lands, and set aside this order.

Held (reversing the decisions of the Courts below,) that it was necessary for B to show a better title to the land than A could produce. It was not enough from him to prove possession anterior to the Magistrate's order under Act IV. of 1840. The presumption was that the land of the *Bheel* belonged to A, who had admittedly owned both estates before, and had retained the fisheries of the *Bheel* after the auction sale. B ought to have shown when and how, if at all, the right to the fisheries and the right to the soil were severed.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. LORD CHELMSFORD:

Their Lordships would not have departed from their usual course of not disturbing the concurrent judgments of the Courts below on a question of fact, if the facts as found were in truth decisive of the real issue between the parties.

That issue is, whether the lands in dispute belong to the *zemindary* of the Appellant, or to the *zemindary* of the Respondents.

The Appellant is in possession under a Magistrate's Order; and it, therefore, lay upon the principal Respondent, who was the Plaintiff in the suit, to oust him from that possession by showing a better title to the property claimed. It is an admitted fact, that at the date of the perpetual Settlement both estates were settled for with the Defendants' ancestor either as one *zemindary* or as two separate revenue-paying estates. It is also clear, that the *Bheel* from which these lands have been gained was part of the *zemindary*. The resumption suit proves that no right to re-assess lands which might be gained from the *Bheel* remained in the Government,

In 1796 the two properties were severed by means, as it is said, of a sale for arrears of revenue, and *Pergunnah Dattea*, which includes the village of *Jhanpa*, was acquired by the *Paul Chowdhrys*, through whom the Plaintiff claims.

It is also an admitted fact, that the *Julkur* and every right which could be exercised by the *Zemindar* while the land was covered with water (what the Judge

* 12, Moore's I. A., p. 145; 2 B. L. R., P. C., p. 1.

calls the "aqueous assets") remained in the Appellant or those whom he represents. In these circumstances, it lay upon the Respondents to show that the effect of the revenue sale was to transfer to them, as part of the village of *Jhanpa*, any soil which might be recovered from the *Bheel*. It has been argued at the Bar, that this alleged title of the Respondents must be inferred from the conformation of the ground or the name of the village. But if any presumption, however slight, can be drawn from these circumstances, they seem to their Lordships to be more than rebutted by the admitted fact, that after the sale the *Julkur* of the *Bheel* remained in the Appellant's ancestor. It has been argued, that the right in the *Julkur* may be distinct from the right in the soil, and this no doubt is true. But here both had been admittedly in the Appellant's ancestor, and it lay upon the Respondents to show when and how they were severed.

The facts found by the two Courts below bear only upon the latter part of the first issue, settled in the cause, viz., whether the Plaintiff was in possession of the lands through their tenants, and had been ousted by the Order in the suit under Act, No. IV. of 1840. That finding does not touch the material part of the issue, viz., whether the land in dispute appertains to the Plaintiffs' *mouzah Jhanpa*. Even if it were proved, that some *jolibila* land was annexed to the village, and passed as part of it at the time of the sale, it does not follow that the land which has since been recovered from the *Bheel* (and great part of the land in question has been admitted to have been so reclaimed since the date of the sale) would so pass. Yet the argument at the Bar went the full length of contending, that the whole site of the *Bheel*, if cleared of water and made capable of cultivation, would fall into and become part of the Respondents' village, *Jhanpa*, though whilst it was covered with water it remained under the dominion of the Appellant. For such a contention their Lordships can see no ground. The decision of the *Fouzdary* Courts, as to the point of possession, was final. The question in this suit was, whether the Plaintiff, by showing a better title than the Defendants, could recover possession from them. In their Lordships' judgment the original title to this land was in the Appellant's ancestors, and it has not been shown that they ever lost it. It is possible, though not very probable, that if there had been fuller evidence of the original Settlement of these properties, and of what passed by the revenue sale, this might have been done. Their Lordships, therefore, in the peculiar circumstances of this case, though they think that the appeal ought to be allowed and the present suit dismissed with costs, and will make their humble recommendation to Her Majesty accordingly, will also recommend, that Her Majesty's Order be made without prejudice to the right of the Respondents to bring, if they shall be so advised, a new suit for the recovery of the lands in question, upon the ground that the title to these lands passed to the *Paul Chowdhrys*, from whom the Respondents derive their title by the revenue sale.

10th, 11th and 12th December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon Sir James William Colvile, and the Right Hon. Sir Robert Phillimore.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

SHAH MUKHUN LALL, and others,* ... ... } *Appellants*,

versus

BABOO SREE KISHEN SINGH, and others, ... } *Respondents*.

Mortgagor and Mortgagee—Interest—Regulation XV. of 1793—Accounts.

The principle that a part cannot both approbate and reprobate the same transaction, is applicable to Indian cases.

* 12, Moore's I. A., p. 157.

Where a mortgage deed stipulates for interest at 9 per cent., but other and collateral deeds, forming part of the same transaction, provide for further profits to the mortgagee, held, that the mortgagor cannot, unless there be a positive legal enactment to that effect, be heard to plead that the written engagement, though not extending to the whole profit stipulated, must be adhered to as against the mortgagee, though the mortgagor may go beyond it to show the full extent of the profit, and so to be relieved from the consequences of his actual contract. Interference with the rate of interest in *India* was a thing of positive law, and cannot be extended beyond the provisions of the Regulation (XV. of 1793.) Section 9 of the Regulation does not declare that where an attempt has been made to elude the usury laws, the contract is itself void, nor does it direct the return of the pledge without redemption. The mortgagee may retain his pledge until he has received out of it his debt with interest at 12 per cent., the maximum allowed by section 10 of the Regulation.

In a suit for redemption, on the ground that the debt has been satisfied with interest, the *onus* is on the Plaintiff. A mortgagee is not an assurer of the continuation of the same rate of profit as his mortgagor was able to raise. Hence an estimate of the rental preceding mortgagor's possession is not sufficient proof of the profits in his time.

The nature of the accounts which a mortgagor may call for from mortgagee, explained. The mortgagee need not personally attest the accounts if he has no personal knowledge of them.

Presumptions against mortgagees for non-productions of accounts must have reasonable limits, and not be mere conjectures or based on inexact data.

18th January, 1869.

JUDGMENT having been reserved, was now delivered by

THE RIGHT HON. LORD CHELMSFORD:

This is an appeal in a mortgage suit instituted more than twenty years ago. The original Plaintiffs, the Mortgagors, named *Singhs*, sued in the Court of the *Sudder Ameen* of the *Zillah Sarun*, the representatives of the original Mortgagees named *Lall*, who were eminent Bankers, having *coties* in various parts of *India*, and also one *Roy Ram Kishen Doss*, the *Gomastah* of the firm, to cancel on redemption three several instruments, viz., the Mortgage deed, lease, and agreement named in the plaint, and which will hereafter be more particularly described. These instruments the Plaintiffs alleged to constitute one mortgage security of the Bankers, the *Lall* Defendants. All the Defendants asserted, however, as to two of these instruments, viz., the lease and the agreement, a different title and interest, conferring a separate interest, as distinct from the Bankers, on their *Gomastah*, the last Defendant.

The lease bore date the 16th of May, 1837; it was for twenty years, and reserved a rent of S. Rs. 24,858 10 as., payable to the *Singhs* by the *Gomastah*. The mortgage deed bore date the 5th of June, in the same year, and pledged the same property also for twenty years to the Bankers, to secure a loan of S. Rs. 150,000 from them to the *Singhs*. The interest reserved was nine *per cent.* Ostensibly, the Mortgagees were entitled to the rent alone, the surplus of which, after deducting the Government revenue, left a balance of Rs. 13,500, exactly the sum calculable as interest on the loan at nine *per cent.* *Roy Ram Kishen Doss* granted, as apparently a subsidiary arrangement, subleases to certain *Kutkinadars*, nominees of the Mortgagors, at rents aggregating S. Rs. 35,067; and the Mortgagors guaranteed to him those receipts of rent. Ostensibly, therefore, the several instruments evidenced a mortgage transaction, providing only for interest alone from the usufruct, leaving the principal debt to be paid otherwise in full, and a beneficial lease in the *Gomastah* yielding an annual profit of Rs. 10,200. All the Defendants insisted that the ostensible was also the real character of the instruments.

The Ikrarnamah was executed by the Mortgagors, the *Singhs*, to the *Gomastah* on the 29th of August, in the same year, as a security to recover certain losses incurred or anticipated from adverse claims, for the due payment of their rents by the sublessees, the *Kutkinadars*, and for a further advance of Rs. 7,000, bearing an interest of twelve *per cent.* The Plaintiffs sought also to recover possession, alleging the Mortgagees, the *Lall* Defendants, whom they treated as Mortgagees in possession, to be satisfied from the usufruct, and further claimed as mesne profits a small alleged surplus from the same source.

This claim, then, of the Mortgagors to redeem before the twenty years were past, was denied in respect of all that the lease covered, which was the whole that the

mortgage deed included. The suit further raised these questions: at what rate of interest, whether nine *per cent.* or a higher rate, the Plaintiffs were entitled at any time to redeem; whether the loan was at usurious interest; and whether the several intruments were a device or means, within section 9 of *Ben.* Reg. XV. of 1793, to conceal usury, and so evade the Usury laws.

The suit, therefore, involved issues of title, and not simply one of payment on an admitted title to redeem under a contract, raising no question as to the terms of redemption.

The suit was heard in the *Sudder Ameen's* Court, which decided in the Defendants' favour on all the issues. From that decision there was an appeal to the *Sudder Dewanny Adawlut*, which decided that the three instruments formed one mortgage security, as alleged in the plaint, and were a device to conceal usury, that the contract was usurious, but that as the plaint was for redemption, the Mortgage was redeemable on payment of the principal and nine *per cent.*, the interest expressed to be payable in the Mortgage deed; and the Court, reversing the finding, sent the case back to be tried in the Court below on the inquiries which it directed, and which were limited in effect to satisfaction of the Mortgage at the date of suit. The cause was then transferred from the *Ameen's* Court to that of the *Zillah* Judge, who, before he proceeded to try the question submitted to him, called for the accounts of the gross receipts and disbursement directed by Regulation XV. of 1793, sec. 11. The Defendants, who subsequently renewed the dispute as to the unity of the title, declared themselves unable to give the accounts demanded of them. The Judge then deputed an *Ameen* to take an account of, and report as to the receipts. The *Ameen* reported, and found that the Defendants were overpaid, to a much larger amount than the Plaintiffs' own case declared them to be. The Court rejected that report, went itself into the inquiry, found the Plaintiffs still indebted on the account, and dismissed the suit. From that decision there was again an appeal to the *Sudder* Court, which reversed that decision, directed that the accounts should be produced, and further, directed certain additional inquiries to be made, the precise character of which need not here be stated. The cause was again heard, after much preliminary litigation as to the nature of the accounts required, and the proper mode of verifying them.

The Court again decreed in favour of the Defendants, declaring a considerable sum, exceeding Rs. 50,000 to be still due, and on that ground dismissed the Plaintiffs' suit with costs, without any declaration as to title. From this decision the Plaintiffs, and also the Defendants, appealed to the *Sudder* Court, the Defendants raising anew their contention as to the rate of interest, that twelve *per cent.* should be declared to be the due rate. The *Sudder* decided the case in favour of the Plaintiffs, and decreed their claim in full, except as to the *wasilat*, and from that last decision the present appeal is brought.

The accounts received in the Court below were declared by the *Sudder* Court not to be the proper accounts, and that Court considered itself entitled to presume, from the non-production of the right accounts, that they, if produced, would show the mortgage satisfied. The statement of the rental and the accounts annexed to the plaint formed the basis of the decision, the correctness of which, as to the amount of income in the time of the Mortgagor's possession, they considered to be *primâ facie* established. The accounts actually rendered were the Banking Books of the Defendants' Banking firm, containing a statement of their receipts; and the accounts of the *Gomastah* of the Bankers, who was, in truth, the person, as Manager, best acquainted with the transactions, and a Trustee, as it was found in effect, for the Mortgagees. He was examined under a commission, and deposed to the correctness of the accounts which he gave in. The existence of any other accounts did not appear.

As the Regulation required the Mortgagees to swear to the accounts, the Court considered the attestation by the *Gomastah* insufficient. On this last appeal to the *Sudder*, the question of the rate of interest

was again raised by the Defendants in their objection to the appeal; the Judges said they had already decided the question, and again declared that they abided by their decision, thinking it correct. They expressed no opinion whether they were excluded by their procedure from reconsidering the matter on a new appeal to them. It is not at all material to the decision of this case to determine, whether they could or could not have entered into that question, in any way, had they thought their previous opinion on the point erroneous. Their Lordships think, that the question as to the interest is open on this appeal, though the Plaintiffs might have appealed, and did not, from the Interlocutory decree on the point. This point is governed and settled by the cases of *Forbes* v. *Ameroonissa Begum* (10 Moore's Ind. App. Cases, 340; *ante*, p. 153) and *Maharajah Moheshur Sing* v. *The Bengal Government* (7 Moore's Ind. App. Cases, 283; 1 P. C. J., p. 645.)

The first question to be determined by their Lordships is, whether the decision of the *Sudder Dewanny Adawlut*, that the interest must be calculated at nine *per cent.* only, is correct. It is clear, that if the Mortgagees had been suing the Mortgagor on the mortgage deed for the debt, they could have recovered no higher rate of interest than nine *per cent.*, the contract being in writing, and incapable of being varied by parol evidence; but this is by no means decisive of the question; for supposing that the extra profits on the several engagements forming one mortgage security had amounted only in the whole to three *per cent.*, making up twelve *per cent.* only in all, precisely the same consequence would have ensued; the reserved interest would have been correctly viewed as constituting part only of the profit, and as such would have been all that the parties stipulated for as to that part of the transaction, but it would not have measured the stipulated return for the loan annually. The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction; as, for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice. The case of *Forbes* v. *Ameroonissa Begum* (10 Moore's Ind. App. Cases, 356; *ante*, p. 158) furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships,—"The Respondent cannot both repudiate the obligations of the lease, and claim the benefit of it." Unless, therefore, some positive law has said that in cases similar to the present, the written engagement, though not extending to the whole profit stipulated, must be adhered to against the Defendant, though the Plaintiff may go beyond it, to show the full extent of the profit, and so to be relieved from the consequences of his actual contract, their Lordships must hold, that the bargain disclosed should be performed so far as the law allows; in other words, that twelve *per cent.* was in this instance the interest to be computed.

The decision of the Judges of the *Sudder Dewanny Adawlut* on this point, was founded, not on any grounds of equity, but upon their construction of the Law. They considered that they were bound, by the terms of the 5th section of Regulation XV. of 1793, to give no more than the interest stipulated, and that nine *per cent.* was that rate of interest, thus in reality begging the question in dispute. Their Lordships have, therefore, to consider the real meaning of the words used in that section, which meaning will be best

ascertained by an examination of other parts of that Regulation.

In *India*, amongst the Hindoos, the restriction as to interest by their law was, that interest stopped when it equalled the loan. The interference with the rate of interest, is, therefore, a thing of positive law, and cannot extended beyond the provisions of the Regulation. By the 2nd section of the Regulation in question, a minimum rate of interest, and that a high one, much in excess of twelve *per cent.*, was directed to be decreed; and by the 3rd the maximum rate of interest was reduced to twelve *per cent.*, in the case only of debts exceeding 100 sicca rupees. The rates prescribed by the Regulation in the several cases enumerated, were fixed rates, constituting both a maximum and minimum in the cases aforesaid, which were limited to contracts between, and prior to, named dates. Then, by the 4th section, in causes of action arising on or after the 1st January, 1793, the Courts were not to decree any interest on any sum whatever, above the rate of twelve *per cent. per annum.* From that time this was the limit beyond which no claim to interest could be enforced in respect to contracts entered into after that date; and it practically governed other cases where interest could be decreed, irrespective of contract. But inasmuch as the words of the earlier sections standing alone might seem to prescribe a rate of interest irrespective of agreement, and so lead to misapprehension of the meaning of the law, the framers of it, by the 5th section, declared further, that if a lower rate of interest than any of the rates authorized to be awarded shall have been stipulated between the parties, no higher rate of interest than the rate so stipulated is to be decreed. This plainly relates to the real agreement between the parties, constituting an actual legal stipulation; for it constitutes a limitation of the 4th section, as well as of the others. It does not extend to the cases comprised within the 9th section, where a device or means are used to disguise the real contract as to interest, for the provisions are inconsistent. The language of the 5th section would be violated by a construction of the word "stipulated," which would confine it to "expressed." Such a construction would be an extension of a penal enactment to a case not within its language and obvious objects, and that where another section did provide for the case before the Court.

The 6th, 7th, and 9th sections apply in terms to remedies in suits brought to enforce, not to suits brought for relief against a contract. To bring a case within the 8th section, the excess must be specified in the contract itself. The 9th section does not declare the contract itself void, nor direct any pledge to be returned, without redemption. The 10th section furnishes an argument, that such was not the design. But even if this did not appear, a penal law, and specially one of so peculiar a character as that contained in the 9th section of this Regulation, is not one to be extended by construction. This section is one *in pœnam* against the concealment of the usury; for the open violation of the Regulation entails, under section 8, only a forfeiture of interest. If the 9th section were so extended by construction as to invalidate the contract itself, and make it, and the conveyance also obtained under it, null and void, then, inasmuch as there are no saving words, an innocent purchaser without notice, from the Mortgagee, by assignment of the pledge, would be unable to retain it, even for the just debt and legal interest. Their Lordships, therefore, think that the only section of the Regulation at all applicable to the present suit brought by a Plaintiff to set aside his contract, and have restitution of the pledge on terms of redemption, is the 10th section. If any case were needed to enforce so plain a rule (which, however, has been questioned), that of *Eshanchunder Singh* v. *Shamachurn Bhuttoo* (11 Moore's Ind. App. Cases, 20; *ante*, p. 210) emphatically points out, in the language of Lord *Westbury*, "the absolute necessity that the determinations in a cause should be founded on a case either to be founded in the pleadings, or involved in or consistent with the case thereby made." The present suit is one for redemption, not for declaring a forfeiture, and must be decided according to the rules applicable to the former suit. If the transaction were simply void, and no estate at all passed, it

is obvious that the remedy to recover the land would be a possessory suit, against which limitation would run from the moment of entry. It cannot be treated as a voidable or redeemable estate between Mortgagor and Mortgagee, for one purpose, viz. to escape the limitation law, and as a void estate for another. If the estate in the lands created by the lease can be determined before the expiration of the twenty years, that can only be effected by coming to the Court for equitable relief, and submitting to the usual terms on which relief is granted. What, then, are these terms? The Court will not, in the interests of justice, permit inconsistency and untruth of statement; will not permit a Plaintiff to say, "I promised to give the Defendant fourteen *per cent.* on his loan to me," and seek relief against him on that allegation; and permit him also the next instant to say, "the contract is expressed for nine *per cent.*, and I will tie my Opponent down to that term," that lower rate must be deemed to have been stipulated, and so to form the measure of his right to interest. They reply to this will be, "you have told us what the real bargain was, and on this statement you have made your application for relief, which you can obtain only on equitable grounds." Their Lordships find in the Regulations no positive law forbidding the application of these principles of justice to the case.

The 10th section rather leads to the contrary conclusion, viz., that in a case circumstanced like the present, the Mortgagee may retain his pledge until he has received out of it his debt, with interest at twelve *per cent.* At the time when this Regulation was passed, the receipt of profits in lieu of interest under a simple usufruct mortgage was common, as indeed appears by the introductory words of the clause. As to mortgages executed before the 28th of March, 1780, the usufruct might be allowed even after the Regulation, in lieu of interest up to that date. Then, after that date, that dividing point of time, and subsequently to it, the character of these mortgages suffered a change. The mortgage possession, instead of enduring by title for the stipulated time, was made liable to abridgment by satisfaction from the usufruct, and a claim to interest arose in some cases where it did not exist before. The perception of the profits in many cases did not constitute receipt of interest, but was in lieu of any. Then, as to all usufructuary mortgages to be made after the dividing time which was before the Regulation, it makes also provision, and subjects alike, all the enumerated mortgages to cancellation and redemption whenever the principal sum, "with the simple interest due upon it," shall have been realized from the usufruct of the property subsequent to the 28th day of March, 1780, or otherwise liquidated by the Mortgagor. It applies, then, to all alike, though the circumstances of them all were not originally similar, subjects them to one provision, and imposes interest, in some cases, where there was no contract for it before. This section, having so provided, drops designedly the words "stipulated" and "specified" which would have been inappropriate in many of the cases, and uses, in more correct language, this expression: "the simple interest due upon it." This simple interest would, of course, in all cases where no interest was named, be twelve *per cent.*; but where a higher rate was named, against which the usufruct was to be a set-off, that is, a receipt "in lieu" of it; the reduced rate would be twelve *per cent.*, and all interest alike would be "due" by force of the enactment, even where interest did not exist before; therefore, as this is the case of an usufructuary mortgage, by means of which a profit higher than the return of twelve *per cent.* was to be made, and as relief is sought, viz., to have the pledge restored as cancelled or redeemed by satisfaction of the usufruct, the clause which is most closely applicable to the claim is the 10th section, the terms of which are large enough to embrace, and were designed, in fact, to embrace, some cases where the law itself made the interest "due." The Regulation, then, rather seems to favour than prohibit the restoration of the pledge, on the Court terms, that is, on reduced terms of interest imposed by the law. The real transaction appearing, and no prohibitory law intervening, the Court is left free to do justice in

the particular case, and if the spirit of the 10th section regulate the case, it will sanction a redemption at the higher rate, allowing the actual contract so far as the law allows it. For the above reasons their Lordships think the interest should have been calculated at the higher rate of twelve *per cent.*

This view of the case would suffice to show, on the Plaintiffs' own estimate, that the decree appealed from cannot be maintained, since the allowance of twelve *per cent.* would, on that account annexed to the plaint, show that the mortgage was not fully satisfied at the date of the institution of the suit. Their Lordships, however, must proceed to consider the other objections urged to the decree, and to view the conduct of the parties through this long protracted litigation with a view to their decision on the subject of costs.

The suit was brought to establish the title to redeem, for cancellation of the instruments, for possession of the lands, and payment of a small estimated surplus. It lay on the Plaintiffs to show that the Mortgagees were paid in full, out of their receipts. It was not also a suit to make the Mortgagees chargeable for non-receipt of profits, which they might have received with common care and attention. A Mortgagee is not an assurer of the continuation of the same rate of profit which his Mortgagor was able to raise. Much depends, in *India*, on personal qualities. The very change of management and possession may cause a falling-off of receipts. Therefore, an estimate of a preceding rental does not suffice to show actual receipts, yet it is on this fallacious estimate, at the outset, that the calculation of the Plaintiffs, which they annexed to their plaint, proceeds. Again, the Plaintiffs make no deduction for those parts of the pledged property which turned out to be subject to prior charges, and the calculation of interest proceeded also on a wrong basis. Had these defects, apparent on the face of the plaint, been duly dealt with at the inception of the case, this long litigation might have been, if not ended, limited at least at an earlier stage. It is, on the other hand, to be remembered that the Plaintiffs claimed in their suit to have the character of the mortgage itself ascertained and decreed. In this they have succeeded, against a long, vain, and unfounded opposition, for the case of the Defendants, on this part of the case, when closely investigated, is found inconsistent. It is not credible that the Bankers would take, for so large a loan, a security which, on their present statement, has left them always losers, even of some part of the interest. The property was in the neighbourhood; the *Gomastah* was a man of business not likely to err so greatly in the valuation of the pledge: therefore, to this part of the claim a groundless defence was made, which has failed, and the suit has established a very important right in the Plaintiffs' favour, though they have proved to be wrong in their estimates of the receipts and the rate of interest. The conduct of the Mortgagees, in not giving in the accounts at an earlier stage, may be ascribed to the nature of their defence, and in no greater degree exposes them, than that defence itself does, to suspicion. If they meant to insist on that right, of course they would not have prepared and kept their account on an inconsistent principle. A great part, therefore, of the obstruction on this subject must be ascribed to this, that they viewed the transaction in its actual, whilst their Opponents and the Court viewed it in its legal, aspect. The case does not afford room for supposing that any extortionate interest was in view, though interest exceeding the legal rate has been stipulated for. The Mortgagees were Bankers, Traders probably, realizing in their business a profit beyond the legal rate of interest, and they may have meant no more than to realize a profit proportionate to the risk, in the calculation of which the danger of loss by litigation cannot be excluded.

The judgment now appealed from mainly proceeds on the non-production of the right accounts under Regulation XV. of 1793. Their Lordships incline to think that provision must, as regards this suit, be taken to be still in force and unrepealed by Act, No. XXVIII. of 1855. It is unnecessary to decide the point, as their Lordships think that, assuming it to be in full

force, it has received, in the judgment under review, too strict an interpretation. Assuming it to be in force, what was the duty which it imposed on the Appellants? The duty to which they were bound by law, in the character ascribed to them by the decree, which was not questioned by the Appellants on this point, was to keep an account of the gross receipts from the property mortgaged, and also the expenses of management and preservation. Some difficulties might attend a very rigid compliance with this Regulation. Their Lordships desire to enforce, by everything which may fall from them on the subject, the duty, as well as the policy and prudence, of keeping as full, complete, and plain an account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the language of the section which applies to the common case, must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the Mortgagor himself, previous to the mortgage, would have been entitled to, and if he could not, by reason of an intervening Lease, call for the account of the collections, neither can his Mortgagee; and also, if, at the time of the mortgage, a valid engagement, not designed to exclude accounting, is made by common consent, qualifying the nature of the usufructuary possession, the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms; and in like manner must be construed the provision as to the attestation of the truth of the accounts, which provision must necessarily be flexible, like the former; for the Mortgagee is to verify only his gross receipts and his expenditure, not the rents, nor the extent of arrears, nor the causes of such arrears; he is not, in fact, directed, then, to make out and verify such an account as might be established against him in a hostile suit, but only his gross receipts and his expenditure. The common rule *qui facit per alium facit per se*, would apply to him. What is done by his Agent is done by himself, and the accounts of the property managed by the Agent, though prepared by the Agent, are the Principal's accounts. He, though by delegation, must deliver in the accounts, and he must in some mode swear or depose that they are true and authentic. Must it necessarily be by his own personal oath in all cases? How can he do that if he knows nothing at all about them? He may have no belief, and may even suspect them to be false; for he may suppose himself to have been deceived by his Agent. Can the Legislature seriously be supposed to have contemplated anything so immoral as that a man should swear positively to knowledge of that of which he has, and can have, no personal knowledge. If it be urged that he may swear to his knowledge and belief, still that rational permission is a modification and expansion of the terms of the law. The words are without any exception, and in terms apply to Women, Infants, Lunatics, persons out of the Country, and others managing necessarily remote possessions, by Agents whom they must employ, and in whom they may confide. Can the Indian Legislature, which recognized *Gomastahs* by legislation, be supposed ignorant of their large authority and responsibility? And can it have resolved to make this direction to take an oath imperatively obligatory on every Mortgagee alike in every conceivable case? Their Lordships think otherwise. They think that the language which, like other provisions of the earlier Regulations, is curt and applied to the more common cases, must, to preserve even the spirit of the enactment itself, be constructed reasonably, as admitting, in case of necessity, of some delegation also in the person deputed to perform the duty of attesting the accounts. If the general Manager who did all, and knows all, with whom the Mortgagors, with that knowledge, contracted, whose name is used, whose accounts in one sense they are, and who, far more than mere representatives, knowing nothing of their own knowledge of the transactions, satisfies the spirit of the law by swearing to the truth of the accounts, it is such a reasonable compliance with the spirit of the law, at least, that its performance, in a case circumstanced like the present, by a substitute, furnishes no

ground whatever for suspecting malpractice or designed evasion of the law, and with that alone their Lordships are concerned in this case, since the mere mode of the verification has no other importance in this case, than as it raises a case of suspicion against the accounts themselves. The mere mode of their verification, under the circumstances of this case, does not raise, in their Lordships' minds, any distrust. The contents of the accounts themselves, however, furnish more ground for doubting their accuracy. They show the interest alone not covered by the receipts. The Bankers and their *Gomastah* were experienced men of business. The loan is large. The property was not likely to be unknown to the lenders as to its general productiveness.

No change of circumstances accounting for so great a decline is disclosed, and the decision below of the Judge of the *Zillah* Court does not justify the conclusion that the whole debt, and some arrears of interest, still remain unsatisfied. Some explanation of this may be afforded by the circumstance that the Mortgagees long insisted on a state of accountability very different from that adjudged; and there does appear to their Lordships reason for thinking the accounts rendered to be so far unsatisfactory as to have justified the Court had it directed a further inquiry; that is, supposing the Plaintiffs' prospect of success in his present suit to have been such as might have been prejudiced by the omission to direct that further inquiry.

Their Lordships, however, think that the *Sudder* Court was not justified in inferring, from the omission to render satisfactory accounts, under the circumstances of this case, that the mortgage had been satisfied when the suit was commenced. Had the state of the accounts, and the dealing as to them, raised a case of presumptive evidence of payment, still the conclusions from the evidence in this case cannot be supported; for the calculation of the Court is not formed on a correct basis, either as to the interest or as to the property; it makes no deduction for losses which the evidence in the cause discloses, arising from the partial loss of the property pledged, and some litigation which ensued thereon; it excludes, also, the evidence which the suit and the inquiries and proceedings subsequently to the Interlocutory decree afford, as does also the failure of the arrangement, through the instrumentality of the *Katkinadars*, that the collections never really equalled the gross estimated rental. This evidence, so far as it reached, destroyed, *pro tanto*, the presumptive evidence of the correctness of the estimated receipts. Presumptions, even *in odium spoliatoris*, have known reasonable limits. They must not be conjectures, nor grounded on *data* which the evidence itself shows to be inexact. Had this case been one in which the whole account between these parties could be taken, their Lordships would have remanded the case for further hearing; or, had the Plaintiffs' own case disclosed a probability, even, that a further hearing could decide it in their favour, their Lordships, under its peculiar circumstances, would have been disposed to adopt the same course under some restrictive direction; but there is not the slightest ground for supposing the income of the estate larger than the Plaintiffs' own calculation; and even assuming that to be incapable of reduction, the allowance of twelve *per cent.* involved the dismissal of his plaint. In general, the dismission of a suit should carry with it its consequence of liability for the costs, and this case is one brought against Mortgagees. But, in the opinion of their Lordships, the present suit affords several substantial grounds for a departure from that rule. The suit was brought, not simply for possession, on an allegation of satisfaction from the usufruct, but to establish the true relation between the Mortgagors and Mortgagees, the true nature of the case, the disguished usury, and the disputed unity in one mortgage title of the three several instruments before explained. So far it was successful, and it, therefore, cannot be ascribed to a litigious, vexatious spirit; it has established points most important to the future true adjustment of the mortgage accounts, and cannot be said to have been unproductive of future benefit to all concerned. And in respect of the costs of the proceedings had in the Courts below subsequently to

the Interlocutory decree of the 14th of July, 1842, their Lordships have to observe, that those proceedings would have been unnecessary had the Appellants then appealed against the *Sudder* Court's decision as to the rate of interest; and, further, that the unsatisfactory result of the inquiries directed by that decree, and the failure of the Courts below to ascertain by evidence the actual amount of the gross collections, are, in some measure, due to the unsatisfactory character of the accounts rendered by the Appellants.

The appeal of the Judge of the *Zillah* Court simply dismisses the Plaintiffs' suit, which, in some important parts of it, had succeeded. That judgment, therefore, cannot be restored without alteration. Errors have been committed in this suit, in a nearly equal degree, by both Litigants. Their Lordships think, that the decree of the *Sudder* Court should be reversed, except so far as it reverses the decision of the Court below, and that it should be declared, that the mortgage, lease, and agreement mentioned in the plaint, and there alleged by the Plaintiffs to constitute one mortgage security, did constitute that one security; that the Mortgagees were the *Lall* Defendants, and the Defendant, *Roy Ram Kishen Doss*, was only their Agent, and had no interest in the lease or agreement distinct from that of the Mortgagees, who are accountable, as Mortgagees in possession, to the Plaintiffs in this suit for all moneys received by them in respect of the rents and profits of the mortgaged property by virtue of the said lease. That the three instruments were entered into with a view to evade the usury laws by a device or mean, within the meaning of the 9th section of Regulation XV. of 1793; and that the Plaintiffs were and are entitled to redeem at any time, though before the expiration of the twenty years' term created by the lease, on payment or satisfaction of all that may be due on the mortgage securities for principal money, interest, and costs, such interest to be calculated at twelve *per cent.*; but that, it appearing that the Plaintiffs have failed to prove that the mortgage debt, with interest and costs, had been satisfied at the time of the institution of the suit, the said suit should be dismissed without costs, and that the decree of the Court below, of dismissal of the Plaintiffs' suit, should be restored, so far only as to include that Order of dismissal, with the declaration and alteration above stated, and that, with a view to the due enforcement of the Order of Her Majesty in Council, the High Court should be directed to remand the cause to the Court below, and to order the decree of dismissal simply to be restored, with the above declaration and alteration. And their Lordships will further advise Her Majesty, that each party should pay their own costs of the appeal to the *Sudder* Court, hereby partly reversed: and that any costs of such last appeal as may have been decreed and paid, and which are inconsistent with such Order of Her Majesty, should be refunded, or otherwise dealt with as justice may require. Their Lordships think, that the Appellants are entitled to the ordinary costs of this appeal; but they are of opinion, that those costs ought not to have been swollen by the severance, in defence of the four persons representing the original Mortgagees, and the presentation of two distinct appeals. They will direct the Registrar to tax these costs accordingly.

By the Order in Council made on the appeal, it was ordered, that the decree of the late *Sudder Dewanny Adawlut* at *Calcutta*, of the 28th June, 1862, be reversed, except so far as it reversed the decision of the Court below, and that it be declared that the mortgage, lease, and agreement mentioned in the plaint, and there alleged by the Plaintiffs to constitute one mortgage security, did constitute that one security, that the Mortgagees were the *Lall* Defendants, and the Defendant, *Roy Ram Kishen Doss*, was only their Agent, and had no interest in the lease or agreement distinct from that of the Mortgagees, who are accountable, as Mortgagees in possession, to the Plaintiffs in this suit for all moneys received by them in respect of the rents and profits of the mortgaged property, by virtue of the lease; that the three instruments were entered into with a view to evade the usury laws, by a device or mean, within the meaning of the 9th section of Regulation XV. of 1793, and that the Plaintiffs were, and are, entitled

to redeem, at any time, though before the expiration of the twenty years' term created by the Lease, on payment or satisfaction of all that may be due on the mortgage securities for principal money, interest, and costs, such interest to be calculated at twelve *per cent.*; but that it appearing that the Plaintiffs have failed to prove that the mortgage debt, with interest and costs, had been satisfied at the time of the institution of the suit, the suit is to be dismissed without costs, and the decree of the *Zillah* Court, of the 20th of May, 1859, for the dismissal of the Plaintiffs' suit, restored, so far only as to include that Order of dismissal, with the declaration and alteration above stated, and with a view to the due enforcement of this Order, Her Majesty is further pleased hereby to direct the High Court to remand the cause to the Court below, and to order the decree of dismissal simply to be restored, with the above declaration and alteration; and that each party are to pay their own costs of the appeal to the *Sudder* Court, hereby partly reversed; and that any costs of such last appeal as may have been decreed and paid, and which are inconsistent with this Order, are to be refunded, or otherwise dealt with as justice may require.

14th, 15th and 16th December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer.)

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

RAJAH BURODACANT ROY,* ... ... } *Appellant*,

versus

THE COMMISSIONER OF THE SOONDERBUNS, ... } *Respondent*.

Sunderbuns Boundary—Regulation III. of 1828, S. 13.

Section 13, Regulation III. of 1828, was intended to make provision for the immediate settlement of the limits of the *Sunderbuns*; hence it fixed peremptorily a period after which the demarcation of those limits, made by the Special Commissioner to that end appointed, should be final

No person can come in after that period (namely, three months from the date of the Commissioner's proceeding fixing the boundary) pleading infancy or other ground for re-opening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world. Even within the period of limitation allowed, no one could be heard to object to the line, unless he declared and offered proof that at the time of the survey he was in the occupation of a definite quantity of land cleared and under cultivation within the line. After the line had once become final, no party could be heard to say that even cultivated lands within it were part of his settled *Zemindary*.

18th January, 1869.

THEIR Lordships reserved judgment, and having heard another appeal between the same parties, respecting the Appellant's right to another portion of land, claimed by the Respondent as part of the *Soonderbuns*(*a*,) now delivered their opinion by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant in this case (the Plaintiff in the suit) is the *Rajah* of *Jessore*. The Respondent is the Commissioner of the *Soonderbuns*, representing the Government of *Bengal*. The real object of the suit is to obtain a judicial declaration that the lands, which are the subject of it, form part of *Pergunnah Sahosh*, the revenue on which was permanently assessed at the Decennial Settlement with the Appellant's ancestor; and, on that ground, to set aside certain instruments which have been executed by or on behalf of the Appellant to Government for the payment of the revenue lately assessed on the same lands, on the assumption that they were not part of his settled estate; and to recover back the payments which have been made to Government under that engagement.

The persons who are in actual possession of the lands are not parties to the suit, which is erroneously stated to be one for the recovery of possession, an error which has led to some confusion in the

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12, Moore's I. A., p. 225; 2 B. L. R., P. C., p. 33.

(*a*) See next case.

argument. The true nature of the suit is shown by the issues which have been settled in it. These were,—

First, whether the boundaries of Lots Nos. 221 and 224, fixed by Mr. *Dampier*, the former Commissioner of the *Soonderbuns* in 1829, in accordance with rule not having been set aside up to this date by any Court, and the Plaintiff not having filed objections in reference to such boundaries for thirty-one years, his claim was barred by cl. 2, sec. 13, of Reg. III. of 1828.

Second, whether the land claimed formed part of the decennially settled *Pergunnah Sahosh*, or the right of Government as being part of the *Soonderbuns*, and, whether the Plaintiff's former proprietor had ever been in possession of the land.

Third, when the disputed land with its boundaries had been released from the claims of Government, on proof of its being rent-paying or *mal* land, and subsequently by means of survey, *Dowl* was unjustly taken for it on the allegation, that it was the right of the *Soonderbuns*, whether the Plaintiff is entitled to have the *Dowl* set aside, and obtain possession of the land, as his *mal* right, together with *wasilat*.

The history of the *Pergunnah Sahosh* is briefly this. After the Perpetual Settlement, the then *Rajah*, the Appellant's Grandfather, mortgaged it to one *Bissonath Bose*. He is said fraudulently to have allowed the revenue to fall in arrear, and to have purchased the estate when put up for sale by Government *benamee* some time in 1804. This transaction was afterwards impeached, and the Government (we must assume regularly) declared the estate to be forfeited; but in the year 1825 regranted it to the Appellant, then an infant. It is alleged, and not disputed, that the effect of this regrant was to remit the Appellant to the precise rights of his ancestor under the Perpetual Settlement. The estate between 1825 and the date at which the Appellant attained his majority was administered by the Collector and other revenue officers acting as the Court of Wards; but their acts are material only as bearing upon one or other of the issues in the suit, and particularly upon that which affirms that the lands in question formed part of *Pergunnah Sahosh* in 1792.

This *Pergunnah*, whatever were its precise boundaries, unquestionably abutted upon, and, at least on one side of it, was bounded by that large tract of waste and jungle land which forms the seaboard of the delta of the *Ganges*, and is known as the *Soonderbuns*. And it is certain that the *Soonderbuns*, whatever were then their precise limits, were neither included, nor intended to be included, in the Decennial Settlement of 1792, but remained the property of Government as the general owners of the soil.

From the *Quinquennial* Register of 1795, it appears that two of the component parts of *Pergunnah Sahosh* were the *mouzahs* or *chucks* of *Tildangah* and *Kumarkhola*. There is, however, no evidence to show what the areas of these *mouzahs*, when settled, were. They were situated at two of the points at which *Pergunnah Sahosh* touched the *Soonderbuns*. And the broad question of fact between the parties is, whether these settled *mouzahs* or *chucks* comprehended the whole of the areas marked Lots 221 and 224 in the coloured map which is part of the record, or whether they were limited to the two smaller areas which are coloured yellow, and lie within those lots or in immediate juxta-position to them.

In 1828 the *Bengal* Government appears to have been active in taking measures for extending cultivation in the *Soonderbuns*, and for ascertaining and asserting the rights of the State therein. As a step thereto, it determined to fix and lay down the boundaries of that tract of unsettled land; and for that purpose (amongst others) Regulation III. of 1828, the effect of which will be afterwards considered, was passed. In 1829, Mr. *Dampier*, the then Commissioner of the *Soonderbuns*, under the 13th section of that Regulation, proceeded to fix and lay down the boundaries of the *Soonderbuns* in the immediate neighbourhood of *Tildangah* and *Kumarkhola*. His proceeding and the Map, called "Captain *Hodge's* Map," was made pursuant to the Regulation, in accordance with that proceeding. The boundary line, as defined

by Mr *Dampier's* proceeding, seems to have included within the limits of the *Soonderbuns* the whole of Lots 221 and 224, together with the two areas marked yellow on the coloured Map, which have before been mentioned; or, in other words, all the land now in question, and also the lands represented by those two coloured portions of the map, and now admitted to belong to the settled *mouzahs* of *Tildangah* and *Kumarkhola*.

At the time of Mr *Dampier's* survey, certain proceedings were pending between the Government and the *Rajah*, or his guardians on his behalf, which must now be considered.

There is some trace of a claim on the part of Government as early as 1812, but the proceedings in question were not actually commenced until the 12th of November, 1825, when the Collector of *Jessore* instituted a suit under Regulation II of 1819, as amended by Regulation IX. of 1825, for the assessment of revenue upon 8,000 *beegahs* of land. The ground of his claim was, that this parcel of land, though in possession of *Rajah Borodacant Roy*, under the names of *chucks*, *Tildangah* and *Kumarkhola*, was, in fact, part of the *Soonderbuns*, and, as such, subject to the claim of Government. This suit was in the first instance defended (the *Rajah* being then a minor) by the *Surbarakur* appointed by the Court of Wards, and was, therefore, in this peculiar condition, that the Plaintiff was the Collector asserting the proprietary of fiscal rights of Government, and the Defendant was an Officer appointed by that same Collector acting as a Court of Wards. And this may be one reason why for some years the suit appears to have been conducted very languidly. In 1829 Mr. *Dampier* fixed his boundary line, which included the lands in dispute with the other lands in that locality within the limits of the *Soonderbuns*. Some proceedings in this pending suit seem afterwards to have been had before him as Commissioner of the *Soonderbuns;* but the suit was not decided until November, 1834, when the then Commissioner, Mr. *Grant*, gave judgment in favour of Government.

His decision was grounded partly upon Mr. *Dampier's* map, partly on the absence of proof on the part of the *Rajah* that the lands formed part of his settled estate; and it seems to have treated the whole of *chucks*, *Tildangah* and *Kumarkhola* as "newly-cultivated lands of the *Soonderbuns* jungle." From this decision the *Surbarakur* appealed. A new trial was directed The case was then tried by Mr. *Kemp*, whose decision, on the 20th of September, 1839, was to the effect, that the 8,000 *beegahs* were lands belonging to *chucks*, *Tildangah* and *Kumarkhola*, which formed part of the *Rajah's zemindary* of *Pergunnah Sahosh*, and that the Government had no right to assess them. This decision was, on the 19th of August, 1842, confirmed on appeal by the Special Commissioner, Mr. *D'Oyley*, who, however, intimated a doubt, whether some portion of the land in question might not have been acquired from the *Soonderbuns* by gradual encroachment, and added to the settled *mouzahs*.

The so-called 8,000 *beegahs* appear to have been, according to ordinary measurement, 12,000, and in the course of the argument there was much discussion as to their precise locality. Mr. *Field* insisted, that they were situated at the southern extremity of Lot 224. But from the proceedings which will be next mentioned, and other evidence in the cause, their Lordships are satisfied that, of the 12,000 *beegahs*, 6,476 form the whole or part of the two before-mentioned yellow areas in the coloured Map which are now admitted to represent the settled *mouzahs* of *Tildangah* and *Kumarkhola;* and that the remaining 5,524 *beegahs* were probably contiguous to them

From the proceedings stated in the record their Lordships gather the following facts:—

Some time between the years 1849 and 1851, Mr. *Smith*, a Deputy Collector deputed for that purpose, made a survey of Lots 221 and 224, and a Settlement of part of them. His instructions were to leave out the land which had been released by the decision of Mr *Kemp;* to specify and define the other land belonging to the two Lots on which the claim of Government attached; and to bring it under assessment.

He seems to have satisfied himself that within the admitted boundaries of *Tildangah* there were 3,193-12-3 *beegahs*, and within the admitted boundaries of *Kumarkhola* 3,282-7-2 *beegahs* of land; and it is impossible to read the proceeding of the Revenue Commissioner, of the 13th of August, 1853, at pages 49 and 50 in the Record, without coming to the conclusion, that these 6,476 *beegahs*, have been exempted from the Government claim, and are now held by the Appellant as part of *mouzahs*, *Tildangah* and *Kumarkhola*, within his settled *zemindary* of *Pergunnah Sahosh*. As to the remaining 5,524 *beegahs*, there is considerable confusion. It appears that Mr. *Smith* took two parcels of land aggregating that number of *beegahs* from Lots 221 and 224, in order to make up the 12,000 *beegahs*, the whole of which he could not find within what, according to his view, were the boundaries of the *zemindary*. But from the statement of his proceedings on the 16th of December, 1856, it would seem that, after excepting and setting apart the 6,476 *beegahs*, he found that Lot 221 consisted of 26,277-13-4 *beegahs*, of which 14,679-16-12 *beegahs* were cultivated and 11,597-16-4 were jungle; and that Lot 224 consisted of 57,000 *beegahs*, of which 14,119-12-4 were cultivated and 42,880-7-12 *beegahs* were jungle; and that after deducting the last-mentioned quantity of jungle, which he left unsettled, he made a settlement for Lot 221 with *Ramrutton Roy* and another, as the representatives of one *Brijokissore Roy*, and a settlement for the cultivated lands in Lot 224 with one *Nobokant Roy*. These parties were in occupation of the lands in question under *Jungleboore Pottahs*, which had been granted by the Court of Wards during the minority of the *Rajah* on his behalf.

The *Rajah* appealed against these settlements, insisting that the lands so settled were part of his settled *zemindary*, *Pergunnah Sahosh*. The Government threatened resumption proceedings, but gave the *Rajah* the option of settling for the lands on favourable terms. Those terms were ultimately accepted; a settlement was made with him for both Lots, 221 and 224, for ninety-nine years, and he signed by his *Mooktar* the usual *Dowls* and *Ikrarnamahs* on the 26th of November, 1856. These are the instruments which the present suit is brought to set aside. One term in the arrangement was, that he should respect the possession and rights of the *Pottahdars*, in the proceedings called *Gantidars*, viz., *Nobokant Roy* and the representatives of *Brijokissore Roy*.

From the above facts their Lordships have come to the conclusion, that these settlements included the 5,524 *beegahs*, part of the 12,000 *beegahs* which had been released, by Mr. *Kemp's* decision, from the claims of Government; but that they did not include the 6,476 *beegahs*.

This settlement with the Appellant was complicated by the fact, that settlements had previously been made with the *Gantidars* as occupiers at less favourable rates; and part of the arrangement contemplated was, that the Appellant should receive from them the revenue assessed on them, paying that for which he was liable under the *Dowls*, and retaining the difference. The representatives of *Brijokissore Roy* afterwards resisted this arrangement; and in a suit between them and the Appellant, the Judge held, that he could not enforce his claim against them, and made observations on the settlements which probably led to the institution of the present suit.

The result, however, of the last-mentioned litigation can have no effect on the determination of the present suit. The Appellant is not seeking to be relieved from the settlement because it cannot be carried out as contemplated; nor does he sue for the performance of any agreement that may have been made. He seeks to avoid the settlement on the broad ground, that the whole of the lands included in it are part of the settled *zemindary* of *Pergunnah Sahosh*. The *Zillah* Judge has held, that this contention is well founded, and has decided in favour of the Appellant. The High Court, proceeding entirely on the consideration that the Appellant is, by force of Regulation III. of 1828, bound by Mr. *Dampier's* demarcation of the boundary line of the *Soonderbuns*, has dismissed his suit.

The first question which their Lordships will consider is, what is the effect upon

the present suit of Regulation III. of 1828, sec. 13, and the demarcation thereunder of Mr. *Dampier's* boundary line?

The Regulation was passed, as the preamble declares, with the double object of appointing Special Commissioners, whose judgment should be final in resumption suits, and of amending the procedure furnished by Regulations II. of 1819, and IX. of 1825, in such suits; and of making provision for the immediate settlement of the limits of the *Soonderbuns* as ascertained by careful local inquiry conducted by the Commissioner specially appointed to the duty, and the Surveyors under his authority. The latter object is dealt with by the 13th section.

The first clause of the section declares, that "The uninhabited tract known by the name of the *Soonderbuns* has ever been, and is hereby declared still to be the property of the State: the same not having been alienated or assigned to *Zemindars*, or included in any way in the arrangements of the Perpetual Settlement." It then affirms the right of Government to make grants and leases of any part of the *Soonderbuns*, and to provide for the clearance and cultivation of the tract; and provides, that if any *Zemindar* or other person owning and occupying, or collecting the rent or revenue of cultivated land in the neighbourhood of the land so granted, shall bring a suit to contest the validity of the grant, his suit shall be dismissed on proof that the land so granted is or was when the grant was made within the limit of the unoccupied jungle so named and described. And then it provides for compensation to persons who may have acquired certain rights in respect of gathering wax, cutting wood, or obtaining other jungle products.

The second clause enacts, "That the boundary of the *Soonderbuns* jungle shall be laid down by accurate survey, as determined on the spot by the Commissioner of the *Soonderbuns*;" it next makes provision for enabling any *Zemindar* or party interested to obtain a copy of the survey map, with the boundary marked thereon, together with a copy of the Commissioners' proceedings on the subject; and it then proceeds in these words:—

"Any party deeming his right injured by the demarcation so laid down, shall be at liberty, at any time within three months from the date of the Commissioner's proceeding fixing the same (which proceeding shall always be held and published on the spot,) to contest the same by petition to a Special Commissioner under this Regulation, having local jurisdiction for the time being (or if no such jurisdiction exist, to the ordinary Courts of Justice, by which the case is cognizable) praying further investigation; provided that no plea of objection against the line of demarcation laid down shall be heard or admitted, excepting only such as shall declare and offer proof that at the time of survey a specific quantity of land, or land with defined limits, was in the occupation of the Petitioner cleared and under cultivation, which, by the line of demarcation adopted, is placed within the *Soonderbuns* tract belonging to Government. Every such application so made shall be regarded as a claim to hold the tract claimed free of the public assessment, and shall be investigated and decided under the rules of Regulation II. of 1819, as modified by this Regulation."

The first thing that strikes the mind on reading these enactments is, that as the object of passing them was to make provision for the immediate settlement of the limits of the *Soonderbuns*, so that object could only be attained by fixing peremptorily a period at which the demarcation of those limits should be final. The object would be defeated if any person could come in after that period, pleading infancy or other ground for reopening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world. Another inference to be drawn from these provisions is, that the line of demarcation so drawn was to be final and conclusive, at least in respect of all waste lands and uncleared jungle. The Petitioner could not be heard to object to the line unless he declared and offered proof that, at the time of the survey, he was in the occupation of a definite quantity of land cleared and under cultivation within the line. Nor was this unreasonable. The presumption which might arise in other parts of *India*, that jungle was within the limits of a settled *zemindary*, would not

arise in the case of a *zemindary* bounded by the *Soonderbuns*. For that tract of land was advisedly excluded from the Perpetual Settlement; and, therefore, the presumption would be, that the settlement in that locality was confined to the land then in cultivation. A person in occupation of cultivated land might, within three months, do two distinct things: he might pray for a further investigation, which might result in a new demarcation of the boundary; and he might put forward his claim to hold the particular lands free from public assessment, which would lead to a judicial investigation of his title.

But as the line defines the tract called the *Soonderbuns*, and the *Soonderbuns* are declared to be *extra* the Perpetual Settlement, it is difficult to see how, after the line had, on the expiration of the three months, become final, any party could be heard to say that even cultivated lands within it were part of his settled *zemindary*. Upon the whole, therefore, their Lordships are disposed to agree with the High Court in the conclusion, that the Regulation was a bar to the Appellant's suit. The decision, with respect to the 12,000 *beegahs*, does not necessarily conflict with this view of the Appellant's rights; "and the judgment in this case will leave that decision and its practical effect untouched." That suit was pending before the Commissioner when he drew his boundary line; and the mere pendency of the suit took it out of the operation of the Act, so far at least as it was a claim to hold the lands free from further assessment. There was no application within the proper time for a rectification of the boundary line.

Let it be assumed, however, for the sake of argument, that the Regulation is not an answer to this suit. Their Lordships would, nevertheless, be of opinion, that the Appellant has failed to make out his case, or to establish the second of the issues settled in the suit.

He comes into Court under a very heavy burthen of proof. He comes to set aside settlements made with a full knowledge of the facts, without fraud, and by way of compromise of a disputed right. The boundary line of Mr. *Dampier* has at least settled the general outline of the *Soonderbuns*, and shows that if the Appellant's case be true, his *zemindary* must have made a very extraordinary indentation into that tract of country. The decision as to the 12,000 *beegahs* is final as to them, but as to nothing more; and even as to part of them the Special Commissioner expressed a doubt, whether they had not been gained by encroachment on the *Soonderbuns*. The Appellant is claiming not only cultivated land, but many thousand *beegahs* of jungle, in the face of the strong presumption that jungle in that locality was not included in the settlement of his *zemindary*.

To these presumptions what evidence has he to oppose? Certain vague admissions of his title made by one Collector in 1805 and 1807, and by another Collector in 1812 (the latter only being in a suit,) upon the application of a third party for the *Pottah* of some lands, of which the precise position is not accurately determined, and which (if any) were at most but a very small part of the lands now in dispute. Besides these there is the *Jummabundee* of 1826, which, at first sight, is a more important piece of evidence. But of that document it is to be observed that, even if it goes the length of supporting the Appellant's present case to its full extent (which, as regards Lot 221, it hardly does), it was prepared by the Court of Wards in the interest of its minor ward; and that its value as an admission by a Government Officer is destroyed by the fact, that more than a year before the date (26th of December, 1826) which it bears, Government had commenced the suit for the resumption of the 12,000 *beegahs*, which included even the lands now admitted to belong to the settled *mouzahs*. Their Lordships, therefore, think that the *Zillah* Court was wrong in holding, that the Appellant had proved, as matter of fact, that the lands in question were part of his settled estate.

Mr. *Field* has, however, contended, that he is, at least, entitled to succeed as to the 5,524 *beegahs*. Their Lordships, as they have before stated, believe them to be included in the settlement; and they consider that, rightly or wrongly, this parcel of land has been finally decided to be

part of the settled *zemindary*. They conceive, however, that no decree can be made respecting it in this suit. The settlement in which it is included, was entered into with full knowledge that it was so included, and by way of compromise. It may be that its inclusion in the settlement was part of the compromise, and a consideration for more favourable terms of settlement. For these reasons, their Lordships think, that it is impossible to give in this suit any particular relief concerning it. Upon the whole, then, their Lordships have come to the conclusion, that the decree of the High Court dismissing the Appellant's suit should be affirmed; and they will humbly recommend Her Majesty to dismiss this appeal with costs.

17th December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer.)

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

RAJAH BURODACANT ROY,* ... ... } *Appellant*,

versus

THE COMMISSIONER OF THE SOONDERBUNS, ... } *Respondent*.

The judgment of the Court below reversed, as the only alternative on the Counsel for the Respondent withdrawing from the case on the ground that the judgment could not be maintained. Such conduct of Counsel in a perfectly clear case, where there can be but one judgment in the matter, highly approved of.

THIS was another appeal between the same parties, brought also from a decision of the High Court (No. 47 of 1859), which reversed the decree of the Judge of *Jessore*, in favour of a claim preferred by the Appellant, for confirming his possession, by declaration of *mal* right, in 8,933 *beegahs* of land, and for removing an attachment, by setting aside an Order of the Revenue Commissioner of the *Nuddea District*, for assessment of revenue.

The point in dispute was, whether the Appellant was entitled to the lands in question, known as the *chucks*, *Magoorah Delutter*, and *Jeerbooniah* comprised in *chuck Delutter*, as forming part of his *Zemindary*, *Pergunnah Sahosh*, or whether the Government was entitled to them, as comprised in and falling within the limits of the *Soonderbuns*.

After the case had been opened by

Mr. *Field*, Q. C. (with whom was Mr. *Cave*,)

Mr. *Forsyth*, Q. C. (with whom was Mr. *Merivale*).

Intimated to their Lordships, that they could not, on the part of the Respondent, maintain the judgment of the High Court.

THE RIGHT HON. LORD CHELMSFORD:

We think that nothing can be more fair and honourable than the course which the Counsel for the Respondent have thought proper to adopt. It is undoubtedly the duty of Counsel, as long as any reasonable doubt exists upon which they may ask for the judgment of the Court, to maintain the cause of their Client; but when they feel no doubt, and when it is perfectly clear, that there can be but one judgment in the matter, and more especially when the case cannot be maintained, except by imputing fraud or the want of fair dealing towards another party, Counsel are bound to withdraw from the case. Under these circumstances, their Lordships can have but one course to adopt, which is to reverse the judgment of the Court below in this case, and to allow the appeal.

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* 12, Moore's I. A., p. 242.

18th December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer).

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

RAJAH SUTTOSURRUN GHOSAL,* ... } *Appellant*,

versus

MOHESH CHUNDER MITTER, ... } *Respondent*,

AND

RAJAH SUTTOSURRUN GHOSAL,... ... } *Appellant*,

versus

TARINEE CHUNDER GHOSE, *Respondent*.

Sale for arrears of Revenue—Enhancement—Reg. XLIV. of 1793, s. 5—Reg. VIII. of 1793, s. 51.

Where, by an old *pottah*, lands forming part of a *zemindary* had been leased at a specified rent, but there were no words in the *pottah* importing the hereditary and *istemrari* character of the tenure, held, that the absence of such words was supplied by evidence of long and uninterrupted enjoyment, and of the descent of tenure from father to son, whence that hereditary and *istemrari* character might be legally presumed.

The *zemindary* was sold for arrears of Government revenue under Reg. XI. of 1822. The purchaser's representatives sued to enhance the rent of the under-tenure. *Held*, that they had no right to enhance. The rights of the purchaser were defined by ss. 30—33 of Reg. XI. of 1822, which were repealed by Act XII. of 1841, and that Act, with exception of the 1st and 2nd sections, was again repealed by Act I. of 1845. Neither of the two last-mentioned Statutes contains any saving of rights acquired under the Statutes which it repealed, but expressly limited the enlarged powers which it gave to purchasers at sales for revenue arrears to purchasers at future sales.

A sale for arrears of revenue cannot of itself merely, and without any act, proceeding or demonstration of will on the part of the purchaser, alter the character of an under-tenure.

Semble.—Sec. 5, Reg. XLIV. of 1793, is now of no force for any purpose, but that of declaring the general principles upon which all the subsequent legislation has proceeded, viz., that of putting a purchaser at a sale for arrears of revenue in the position of a party with whom the perpetual settlement of the estate was made. Where an under-tenure existed at the time of the decennial settlement, the only right which the *Zemindar* could exercise over it was that conferred by section 51 of Reg. VIII. of 1793.

A suit for enhancement implies such a privity of title or tenure existing between the parties, that a claim to some rent is legally inferrible from it. The decision in the case of *Ranee Surnomoyee* v. *Maharajah Suttees Chunder Roy Bahadoor*, (10 Moore's I. A., p. 123, *Ante*, p. 60) commented on, explained and reiterated.

18th January, 1869.

THEIR Lordships' judgment, in both appeals, was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The question raised on these appeals is, whether the Respondents (being the Plaintiffs in two different suits) have established, as against the Appellant, their right to enhance the rent payable by him in respect of 134 *beegahs* and 2½ *cottahs* of land, situate in the Twenty-four *Pergunnahs*.

This parcel of land is alleged in both suits, to form part of a *zemindary*, of which somewhat more than ten undivided sixteenths belong to *Moheshchunder Mitter*, the Respondent on the first appeal, and the remainder, being somewhat less than six sixteenths, belong to the Respondent in the second appeal, or, rather, his Master, *Degumber Mitter*.

Moheshchunder Mitter claims title to his portion of the *zemindary* as the Nephew *ex parte materna*, and representative in estate of one *Gunganarian Ghosal*, who purchased it at a sale for arrears of Government revenue in 1839, and died in 1851. *Degumber Mitter's* title to his portion is derived through several successive alienations from some person who purchased that portion at a similar sale in 1837. From the fact that these undivided portions of the *zemindary* were thus sold at different Government sales, it is to

* 12, Moore's I. A., p. 263, 2 B. L. R., P. C., p. 23.

be inferred, that before those sales they were held by different parties, each of whom was separately liable for his share of Government revenue.

In these circumstances, the two *Mitters* have brought separate suits for the enhancement of the rent of the lands in question; and for the purposes of these appeals, their Lordships will assume, that in the Courts below they have been properly held entitled so to do, though there certainly appears to have been a well-grounded objection to the form in which the plaints were originally framed.

In each case the Plaintiff rests his claim to enhance on the statutory rights of a Purchaser at an auction sale, meaning thereby, a sale for arrears of Government revenue; and the Regulation under which each of the sales in question took place was *Ben.* Reg. XI. of 1822.

The defence in the two suits was very much the same. The Appellant insisted, that of the land in question, 67 *beegahs* and 3 *cottahs* had been held by him and his ancestors under a *Pottah*, dated in 1786, at a fixed rent of S. Rs. 163. 13 as. 10 p.; that of the rest of the lands, 42 *beegahs* and 14 *cottahs* were *Lakhiraj;* and the remainder, either including, or, perhaps, with the exception of a very small portion which had been resumed by Government as a towing-path, was held by him as part of a different *Tulook*, under one *Ramtonoo Dutt.* He further insisted, that the suit were barred by lapse of time, twelve years having in each case elapsed since the date of the purchase at the auction sales. And, in *Degumber Mitter's* suit, he further questioned the right of one who was a mere Purchaser by private contract from one who had bought at a Government sale to institute such a suit. He also raised the question, whether, the suit ought not, under cl. 7 of the 23rd section of Act, No. X. of 1859, to have been brought in the Collector's instead of the *Zillah* Court.

Their Lordships think it will be convenient, in the first instance, to consider the Respondent's claim to enhance, as if all the lands in question were covered by the *Pottah* of 1786.

Both the Courts below, which dealt with the questions of fact, have affirmed the genuineness of that *Pottah*, and their Lordships see no reason for impeaching it.

Again, though the document is not in the form of the ordinary instruments which create an *Istemrari* tenure, it is in terms a grant of the lands at a fixed rent, for it specifies the sum. And, upon the principle laid down by this Committee in the case of *Baboo Gopal Lall Thakoor* v. *Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 191; *Ante*, p. 98), the absence of words importing the hereditary character of the tenure is here, as in that case, supplied by evidence of long and uninterrupted enjoyment, and of the descent of the tenure from Father to Son, whence that hereditary character may be legally presumed.

Upon the evidence their Lordships have no doubt, that at the date of the earliest of the Government sales, those whom the present Appellant represents were, by virtue of the *Pottah*, in possession of the land which it covers at a fixed rent, under a sub-tenure upon the then *Zemindars*.

It follows, that the Respondent's right to enhance the rent, which implies a right to vary the terms of the sub-tenure, and to set it aside, if that title to enhance be disputed on grounds inconsistent with the obligations of such a dependent tenure, must, if it exists at all, depend upon the peculiar and statutory powers acquired by a Purchaser at a sale for arrears of revenue. And accordingly, both in the plaints and in the notices given in pursuance of *Ben.* Reg. V. of 1812, sec. 9, those powers are put forward as the foundation of the right.

The first question, then, is—Are the Respondents, or is either of them, entitled to exercise those powers? That neither is so entitled has been strongly argued by the learned Counsel for the Appellant, upon the following among other grounds. The sales took place under *Ben.* Reg. XI. of 1822; and the rights of the Purchasers through whom the Respondents claim were defined by the 30th and three following sections of that Regulation. Those enactments were repealed by the 1st section of Act, No. XII. of 1841; and all the provisions of that Act, with the exception of the first and second sections, were again

repealed by Act, No. I. of 1845, which, as modified by some subsequent Acts, is the existing sale law. Neither of the two last-mentioned Acts contains any saving of rights acquired under the Acts which it repealed; and though each gave to Purchasers at sales for arrears of Government revenue powers equal to or even larger than those given by the repealed Acts, it expressly limited those powers to Purchasers at future sales, *i. e.*, "sales under this Act." The Respondents, therefore, cannot invoke Regulation XI. of 1822, as the foundation of their alleged rights, because that has been absolutely repealed; and they cannot call in aid the subsequent Acts, because they have given no power to Purchasers at sales which took place before they were passed.

This point, though it seems to have been overlooked in many cases in *India*, is not now adjudged here for the first time. It was fully considered and determined by this Committee in the case of *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123). The Judges of the High Court have attempted to distinguish that case from the present, on the ground that in the former the sale relied upon was made under *Ben.* Reg. XLIV. of 1793. But that statement proceeds upon a misapprehension of the facts of the earlier case. In that, as in these, the sale on which the power to enhance depended had taken place under *Ben.* Reg. XI. of 1822; and it was not until they found that they could not support their case, either on that repealed Regulation, or on the subsequent Acts, that the learned Counsel for the Respondent, the *Maharajah*, fell back upon the 5th section of *Ben.* Reg. XLIV. of 1793, which, though suspended by the subsequent Legislation on the subject, had never been expressly repealed.

Their Lordships must also observe, that in the judgment delivered in that case it was carefully considered, whether a sale for arrears of revenue of itself merely, and without any act, proceeding, or demonstration of will on the part of the Purchaser, altered the character of the tenure. And it was decided, that the sale law had not "that hard and rigid character." It is true that the judgment, assuming that the powers given by *Ben.* Reg. XI. of 1822 had been swept away by the repeal of that Regulation, dealt only with the effect of a sale under Reg. XLIV. of 1793. But what is laid down concerning such a sale may, even *à fortiori*, be predicated of a sale under any of the subsequent sale laws, and, in particular, of one under Regulation XI. of 1822. For the words of the Regulation of 1793 (sec. 5) are, that all engagements of the former proprietor, and all under-tenures granted by him, shall "stand cancelled from the day of sale;" whereas the Regulation of 1822 (sec. 30) enacts, that "all tenures which may have been created by the defaulter or his predecessors, being representatives or assignees of the original Engager, as well as all tenures which the first Engager was competent to set aside, alter, or renew, shall be liable to be avoided and annulled by the Purchaser, &c.,"—expressions which, far more strongly than those of the earlier Regulation, import that the estate is not, upon a sale for arrears of revenue, necessarily and *ipso facto*, changed in its nature and incidents. And, if this be so, the repeal of the Regulation which destroys the power to change the estate, must leave its freedom from change, independent of mutual will, unimpaired.

Their Lordships, then, being clearly of opinion, both upon principle and the authority of the decision in *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123; *Ante*, p. 60), that the Respondents cannot now for the first time exercise powers which, if they ever existed, existed only by virtue of the repealed sections of *Ben.* Reg. XI. of 1822, do not deem it necessary to consider, whether the stringent powers given by those enactments to Purchasers, *eo nomine*, could in any case be exercised by the heirs or assignees of such Purchasers. Justice and sound policy alike require that inasmuch as the Law has given them for the particular purpose only of enabling the Purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship

to under-tenants, and insecurity to property, they should be exercised within a reasonable time. And their Lordships believe that that object has now been in some measure secured by Acts, Nos. X. and XIV. of 1859.

Their Lordships have further to remark, that in the case of the *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy, Bahadoor*, to which they have already referred, this Committee, whilst it carefully abstained from determining whether, upon the true construction of all the Regulations taken together, the 5th section of Regulation XLIV. of 1793 ought to be taken to have been repealed, nevertheless proceeded to consider whether that enactment, if assumed to be still in force, would support the Respondent's case. And after putting upon the section the construction stated at page 147 of Vol. 10, Moore's Ind. App. Cases, the judgment ruled, that the Purchaser had an option to confirm the existing rate of rent, and must, upon the evidence in the particular case, be taken to have exercised that option in favour of the dependent *Talookdar*

Their Lordships must reiterate the doubts expressed by those who decided the case of the *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy, Bahadoor*, whether the clause in question can be held to be in force for any purpose but that of declaring the general principles upon which all the subsequent legislation has proceeded, viz., that of putting a Purchaser at a sale for arrears of revenue in the position of the party with whom the Perpetual Settlement of the estate was made. They do not think that a party who has lost the particular rights which were given to him, or to the Purchaser whom he represents, by any of the subsequent Statutes, can fall back upon the old law which has been so repeatedly modified.

It is to be observed, however, that, even if the section be in force, the tenure here in question is not one which, upon the strictest interpretation of that clause, could stand cancelled. It existed at the time of the Decennial Settlement, and their Lordships apprehend, that the only right which the *Zemindar* with whom that Settlement was made could have exercised over it was that conferred by section 51 of *Ben.* Reg. VIII. of 1793. No attempt has been made to bring the present cases within that section, which seems to cast upon the *Zemindar* the burthen of proving particular grounds for enhancement of rent.

Upon the whole, then, their Lordships are of opinion, that the Court of the Principal *Sudder Ameen* and the High Court of *Calcutta* were in error in holding that the Respondents had established their right to enhance the rent of the lands covered by the *Pottah* of 1786.

It may be said, that this does not dispose of the question as to the other parcels of land. But the foundation of the suits is, that the Respondents have the powers of Purchasers at sales for arrears of revenue; and if that foundation fails, the failure is fatal to the whole suit. Their Lordships, however, are of opinion, that there are further objections to the maintenance of the present suits in respect of those parcels of land. There is no evidence that the Appellant has ever paid to the Respondents any rent except the sum of S. Rs. 136. 13 as. 10 p., being the rent reserved by the *Pottah* in respect of the 67 *beegahs* and 3 *cottahs*. He disputes the title to rent in respect of the other parcels, treating one parcel as *Lakhiraj*, the other as held of a different Landlord. A suit for enhancement implies such a privity of title or tenure existing between the parties, that a claim to some rent is legally inferrible from it, and there is here proof that that relation is denied to have existed at any time between the parties in respect of these two parcels of land. As to the latter portion, where the Respondents' title is denied and the right of another *Zemindar* set up, the proper remedy seems to be by a suit in the nature of an ejectment. Again, if the lands alleged to be *Lakhiraj* lie within the Respondents' *zemindary*, the law has given them an appropriate remedy in a suit for resumption and re-assessment.

The present decision will not deprive them of either remedy, if sought by them in the character of ordinary *Zemindars*. But it is to be observed, that a suit of either kind is now subject to a particular law of limitation, and that consideration

is a strong ground for not allowing such rights to be irregularly litigated in a suit like the present, which is subject to a different, if it is subject to any, rule of limitation. Upon the whole, therefore, their Lordships have come to the conclusion, that they must recommend to Her Majesty to allow these appeals; to reverse the decrees of the Court below, and in lieu thereof to Order, that both suits be dismissed with costs. The Appellant will be entitled to the costs of these appeals; but it will be for the Registrar, in taxing those costs, to consider whether the costs of more than one case should be allowed *(a)*.

17th December, 1868.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer.)

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

MUSSUMAT RANEE SURNO MOYEE,* ... } *Appellant,*

versus

SHOOSHEE MOKHEE BURMONIA and others, ... } *Respondents.*

Limitation—Section 32 of Act X. of 1859—Cause of Action—Trespass.

A, a *Zemindar*, sold the rights of *B*, his *putnidar*, for arrears of rent, under Regulation VIII. of 1819. This sale was subsequently set aside at the suit of *B* for irregularity. *A* then sued *B* for the arrears, under Act X. of 1859, and *B* raised the defence that the suit was barred, more than 3 years having elapsed from the close of the year in which the arrear became due. *Held* (reversing the decision of the High Court,) that upon the setting aside of the *putni* sale, the *putnidar* took back the estate subject to the obligation to pay the rent; and that the particular arrears of rent claimed must be taken to have become due in the year in which that restoration to possession took place, and Plaintiff could sue within three years from the close of that year.

Also held, that *A* was not guilty of a trespass in bringing the property to sale under a defective notice, and *A* could not have sued for the arrears pending the proceedings to set aside the sale.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

THE facts of this case are simply these. The Appellant is a *Zemindar*. Those whom she represents had granted a *Putnee talook*, and the *Putneedars* had fallen into arrears of rent. The *Zemindar*, the Appellant, pursued her remedy under Regulation VIII. of 1819, and brought the *Talook* to sale. It sold for a sum greatly in excess of the rent in arrear. The Purchaser was put in possession of the *Talook*. Out of the purchase-money the arrears were paid, and the balance, in the ordinary course, remained in the Collector's hands, for the benefit of those who were entitled to it. A suit was then brought to set aside the sale of this *Putnee talook*, on the ground of irregularity; and we must assume that it was correctly set aside by the judgment of the Court below. The first judgment on the case was on the 26th of December, 1860. The Appellant brought her appeal in the High Court; and the final judgment, dismissing her appeal, was on the 30th of June, 1863. The effect of the judgment was, that she had to pay back the purchase-money to the Purchaser, with interest; that the *Putneedars* were again put into possession of the *Talook*; and that they recovered the mesne profits, during the period in which they were out of possession, from the Purchaser. The Appellant then brought the present suit for recovery of the arrears of rent. She brought it in the Collector's Court, as in an ordinary case, and must, therefore, we apprehend, be taken to have brought it under Act, No. X. of 1859. She was then met by the defence that the suit was out of time, that it was barred by the 32nd section of that Act; the construction put on that enactment being, that the suit should have been brought within three years from the time on which these arrears first became due, viz., the last day

(a) See *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh*, *ante*, p. 403.

* 12 Moore's I. A., p. 244; 2 B. L. R., P. C., p. 10.

of the year for which the rents constituting them had accrued. The result of the decision is, that she has not only lost the remedy which *Ben.* Reg. VIII. of 1819 gave her, but that she has no other remedy for those arrears of rent. If that decision is founded upon grounds which cannot be shaken, it certainly is a very unfortunate result, and a result which obviously works a great injustice; for the *Putneedars* have got back their *Putnee*, and have, at the same time, relieved themselves from the obligation of paying for that period, the very rent upon which they held it.

The case of the Appellant has been argued on various grounds. Mr. *Cave* has argued, that this clause is to be qualified by introducing certain clauses of the old Regulation of limitations of 1793. He has also argued, that if those claims can no longer be imported into the consideration of the case, it falls within one of the exceptions imported into the existing Act of limitation—the Act, No. XIV. of 1859.

Their Lordships are of opinion, that if this case had arisen in an ordinary Court of Law, and that the law of limitations to be applied was Act, No. XIV. of 1859, there could be no doubt at all upon the question; and that it would not be necessary to fall back upon the exception referred to by Mr. *Cave*, because it seems to their Lordships to be perfectly clear, that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived; and whether that time be taken to be the date of the first decree, or the date of the final decree, the present suit would, in either case, have been brought in time. They do not, however, think it necessary to decide that either that Act, or the particular exception in it, is to be brought in to qualify the peculiar and special law of limitations introduced by the Act of 1859, because they think that, upon the fair construction of the 32nd section of that Act, the time had really not run. Their Lordships' view of the case is this: that, upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place. It follows, that upon the language of the 32nd section of Act, No. X. of 1859, the Appellant was not barred from her remedy. Their Lordships further authorize me to say, that they do not concur in the view taken by the High Court, that the Appellant can be said to have committed an act of trespass, because, when she pursued the remedy, which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, and that her proceedings, therefore, became inoperative. Their Lordships cannot treat this as an act of trespass, or hold with the High Court, that in bringing this suit she is a person seeking to take advantage of her own wrong. They must also respectfully dissent from another statement of the learned Judges of the High Court, to the effect that the Appellant might have sued for these arrears pending the proceedings to set aside the sale of the *Putnee*. It is clear, that until the sale had been finally set aside, she was in the position of a person whose claim had been satisfied; and that her suit might have been successfully met by a plea to that effect.

On these grounds, their Lordships are prepared to recommend to Her Majesty that the appeal be allowed with costs, that the judgment of the High Court be reversed, and in lieu thereof, that the appeal to that Court be dismissed, and the judgment of the Court below affirmed with costs.

An Order in Council reversing the decision of the Court below was made thereon.

2nd February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

Ex parte KISTO NAUTH ROY.*

Appeal to the Privy Council—Re-hearing.

There were four Respondents in an appeal to the Privy Council. At the hearing, the appeal was allowed *ex-parte* against all the Respondents. One Respondent afterwards petitioned for a re-hearing, on the ground that neither he nor his agents had notice that the appeal had been entered, or fixed for hearing, until after it had been decided.

On enquiry it appeared that the petitioner had inaccurately described the suit to his agents as an appeal against himself only, without mentioning the names of the other Respondents; and the agents on being told at the Privy Council Office, that no appeal so entitled was pending, had taken no further steps.

Held, that there had been omission and neglect on the petitioner's part and on the part of his agents, such as to prevent the Judicial Committee from recommending a re-hearing of the case.

A PETITION for re-hearing the above appeal was afterwards presented by *Kisto Nauth Roy*, one of the parties to the same.

The petition alleged, that on the 19th of August, 1864, the Petitioner obtained a decree in his favour in the High Court at *Calcutta* in a suit brought by the Appellant, *Mussumat Ranee Surno Moyee*, against the Petitioner and others, and that from that decree the *Ranee* appealed to *England*; that in the month of September, 1867, the Petitioner instructed his Agents in *England* to appear for him in the appeal, and take all necessary steps on his behalf, with a view of maintaining the decree of the High Court; that on the 23rd of October, 1867, the Petitioner's Agents attended the Privy Council Office, and made inquiries with respect to the appeal, and were informed that the record of the appeal had not yet arrived in this country; that the Agents on the same day wrote a Letter to the Registrar of the Privy Council, headed "*Ranee Surno Moyee*, Appellant; and *Kisto Nauth Roy*, Respondent," asking him to give them notice when the transcript arrived, and to enter an appearance in their names for the Petitioner; that the appeal was, notwithstanding many inquiries by his Agents, and every diligence on the part of the Petitioner, set down for hearing, and ultimately heard *ex parte* in the absence of the Petitioner, and judgment given on behalf of the Appellant; that the Petitioner had ascertained that in the certificate of the Registrar of the Indian Court accompanying the transmission of the record to *England* the title of the appeal was given "*Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*," without adding the words "and others," and that in consequence of this omission and mistake the appeal was entitled in the same manner in the record of the Privy Council Office, and that the Appellant having many other appeals pending before the Privy Council, the Officers of the Privy Council were misled by such title, and unable to give your Petitioner information of the steps taken in the appeal; that there were other parties Defendants in the suit, but that the Petitioner and *Shooshee Mokhee Burmonia* alone appealed from the Court of First Instance to the High Court, and that in the proceeding in the Court below the Petitioner's name was sometimes used first, and sometimes the name of *Shooshee Mokhee Burmonia*; and the Petitioner stated, that he had used every diligence to have the appeal argued on his behalf before the Privy Council, and submitted that a re-hearing of the appeal so heard *ex parte* ought, under such circumstances, to be allowed, and prayed that he might be at liberty to appear to and argue such appeal.

Mr. *Manisty*, Q. C., and Mr. *Doyne*, for the Petitioner.

There was a *bonâ fide* intention on the part of the Petitioner to appear and support the decree made in his favour by the High Court. He had retained Counsel, who were to be instructed at the hearing of the appeal. No default can be imputed to his Agents in *England* for not entering an appearance, and the hearing

* 12, Moore's I. A., p. 254; 2 B. L. R., P. C., p 60.

took place under circumstances over which he had no control. The Petitioner's Agents were misled by the name of the Petitioner being omitted in the title of the appeal transmitted from *India*, the fact being, that there were other appeals then pending by the same Appellant in which the Petitioner was not a party. A re-hearing of an appeal heard *ex parte* in similar circumstances was granted in *Rajundernarain Rae* v. *Bijai Govind Sing (a)*; *Dumaresq* v. *Le Hardy (b)*. There the law and practice in such circumstances were investigated, and are fully stated both in the argument and judgment, and in the notes appended by the Editor to the report.

Mr. *Cave* for *Mussumat Ranee Surno Moyee*, opposed.

Nothing is shown to entitle the Petitioner to the extraordinary relief now asked for, and there does not appear to have been a *bonâ fide* intention to enter an appearance, no step being taken until the Order in Council was made reversing the decree of the Court below. In such circumstances, the Court will adopt the rule laid down in *The Singapore and The Hebe (c)*; *The Montreal Assurance Company* v. *McGillivray (d)*; *Motz* v. *Moreau (e)*; and refuse the application.

6th February, 1869.

Judgment was reserved, and now delivered by

THE RIGHT HON. LORD CHELMSFORD:

This is a petition for the re-hearing of an appeal from a decree of the High Court of Judicature at *Fort William* in *Bengal*, which was heard *ex parte* on the appearance of the Appellant alone, and in which their Lordships agreed to recommend to Her Majesty that the appeal should be allowed, and the decree of the Court below be reversed.

(a) 1 Moore's P. C. Cases, 117.
(b) 1 Moore's P. C. Cases, 127.
(c) 4 Moore's P. C. Cases (N. S.), 271; S. C. Law Rep., 1 P. C., 378.
(d) 13 Moore's P. C. Cases, 125.
(e) 13 Moore's P. C. Cases, 376.

The Petitioner, one of the Respondents in the appeal, prays for a re-hearing, on the ground that he had fully intended to appear in support of the decree and had given instructions to his Agents in *England* to enter an appearance for him, and take all necessary steps for maintaining the decree, but that neither he nor his Agents had any notice that the appeal had been entered, nor were they aware of its having been fixed for hearing until after the hearing had taken place, and the report made to Her Majesty in Council had been agreed to.

In support of the petition the case of *Rajundernarain Rae* v. *Bijai Govind Sing (a)* was relied upon to show, that it is competent to their Lordships, even after a report to the King and the confirmation of the report, to recommend that there shall be a re-hearing.

Such an unusual indulgence, however, ought never to be granted except under very special circumstances, and only where the *ex parte* hearing has not been occasioned by any default in the party applying for a re-hearing. The case referred to was one of this exceptional character. The hearing was *ex parte* upon the appearance of the Respondent alone, and the Committee, adopting a form of Order which had been used on previous occasions, affirmed the decree of the Court below, and dismissed the appeal with costs. Upon a petition by the Appellants, praying to have the Order for dismissing the appeal and affirmance of the judgment recalled, and for leave to prosecute their original petition of appeal, their Lordships considered, that a simple dismissal was to be regarded as the Order which must have been in their contemplation, and that no more could have been intended in substance, although the objectionable form importing affirmance was followed. And upon the application for a re-hearing, Lord *Brougham*, in delivering the opinion of the Committee, stated that the case for indulgence was a strong one, provided there was power to grant the application. The parties were infants under the Court of Wards in *Calcutta*, and appeared by a public function-

(a) 1 Moore's P. C. Cases, 117.

ary through the appointment of that Court as their guardian *ad litem;* this person neglected the case altogether, and not only did not provide funds for carrying it on, but absconded with the fund in his hands which had been allowed for the expense of the suit, and he was not to be found when the Agent here desired to communicate with him, nor had he since returned. Their Lordships, therefore, thought "in the particular circumstances of the case," His Majesty should be advised to amend the Order, and to let in the Appellants to be heard, notwithstanding the dismissal, that is to say, "to restore the appeal," but the conditions were imposed of payment of the Respondent's costs occasioned by the default at the time of the *ex parte* report, and also by the application for a re-hearing.

In the present case it cannot be truly alleged, that the *ex parte* hearing took place without any default on the part of the Petitioner or his Agents.

The appeal was from a decision of the High Court of Judicature at *Fort William* in *Bengal*, in favour of the Defendants, in a suit in which *Mussumdt Ranee Surno Moyee* was Plaintiff, and *Shooshee Mokhee Burmonia*, the Petitioner, *Kisto Nauth Roy*, and several others, were Defendants.

In the certificate of the Registrar of the Court accompanying the transmission of the record, the only Defendant named in the title of the appeal was *Shooshee Mokhee Burmonia*, without the addition of the words "and others;" but in the record itself the words "and others" were added to the name of the Defendant. The Petitioner's instructions to his Agents probably named only himself as the Respondent in appeal, because a Letter, dated the 23rd of October, 1867, was written by them to the Registrar of the Privy Council in these words:—

"*Ranee Surno Moyee*, Appellant,

and

Kisto Nauth Roy, Respondent,

In appeal from *Bengal*.

"We are instructed on behalf of the Respondent in the above appeal, and shall be obliged by your giving us notice when the transcript of proceedings arrives in this Country, and by your entering an appearance in due time in our names on behalf of the Respondent."

The Agents made inquiries at the Council Office on the day this Letter was written, and also subsequently in the same month of October, whether the record in the appeal had arrived. As there was no appeal with the title named in the Letter, they were of course answered in the negative. The misinformation as to the non-arrival of the proceedings in this Country was owing to the inaccurate description of the appeal given by the Petitioner to his Agents. This inaccuracy is inexcusable, because he knew perfectly well that there were many other Respondents beside himself, and that his name did not stand the first amongst the Defendants in the title of the suit. All the ignorance of the proceedings taken on the part of the Appellant resulted from the Petitioner having thus originally misled his Agents in his instructions to them. The Agents themselves, too, are not wholly free from blame. They should not have been satisfied with having requested the Registrar to give them notice of the arrival of the proceedings, which it was no part of the duty of his office to do, but they should have examined for themselves at the Council Office, and, having the name of the Appellant accurately given, they would have ascertained that there was an appeal by him, and upon the production of the proceedings they would have found that to the name of the Respondent there were added the words "and others," which would have led to a further examination, and to the discovery that it was the appeal in which the Petitioner was interested, and in which they were instructed to appear for him. Under these circumstances, to grant the indulgence of a re-hearing to the Petitioner, would be to give him the benefit of his own and his Agents' default.

It is necessary to distinguish this case from that of *McLeary* v. *Hill* and others, which was heard by this Committee on the 30th of June, 1868, and in which their Lordships intimated their opinion, that the decree appealed from ought to be varied

and amended, and directed minutes of the proposed report to be prepared by the Counsel for the Appellant. This was accordingly done, and on the 2nd of July the minutes were approved and adopted by their Lordships, and were afterwards, on the 7th of July, submitted to Her Majesty for approval. Immediately after the Order in Council had been made, the Registrar, in drawing the final Order, discovered that the Appellant's Solicitor had omitted to take out and issue the usual process requiring four out of the five Respondents to appear to the appeal, although he had issued the regular process against the fifth Respondent. The Registrar reported this fact to their Lordships, and on the 10th of July their Lordships reported to Her Majesty that the Order of the 7th of July ought to be revoked. The appeal then stood over for further directions, and the Appellant was ordered to serve a personal notice of the appeal on each of the four Respondents who had not appeared.

The distinction between this case and the present is, that in *McLeary* v. *Hill* and others, the Appellant had neglected to take an essential step in the appeal, and was, therefore, not entitled to set down the case *ex parte* as against the Respondents. In the present case, although no appearance had been entered on behalf of the Respondents, or either of them, the Appellant had done all she was required to do by the practice and rules of the Judicial Committee, and the omission and neglect is that of the Petitioner, who now asks for a re-hearing of the appeal. The petition must be dismissed with costs.

8th and 9th February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

RAJAH SAHIB PERHLAD SEIN,* ... ... } *Appellant*,

versus

BABOO BUDHOO SING, ... *Respondent*.

Judgment was delivered in this case, and four other appeals affecting the same property, at the same time.—See *post*, p. 431.

9th and 10th February, 1869.

On Appeal from the High Court of Judicature at Calcutta.

KALEEPERSHAD TEWARREE,* ... } *Appellant*,

versus

RAJAH SAHIB PERHLAD SEIN, ... } *Respondent*.

For judgment see *post*, p. 435.

10th and 11th February, 1869.

RAJAH SAHIB PERHLAD SEIN,* ... ... } *Appellant*,

versus

DOORGAPERSAUD TEWARREE, *alias* BOOBOO TEWARREE, MUNNE LALL TEWARREE, and KALEEPERSHAD TEWARREE, the Brothers, and the Widow, the heirs-at-law of MUDDEN MOHUN TEWARREE, deceased, ... } *Respondents*.

* 12, Moore's I. A., pp. 275, 282, 286.

Judgment was reserved (see *post*, p. 439) and afterwards delivered with the judgment in the other four appeals.

12th February, 1869.

RAJAH SAHIB PERHLAD SEIN,* ... ... } *Appellant,*

versus

RUN BAHADOOR SINGH, and others, ... } *Respondents.*

In this case also judgment was postponed, and afterwards delivered with the judgments in the four other cases, see *post*, p. 443.

15th and 16th February, 1869.

RAJAH SAHIB PERHLAD SEIN,* ... ... } *Appellant,*

versus

MAHARAJAH RAJENDER KISHORE SINGH, ... } *Respondent.*

For judgment see *post*, p. 444.

Contract of Sale—Specific Performance—Proof of Consideration—Onus—Limitation—Thakbust Award—Legal Disabilities.

1. It is very questionable in any case whether the effect of the execution of a Bill of sale by a Hindu vendor is to pass an estate irrespectively of the actual delivery of possession. Where the vendor sells an estate, of which he is not in possession, in consideration of advances to enable him to sue for its recovery, it is not open to the purchaser, after failing to complete his part of the contract, to claim specific performance and delivery of the recovered estate, on tendering the balance of the purchase-money.

2. It is the established practice of the Courts in *India*, in cases of contract, to require satisfactory proof that consideration has been actually received, according to the terms of the contract, and a contract under seal does not of itself, in *India*, import that there was a sufficient consideration for the agreement.

A Plaintiff, however, suing to set aside a security admittedly executed by himself, must make out a good *primâ facie* case before the Defendants can be called on to prove consideration.

3. A *Zemindar* has, as such, a *primâ facie* right to the gross collections from all the *mauzas* within his *zemindary*. It is for parties setting up an intermediate tenure to prove their grant.

4. Defendant claimed to hold a *mokurrari* tenure, under deeds executed by Plaintiff *Zemindar*. The Plaintiff denied the authenticity of the deeds, and sued to set them aside. The lower Courts dismissed his suit as barred by limitation, on the ground that Plaintiff had, in a petition before the Collector, admitted that Defendant was *Mokurraridar* of the tenure, and that this being so, limitation ran against him from the date of the deeds. *Held*, that the case should have been tried on the merits, as the petition was not a conclusive admission of the genuineness of the deeds, and it was not right to infer from it that Plaintiff knew of their existence at the time of their professed date.

5. A *Thakbust* award of boundary, made in the Lower Provinces, may be an award under Regulation IX. of 1825, within the meaning of Act XIII. of 1848. It would, in any case, be material evidence of possession.

The pendency of an appeal to *England* does not put the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

12th March, 1869.

THEIR Lordships having reserved the consideration of these appeals, judgment was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

Their Lordships have now to dispose of five appeals in which the same person, *Rajah Sahib Perhlad Sein*, is an actor, being in four of them the Appellant and in the fifth the Respondent. Though the cases are not otherwise connected with, or dependent on each other, it will be convenient to state certain facts relating to the *Rajah* and his title which are common to all. He is now in undisputed possession of the *Raj* and *zemindary* of *Ramnuggur*, the title to which was in litigation from 1835 until 1858. He originally sued for them as guardian on behalf of his infant Son under a deed of gift; they were at the same time claimed by *Run Murdun Sein* as a Son of the former *Rajah*, *Umur Pertab Sein*, and by other parties under different titles. Ultimately the right of succession of the present *Rajah* as the nearest collateral heir of *Umur Pertab Sein* was declared by a decree of the *Zillah* Court, dated the 27th of February, 1845, and that decree was affirmed on appeal by the *Sudder* Court on the 9th of September, 1846. From that date the litigation was confined to the *Rajah* and *Run Murdun Sein*, who alone preferred an appeal to Her Majesty in Council, which was

* 12, Moore's I. A., pp 289 and 292.

finally determined in the *Rajah's* favour in January, 1858 (*a*). The estate was in the possession of one of the Widows of *Umur Purtab Sein* from the time of his death in 1834, until February, 1840, when she died. The Collector of the District was then directed to keep it under attachment until the title to it should be determined in the pending litigation. After the *Sudder* Court's decree in 1846, an Order was made that the *Rajah* should be put into possession on giving security to abide the event of the appeal to *England;* but owing to delays in perfecting that security, he did not obtain actual possession until June, 1848. The security afterwards failed; the *Rajah* was unable to give fresh security to the satisfaction of the Courts; an Order was made on the 18th of May, 1854, that the property should again be attached by the Collector; and it remained under attachment from that time until possession was restored to the *Rajah* in 1858, upon the determination of the appeal in his favour. Having stated these facts and dates, their Lordships will proceed to deal with the several appeals in their order, beginning with that in which *Baboo Budhoo Sing* is Respondent.

Sahib Perhlad Sein *vs.* Budhoo Sing.

The suit out of which this appeal has arisen was brought to recover from the Appellant (the *Rajah*) possession of a four-anna share of certain specified property, comprising the whole, or a very considerable part of the *zemindary* of *Ramnuggur*. The original Plaintiff was a Mussulman Lady, claiming to be, at least for the purposes of the suit, the sole representative of her late Husband, *Sultan Jan*, who was the sole representative of one *Kajah Hossein Ally Khan*. After the institution of the suit she sold all her interest therein to the Respondent, who has been substituted as Plaintiff on the record, and may be taken to have all the rights in the subject matter of the suit which could have been successfully asserted either by *Kajah Hossein Ally Khan*, or by *Sultan Jan*.

(*a*) See *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*, 7 Moore's Ind. App. Cases, 18; 1 P. C. J., p. 591.

His title is founded on a *Kowala* or Bill of sale of the property in dispute, which is admitted to have been executed to the *Kajah* by the Appellant on the 23rd of September, 1844, and, therefore, at a time when the latter neither was in the possession of the *zemindary*, nor had established in any Court his title thereto. The case of the Respondent is, that this Bill of sale expresses the real contract between the Appellant and the *Kajah*, which was one for the absolute sale by the former and purchase by the latter of a four-anna share of the specified property for the price of Rs. 75,000, and that that sum was actually paid down in cash when the instrument was executed.

The case of the Appellant is, that being in want of funds to carry on his suit for the *Raj* and *zemindary*, and for his own support, he applied to the *Kajah*, who agreed to make advances for those purposes on condition of having the Bill of sale executed, registered, and duly notified in the pending suit; that no part of the expressed consideration or sum of Rs. 75,000 was paid on the execution of the Instrument; and that though the *Kajah*, from time to time, advanced small sums of money, the whole amount of his advances fell far short of Rs. 75,000; that afterwards the *Kajah* absconded from *Patna* on a charge of disaffection to the Government; whereupon it was agreed between his Son, *Sultan Jan*, and the Appellant, that a Bond for Rs. 76,000 hypothecating the whole of the property in question, and not merely a twelve-anna share of it, should be substituted for the instrument importing the absolute assignment of the four-anna share; and that, accordingly, such a Bond was executed by the Appellant to *Sultan Jan*, on the 7th of March, 1846; but that the Rs. 76,000 was merely a nominal consideration, of which no part was paid, the real contract being one to secure moneys already advanced with future advances which *Sultan Jan* undertook but failed to make.

The questions thus raised between the Appellant and Respondent are not now litigated for the first time. In August, 1848, *Sultan Jan* instituted two suits against the Appellant, of which one, being

almost identical with the present, was brought to recover possession of the four-anna share of the property under the title founded on the Bill of sale; and the other was for the recovery of the Rs. 76,000 purported to be secured by the Bond which he alleged to have been advanced in addition to the Rs. 75,000 said to have been paid on the execution of the Instrument of September, 1844.

Both these suits were dismissed by the *Zillah* Judge (Mr. *Hathorn*). He held that the Plaintiff's story in one suit as to the payment of the Rs. 75,000, and in the other as to the payment of the Rs. 76,000, was false; and in his judgment in the Bond suit he expressed an opinion, that the Appellant's account of the transactions was substantially the true one. There was an appeal to the *Sudder Dewanny Adawlut* against both decrees. The appeal in the Bond suit was absolutely dismissed. On the other appeal the Pleaders for the Respondent (the present Appellant) unfortunately raised a question as to the sufficiency of the stamps on certain documents which had been put in evidence; and the *Sudder* Court, avoiding the decision of the case upon its merits, directed the suit to be dismissed on that ground only; and consequently gave to the Plaintiff, *Sultan Jan*, all the advantages which a judgment of nonsuit has over a judgment for the Defendant.

The result, however, of that litigation was a conclusive decision against *Sultan Jan* in the Bond suit; whilst in the other suit a decision on the merits was passed against him in the *Zillah* Court, which was only so far qualified by the decree of the *Sudder* Court that he was left at liberty to bring a new suit. The date of that decree was the 4th of January, 1853.

In this state of things the present suit instituted on the 22nd of August, 1856. It was brought in the Court of the Principal *Sudder Ameen*, who dismissed it with costs; and on appeal his decision, except as to costs, was confirmed by the *Zillah* Judge (Mr. *Atherton*.) Both decisions proceeded upon the assumption that the Respondent's case as to the payment of the consideration of Rs. 75,000 was false, and the Appellant's true. And both Judges, conceiving that their decision on this point was sufficient to determine the suit, omitted to decide an issue which expressly raised the question whether the Bond for Rs. 76,000 of 1846 had been given in substitution for the absolute Bill of sale of 1844. According to the practice of the Courts of *India*, these two decisions were final in *India* on questions of fact, though on questions of law or procedure there lay a special appeal to the *Sudder* Court. Such an appeal was in fact preferred. It is unnecessary to state any of the grounds of it, except the fourth; which is to the following effect:—"If, for argument's sake, it be admitted, that the Defendant did not receive the full price, yet by reason of his acknowledging to have executed a *Bynamah* (Bill of sale), a decree in this suit would be just and indispensable, because the Defendant has the power to sue for the recovery of the balance of the purchase-money."

On that appeal the *Sudder* Court, on the 27th of September, 1860, made the decree which is the subject of the present appeal. Though bound by the finding of the Courts below that the Rs. 75,000, had not been paid as alleged by the Plaintiffs, the Judges who sat on the appeal nevertheless, proceeding upon a statement in Mr. *Atherton's* judgment to the effect, that the advances made to the Appellant probably amounted to about Rs. 18,000 or 20,000 in all, arrived at the conclusion, that the real and final contract between the parties was one of absolute sale and purchase, upon which there had been a partial payment of the purchase-money. They further held that, in these circumstances, a complete title to the lands passed to the *Kajah* by virtue of the Bill of sale on its execution; and (by a supposed application of the doctrines of English Courts of Equity) that the Vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money; and was to be held accountable as a Mortgagee in possession for the rents and profits. They accordingly remitted the cause to the Judge, with directions "to decide it *de novo* in his Court, on the points now mooted, or upon others which fairly arise on the pleadings."

Before they consider, whether the principles upon which the Judges proceeded were sound in themselves, or applicable to a transaction of this nature between Hindoos or between a Hindoo and a Mussulman, their Lordships must observe, that this application of them assumed a state of things which was not consistent with the case made by either party, and was certainly not necessarily implied by the findings of the Courts below upon the issues of fact. For even if those Courts had found that advances within a certain limit had been made, it did not follow that they were made in part payment of the consideration for a subsisting contract of sale, and not, as the *Rajah* insisted, upon a contract for security. And, indeed, the decree under appeal, by remitting the cause for trial upon the points fairly arising on the pleadings, including the undetermined issue as to the substitution of the Bond for the original contract, left this very point open.

Their Lordships, however, are of opinion, that even if this question of substitution had been determined in favour of the Respondent, the decree of the *Sudder* Court would nevertheless have been erroneous.

It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the *Sudder* Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract, and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a Bill of sale by a Hindoo Vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the Instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review (*a*); in both of which actual possession seems to have passed from the Vendor to the Purchaser. To support it, the execution of the Bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the Vendor sells that of which he has not possession, and to which he may never establish a title? The Bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency; of which the Purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do. In the present case the Purchaser had alleged that he was in that condition, having paid the whole of the price at the date of the execution of the Instrument; but that allegation has been found to be false. Nor, if the fact had been, as assumed by the *Sudder* Court, that part of the purchase-money was paid upon the execution of the contract, and the Purchaser had come into Court alleging such part payment and tendering the balance, does it follow that he would have been entitled to a decree for specific performance; for the contract sued upon is an eminently speculative, not to say a gambling, one. On the face of it, the Vendor agrees in consideration of a sum presently paid, to sell that which he has not, and may never have; and the price is presumably fixed upon a calculation of the risk undertaken by the Purchaser, at a sum far below the real value of the thing sold. But if the Purchaser under such a contract has retained part of the price for several years and until the risk has been determined by the happening of the contingency, he has *pro tanto* diminished the risk which he contracted to bear; and the Vendor has *pro tanto* lost that for which he stipulated—the present use and enjoyment of the money. The contract, therefore, has become incapable of being performed, according to the true meaning and intent of the contracting parties. Their Lordships are, therefore, of opinion, that the decree made by the *Sudder* Court upon their assumption of the facts was in every point of view erroneous, and cannot be supported.

(*a*) These cases were *Gopeechurn Kurr* v. *Kooroona Dasee*, Decisions, 1867, p. 225; and *Surbonarain Singh* v. *Maharaj Singh*, Decisions, 1858, p. 601.

They have now to consider not only what decree the *Sudder* Court ought to have made on the special appeal, but what ought to be the final decree in the suit; since in order to do complete justice between the parties, they have allowed the learned Counsel for the Respondent to impeach the decrees of the two Lower Courts, and to argue the whole case upon the merits. And it has been so argued very ably by Mr. *Bell*. The first and most material question is, whether it has been correctly found that the Rs. 75,000, were not paid as alleged by the Respondent upon the execution of the Bill of sale. That has been so found by three Courts in *India;* and therefore, in attempting to disturb the finding, the learned Counsel undertook a more than ordinary burthen. He argued, however, that the two decisions in this suit gave undue weight to the former decision of Mr. *Hathorn;* and that that Gentleman's judgment had not allowed sufficient weight to the presumptions arising from the admitted acts of the Appellant in executing the Bill of sale, and the receipt for the purchase-money, and in subsequently recognizing them. Their Lordships fully concede, that though, according to the law and practice of the Courts in *India*, those acts were not conclusive evidence against the Appellant, the presumptions arising from them ought to have been allowed due weight upon the trial of the issue, whether the consideration had been paid as alleged. They observe, however, that the issue came ultimately to be determined upon the testimony of conflicting witnesses, of whom the Judge held, that some were credible and respectable, and others altogether unworthy of credit. Nor, can their Lordships say, after giving full weight to the presumptions in question, and to the other circumstances in the case, that the finding was wrong. They are disposed to believe, that the real arrangement between the Appellant and the *Kajah* was for advances to be made, from time to time; and that the form of the contract was adopted in order to evade the effect of the decisions of the Indian Courts in respect of what they consider champerty. They think, therefore, that there is no ground for disturbing the finding, that the Rs. 75,000 were not paid as alleged; and it follows, from the reasons which they have already stated, when dealing with the judgment of the *Sudder* Court, that if that finding was correct, the suit was properly decided in the Appellant's favour upon it. Their Lordships, however, think it right to add, that upon the evidence, corroborated as it is by the fact that the Bond hypothecated the whole, and not only three-fourths of the property in question, they think that the issue as to the substitution of that security for the Bill of sale would also have been properly found in the Appellant's favour.

Mr. *Bell* pressed upon their Lordships the propriety of doing complete justice between the parties, by imposing upon the Appellant the terms of repaying the advances actually made to him by the *Kajah* and *Sultan Jan*. They do not see how they can do this in the present suit, of which the dismissal will not prevent the recovery of those advances if they are still recoverable. *Sultan Jan's* proper course was to sue for the repayment of them in the Bond suit, if they were included in that security; or if they were not so included, under his general title as representative of his Father. If, in consequence of his failure to do so, or of the lapse of time, the remedy is gone, their Lordships may regret that result; but they do not see how they can supply a new remedy by imposing terms upon the Appellant, who is not in this suit seeking the aid of the Court, but is sued upon a different and inconsistent cause of action. And the difficulty of taking such a course is increased by the circumstance, that the Respondent is not the representative of the *Kajah* or of *Sultan Jan* for all purposes, but is merely the Assignee of the rights which *Furkhoonda Khanum* has specially claimed in this suit.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be allowed with costs; that the decree of the *Sudder* Court be reversed, and that in lieu thereof an Order be made dismissing the special appeal with costs. The effect of this will be to affirm the decree of Mr. *Atherton*. Their Lordships are not disposed to interfere with the discretion exer-

cised by him in respect of the costs of the suit in the Lower Courts.

Kaleepershad Tewarree v. Sahib Perhlad Sein.

In the second appeal under consideration, *Kaleepershad Tewarree* is the Appellant, and the *Rajah* the Respondent.

The suit out of which it arises was brought by the Respondent to set aside a *Zur-i-peshgi* deed, dated the 23rd of December, 1851, which purports to have been executed by him to the Appellant and his Brother, *Muddun Mohun Tewarree*, since deceased, for securing to them the repayment of Rs. 49,453, with interest, by the pledge or mortgage of fifteen *mouzahs*, part of the *zemindary* of *Ramnuggur*. He also claimed *wasilat*, or the mesne profits of the property, for six years. The Respondent admits the execution of the deed, but says that it was executed as a security for the amount appearing to be due on a Bond previously executed by him in favour of the same parties in February, 1849; that he never received any consideration for the Bond; and that he was induced to execute both documents by his Servant, *Lalla Binda Lall*, who was acting in collusion with the *Tewarrees*.

His story as to the consideration for the Bond is, that in the course of the negotiations for procuring the security, to abide the event of *Run Murdun Sing's* appeal to *England*, which he had to give when he got into possession of the property in 1848, it was arranged that *Ranee Unopoorna*, who became his surety and pledged her property by way of security, should receive a *bonus* of Rs. 20,000; that the Appellant and his Brother should pay that *bonus*, and for so doing should themselves receive another *bonus* of Rs. 20,000; that the Bond was given to secure these two sums of Rs. 20,000; but that the *Tewarrees* failed to pay the Rs. 20,000 to the *Ranee*, who consequently contrived to escape from her obligations as security by means of a revenue sale and *Benamee* repurchase of the property which she had pledged as security, and so brought about the re-attachment of the *zemindary* in 1854. His case, therefore, is, that the deed impeached was obtained from him fraudulently and without consideration.

The case of the Appellant is, that the transactions were what they purported on the face of them to be; that the Bond was given to secure advances which had been made in *Calcutta* to *Lalla Binda Lall* as the Agent of the Respondent, with his sanction and on his account; and that the *Zur-i-peshgi* deed was executed to secure a balance found on a settlement of accounts to be due in respect of the Bond debt, and some other transactions.

It is an admitted fact, that the Appellant and his Brother have been in possession of the property under the deed for several years. The Appellant's case is, that he is still in such possession; but this seems to be disputed by the Respondent.

The cause was tried by the Principal *Sudder Ameen*, who dismissed the suit with costs. His decree was reversed by the High Court, chiefly on the ground that the Defendants, the *Tewarrees*, had failed to prove that they had given consideration for the Bond; but the decree of that Court, though it directed that the *Zur-i-peshgi* deed should be set aside, refused to award any of the *wasilat*, or mesne profits sued for, and gave no costs.

The Appellant, as the survivor of the two Defendants, appealed against the decree; and there is also a cross appeal against so much of it as rejects the claim to *wasilat*, and refuses to give the costs of the suit to the Respondent.

From the foregoing statement it sufficiently appears, that the question between the parties is one of fact, viz., which of these conflicting stories is true.

It is obvious, however, that, in the first instance, it lies upon the Respondent, who comes into Court to set aside a security solemnly executed by himself, and perfected by possession, to make out his case. And the first question to be considered is, whether he has done so, at least so far as to cast upon the Defendants the burthen of proving theirs. There has been some argument as to the rule and practice of the Courts in *India* on this point, and, in particular, upon the ruling of the *Sudder* Court in its judgment in the suit of *Sultan Jan* upon the Bond for Rs. 74,000, which has been made one of the exhibits in this cause. Upon that

their Lordships observe, that if what was stated by the *Sudder* Court be read in connection with the context, it does not seem to go beyond what both sides would admit to be the law in *India*. The Appellant in that case had argued that, unless the "party sued in the Bond could establish affirmatively that his signature had been obtained under the influence of force or fraud," he was conclusively bound by that signature, and that a decree must pass against him. The Court said, in answer to this, that it had become the established practice of the Courts in *India*, in cases of contract, to require satisfactory proof that consideration had been actually received according to the terms of the contract; and that it had never been held there, that a contract made under seal of itself imported that there was a sufficient consideration for the agreement. The latter proposition seems to be indisputable. The former may be too loosely expressed; and the later cases cited by Mr. *Pontifex*, show that if it is to be taken as affirming that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burthen of proving payment of that consideration, it is too wide. It is further to be observed, that a party who, like the Plaintiff in the case referred to, comes into Court to enforce a Bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance.

Their Lordships have no doubt that, in the latter case, the law of *India*, as of this and probably every other Country, casts upon the Plaintiff the burthen of establishing at least a good *primâ facie* title to the relief which he seeks; and they will first proceed to consider how far the Respondent has affirmatively made out the case upon which he relies.

Now, what are the facts which are either common to the cases of both parties, or are proved beyond dispute?

In 1845 *Lalla Binda Lall* was in *Calcutta* as the Agent of the Respondent, looking after the appeal in the great suit for the *Raj* which was then pending in the *Sudder* Court, and possibly other law business. He remained there after the *Sudder* Court's decree of the 9th September, 1846, had been made in the Respondent's favour. The principal business which he had then to perform was to procure the security which the Respondent had to give in order to get into possession. Whilst he was so resident in *Calcutta* he certainly had some transactions with the *Tewarrees*, one of whom, *Muddun Mohun*, was or had been the *Vakeel*, or *quasi* Diplomatic Agent of the *Maharajah* of *Nepaul;* but who also carried on there some kind of *Mahajunny*, or money-lending business. On the 27th of December, 1847, *Ranee Unopoorna* executed the security Bond pledging her property; and on the same day entered into an agreement with *Lalla Binda Lall* as the Respondent's Agent, by which it was stipulated that for her protection her Manager should be allowed to make the *zemindary* collections from *Ramnuggur*, paying thereout an allowance to the Respondent, but keeping the surplus moneys in deposit. There is not a word in this subsidiary agreement about the *bonus* of Rs. 20,000. The Respondent seems to have objected to the arrangement so proposed, and for that, or some other reason, it was not carried out. The security itself was, in the first instance, rejected by the *Zillah* Judge, Mr. *Hathorn;* but on appeal to the *Sudder* Court, was admitted as sufficient. The delay caused by these proceedings accounts for the interval of time between the date of the security Bond and June, 1848, when the Respondent was actually let into possession. The proceedings put in by the Respondent show that in September, 1848, *Ram Chund*, and very shortly afterwards, *Ranee Unopoorna* herself, made an application to have the security Bond set aside, and *Ranee Unopoorna* and her property released therefrom. The final Order of the *Sudder* Court refusing to release her was, however, not made until the 19th of February, 1851. Thereupon she took the steps which have been already mentioned to release herself. The property which she had pledged by way of security was sold for arrears of revenue on the 11th of October, 1851. Not-

withstanding this sale, the Respondent remained in possession of the *zemindary* until May, 1854. *Run Murdun Sing's* first application for fresh security was not made until August, 1853; fresh security, the nature of which does not appear, was then tendered, and was finally rejected in May, 1854. The Respondent, whilst still in possession, received from the *Tewarrees*, for at least two years, the rent payable to him under the *Zur-i-peshgi* deed. After the attachment, the following circumstances occurred. The Collector in the first instance attempted to make the gross collections from the *zemindary* irrespectively of all interests intermediate between the *Zemindar* and the *Ryots* which had been created by the Respondent. A remonstrance was made by many of those claiming such interests, though not, so far as the evidence goes, by the *Tewarrees*. The Commissioner directed that such interests should be respected pending the attachment. In consequence of this, the Collector issued an Order to the Respondent, calling upon him to specify what *mouzahs* he had given in *Mocurrery*, and under simple leases and *Zur-i-peshgi* deeds; and in answer to that Order he filed a report, stating, amongst other things, that the fifteen *mouzahs* in question were under *Zur-i-peshgi* to *Muddun Mohun Tewarree*. Thereupon the tenure and possession of the *Tewarrees* was confirmed by an *Umuldustuk* of the Collector, dated the 7th of June, 1855; and on the 8th of June, 1855, two *Mooktars* filed in the name of the Respondent a petition in answer to some remonstrance of *Run Murdun Sing's*, affirming, among other things, the *bonâ fides* of this transaction with the *Tewarrees*, and repudiating the imputation that they were servants of the Respondent holding for his benefit. In August, 1856, under Orders of the Collector, confirmed by the Commissioners, the *Tewarrees* obtained a refund of Rs. 1,883. 9 as. 2 p. the amount of the collections deposited in the Collectorate in respect of the rents and profits of the fifteen *mouzahs* received between date of attachment and that of the Commissioner's Order above referred to. This proceeding seems to have elicited from the Respondent the first suggestion of the case now made by him. On the 18th of October, 1856, a petition was presented by a *Mooktar*, professing to act in his name, complaining of the Order for the refund, and setting up against the *Tewarrees* a case substantially, but not altogether, the same as that now made. The petition was referred to the Respondent, in order to ascertain whether it was really his act; and by another petition signed, not by himself, but a *Moonshee*, he adopted it generally, though he disputed the accuracy of some of its statements, and insisted that the fifteen *mouzahs* ought to be re-attached. It does not appear by any evidence what, if anything, was done on the petitions; but the *mouzahs* were certainly not re-attached. The *Tewarrees* remained in possession of them up to the time when the Respondent recovered possession of the *zemindary* in 1858; if not up to the day of the commencement of this suit.

What, then, is the case proved by the Respondent, and how far is it consistent with these established facts?

It is not very easy to make out from the plaint and the dispositions of the Respondent in support of it, a clear or consistent story touching the alleged undertaking of the *Tewarrees* to pay the *bonus* to the sureties. His case must be tried by the testimony of his witnesses, of whom *Lalla Binda Lall*, though treated as having colluded with the *Tewarrees*, and made a Defendant to the suit, is the most important, and certainly not the least friendly. He is, moreover, admitted to have been restored, whatever his former delinquencies may have been, to the Respondent's service.

According to that testimony the history of the transactions in question is this:—

Before the security Bond was drawn up, *i. e.*, before the 27th of December, 1847, *Lalla Binda Lall* had agreed with *Ranee Unopoorna*, or with *Ram Chund* on her behalf, to pay the *bonus* of Rs. 20,000 as soon as the Respondent, upon the acceptance of the security, should be put into possession. After the execution of the security Bond, but before it was tendered to Mr. *Hathorn*, *Muddun Mohun Tewarree*, on *Lalla Binda Lall's* application,

agreed to become responsible for the payment of the *bonus* on the condition that he and his Brother should receive the further *bonus* of Rs. 20,000, to be paid out of the rents of the estate.

The undertaking, therefore, was given some time before the 18th of June, 1848, and ought to have been performed at that date. The Bond was executed in February, 1849. The witnesses who speak to that transaction all admit, that the Respondent then knew that the *bonus* had not then been paid to the surety. They do not explain why, in these circumstances, the Bond was taken for Rs. 40,100, or bore interest from its date.

According to *Beharry Lall* and some of the witnesses, it was in consequence of the failure of *Muddun Mohun Tewarree* to perform the promise of payment which he renewed at the time of the execution of the Bond that the surety first made her attempt to be released from her security. But the documentary evidence already adverted to, shows that she had applied to be released before the Bond was executed. Again, the witnesses who speak to the execution of the *Zur-i-peshgi* deed, equally prove that the Respondent then knew that *Muddun Mohun Tewarree* had not paid the *bonus* which they say he had undertaken to pay. They allege, that he then renewed his promise to pay it, and that on the faith of that promise the *Zur-i-peshgi* deed was executed. They represent that in consequence of the non-performance of this last promise, the surety caused her pledged property to be sold at the auction sale. Yet the documentary evidence proves that it had been so sold more than two months before the date of the *Zur-i-peshgi* deed. The Respondent himself admits that he executed that deed to secure the amount of principal and interest due on the Bond. But neither he nor any of his witnesses give any explanation why interest was thus allowed upon a sum which, to his knowledge, had not been paid. Again, *Lalla Binda Lall* says, that when he finally discovered that the surety had not been paid the *bonus* and had escaped from the liability, he wrote to the Respondent not to give the *Tewarrees* possession under the deed. Yet the documentary evidence proves that they were put into possession, and that the Respondent repeatedly recognized them as *bonâ fide Zur-i-peshgidars* in possession, until, in the autumn of 1856, he was induced to put forward some such case as that now made.

The learned Counsel for the Respondent sought to account for the discrepancies above-mentioned by various ingenious suggestions; but these were all more or less speculative, and inconsistent with the depositions of their witnesses. They also contended that their case was established by the admissions made by the Appellant in his deposition.

Their Lordships, however, are of opinion, that these admissions cannot fairly be taken to amount to more than the Appellant and his Brother, or one of them, took some part in the negotiations with *Ram Chund* and *Ranee Unopoorna* for procuring the security; that they knew the surety was to receive a *bonus*, and believed that she did in fact receive Rs. 18,000 from *Lalla Binda Lall*, partly directly and partly through them; that is, out of the advances which they made to *Lalla Binda Lall* on the Respondent's account. If there is any doubt as to what really took place between *Lalla Binda Lall* and the *Tewarrees* on the one side, and *Ram Chund* or *Ranee Unopoorna* on the other, and in particular whether, as suggested at the Bar, there were negotiations after the sale of her property for the renewal of that particular security, it lay upon the Respondent to clear all that up by examining, as he might have done, the two last named persons, or one of them.

Upon this evidence the Principal *Sudder Ameen* came to the conclusion, that the Plaintiff had failed to prove his case, and dismissed the suit. The judgment of the High Court proceeds on the ground, that the Respondent had, at all events, established such a *primâ facie* case as threw upon the Appellant the burthen of proving his own, and that he had failed to do so. Their Lordships cannot assent to the reasoning by which the Judges of that Court have arrived at the first of these conclusions. They seem to their Lordships in some passages to substitute speculation for proof; in others, as for instance in all that relates to

Ranee Unopoorna's security, which they treat as subsisting down to 1854, to proceed upon a misconception of the facts proved; and in others to draw inferences from facts proved or admitted, which are not the necessary, or even the legitimate, consequences of those facts.

Their Lordships do not deny, that if it lay upon the Appellant to prove the truth of his case, he has very imperfectly done so, and that exceptions might fairly be taken to the non-production of his Books of account, and to the non-appearance of *Muddun Mohun Tewarree* as a witness. But considering that it lay upon the Respondent to establish a clear and consistent case for setting aside his own deed, and that the evidence in the cause wholly fails to do so, their Lordships are of opinion, that the conclusion to which the Principal *Sudder Ameen* came was just and proper, though the reasons which he gives for it may not be altogether satisfactory. The Order, therefore, which in this case they will recommend to Her Majesty is, that this appeal be allowed; that the judgment of the High Court be reversed; and that, in lieu thereof, an Order be made dismissing the appeal to that Court with costs; and further that the cross-appeal be dismissed. The Respondent must pay the costs both of the appeal and of the cross-appeal.

Sahib Perhlad Sein v. Doorgapershad Tewarree.

In the next case to be disposed of, the *Rajah* is Appellant, and *Doorgapershad Tewarree* and others, the representatives of *Muddun Mohun Tewarree*, deceased, are the Respondents.

This suit was brought by the Appellant on the 31st of December, 1861, to recover possession of two *mouzahs* forming part of his *zemindary* of *Ramnuggur*, from the Respondents, "in reversal of an allegation of *Mocurrery*, and proceedings of the Deputy-Collector and Collector, dated the 9th and 16th of June, 1856." He also claimed a refund of a small sum of money, being collections in deposit paid to *Muddun Mohun Tewarree* under those proceedings, and the mesne profits of the *mouzahs* between 1261 and 1269.

His case was, that in 1849-50 he made over these villages, or their produce, to *Muddun Mohun Tewarree*, who "lived with him," in consequence of the execution of the security Bond by *Ranee Unopoorna* "in lieu of allowance" for his rendering service; that no *Mocurrery* grant of them was ever made by him; that some time in 1857 he discharged *Muddun Mohun Tewarree* from his service for bad faith, whereupon his tenure determined; and that the moneys in deposit in the Collectorate had been paid out to *Muddun Mohun Tewarree* upon a false allegation of the existence of a *Mocurrery* grant, which the Revenue officers had never seen.

The case of the Respondents was, that *Muddun Mohun Tewarree* held the villages under a *Mocurrery* (*i. e.*, an hereditary tenure at a fixed rent) granted by the Appellant on 5th *Falgoon*, 1256 (February, 1849,) as a reward for services already rendered; that *Muddun Mohun Tewarree* never lived with the Appellant as a servant, in the proper sense of the term, but was the *Vakeel* of the *Maharajah* of *Nepaul*, and resident in *Calcutta*. The substantial issues settled in the suit were, first, whether the suit was barred by the law of limitation; secondly, whether the property in dispute was possessed by *Muddun Mohun Tewarree* by virtue of a *Mocurrery* grant, or as payment for service from 1257 *Fusly*; and if by the *Mocurrery* grant, whether that grant was valid or not; and thirdly, whether *Muddun Mohun Tewarree* was a servant of the Appellant or a *Vakeel* of the *Maharajah* of *Nepaul*, residing in *Calcutta*.

The *Zillah* Judge found that the suit was barred by the law of limitation, having been instituted more than twelve years after the date of the *Pottah* set up by the Respondents, and the commencement of *Muddun Mohun Tewarree's* possession. And dealing also with the other two issues of fact, he found that the Defendants had had possession since 1256 *Fusly*, by virtue of the *Mocurrery* grant, and that that grant was genuine and valid. He, therefore, on both grounds, dismissed the suit.

Their Lordships will here observe, that it is upon the latter finding alone that this decision can be upheld. For if it be not

established that *Muddun Mohun Tewarree*, in fact, held possession under a *Mocurrery* tenure, there is no evidence at all that the Appellant knew that he claimed so to hold it at any time before 1856, and his suit would be in time. On the other hand, if that fact be established in favour of the Respondents, they are entitled to a decree upon the merits. The nature of *Muddun Mohun Tewarree's* tenure is, therefore, the only real question in the cause.

The High Court, on appeal, affirmed the decree of the *Zillah* Judge. The grounds assigned by the Judges were, that the Appellant had failed, in their opinion, to establish the precise case set up by him; that there was no proof of any lease other than the *Mocurrery Pottah*; and, therefore, that *Muddun Mohun Tewarree* must be taken to have been in occupation of the lands, either under no engagement at all, which was highly improbable, or under the *Pottah* propounded by his heirs: and the judgment ends with this sentence—"We incline to think, that the probabilities are in favour of the latter view of the case; and as we are not satisfied that the decision of the Court below is wrong upon the merits, we see no reason to interfere with the judgment, and dismiss the appeal."

The result of these decrees, if they stand, will be to establish against the Appellant, and all who claim under him, the right of the Respondents and their successors to hold the villages in question under a perpetual hereditary tenure at a fixed rent. Their Lordships proceed to consider how far this conclusion is justified by the evidence taken in the cause.

The witnesses of the Appellant do not greatly differ from those of the Respondent as to the origin of the transaction. They differ somewhat as to the date of it, but all speak to a visit of *Muddun Mohun Tewarree* to the Appellant, and to a demand by the former of something for his support. Again, those for the Appellant, whilst they treat what was given as being a retainer for future services, admit that it was also a reward for past services, including that of procuring the security on which the Appellant had obtained possession of his estate. It is, moreover, clear that *Muddun Mohun Tewarree* was not in the ordinary sense of the term a servant of the Appellant; that he was or had been the *Vakeel* of the *Maharajah* of *Nepaul*; that his residence was in *Calcutta*; and that whatever services he had rendered or was to render to the Appellant were rendered or to be rendered there. On the whole, the weight of the evidence on this part of the case is in favour of the conclusion, that whatever was given, was given as a reward for a past and special service; and that the gift was not a mere assignment in the nature of wages to a servant for continuing services determinable with those services at the will of the Master. The chief and irreconcilable discrepancy between the witnesses is as to the subject of the grant. Those for the Appellant say, that the *mouzahs* in question were then under lease to two *Ticcadars*, and that in answer to *Muddun Mohun Tewarree's* demand the Appellant caused letters to be written to those persons directing them to pay their rents to *Muddun Mohun Tewarree* and his Brother *Munnoo Lall Tewarree*, who was to remain at *Ramnuggur*. From one of the proceedings which will be afterwards mentioned, though not from the testimony of the witnesses, it appears that for the assignment of those rents, which amounted together to nearly Rs. 1,000 *per annum*, *Muddun Mohun Tewarree* and his Brother were to pay the Appellant a reserved rent of Rs. 81 *per annum*. And it has not unnaturally been asked, why if this case be true, is it not corroborated by the production of the letters to the *Ticcadars*, or by some evidence on their part, or by proof of a *kabooleat* from the *Tewarrees* undertaking to pay the reserved rent of Rs. 81.

On the other hand, the witnesses for the Respondents depose that in answer to *Muddun Mohun Tewarree's* demand of a reward, the Appellant caused a *Mocurrery* deed of the two villages to be then and there drawn in the name of *Muddun Mohun Tewarree*, and signed and sealed it himself. And the Respondents produce a deed which purports to grant to *Muddun Mohun Tewarree* a *Bekh-birt Mocurrery* of the two villages on an annual *jumma* of Rs. 136, to be enjoyed by the lessee from

generation to generation. It appears to have been originally on plain paper (for the memorandum at the foot of it shows that the Respondents before filing it in this suit had to pay a penalty for getting it stamped). It was never registered; and as set out in the Record, it does not appear to bear the Appellant's signature. It was contended at the Bar that the impression of his seal is also wanting. Their Lordships cannot think that if this were really the case, both the Courts below would have omitted to comment on these material defects in the document, of which the original was before them. On the other hand, their Lordships are bound to say, that the evidence before them, so far as they have hitherto considered it, is far from being satisfactory proof of the grant of a *Mocurrery* tenure.

The Respondents have also produced the *Farkikuttee*, or receipt. The importance of it is that the Appellant thereby purports to admit the receipt of the rent of the villages from 1256 to 1261 (1849 to 1854) from *Munnoo Lall Tewarree*, *Mocurreredar*. The date is the 10th of *Bysack*, 1261. But, in their Lordships' opinion, this document and the evidence in support of it are extremely suspicious. On the face of it, it does not bear the Appellant's signature, but that of some other person. It was written on plain paper. It does not specify the amount paid, and it treats *Munnoo Lall Tewarree*, who is not named in the *Mocurrery* deed, as the *Mocurreredar*. Again it is a general receipt for rents which would in ordinary course have been paid on separate receipts at different times during four or five years. The witnesses who speak to it say, that it was signed by the *Rajah* on a settlement of accounts between him and *Munnoo Lall Tewarree*, and that the *Rajah* then requested *Munnoo Lall Tewarree* to give him the receipts or letters which he had received. If these receipts were returned, they are not produced; if they were retained, no sufficient reason is assigned for their retention. And this piece of evidence appears to be so far from advancing the Respondent's case that it throws additional suspicion upon it.

The degree in which the proceedings which took place after the re-attachment of the *zemindary* tend to corroborate the case of either party remains to be considered.

On the 26th October, 1854, the Collector called upon the Appellant to make a return of the *mouzahs* of which he had given *Mocurrery*, simple *ticca*, and *Zur-i-peshgi ticca* leases. On the 13th November, 1854, the Appellant made a return of the *Mocurrery* tenures created by him, in which there is no mention of that which is now in dispute. He did not then send a list of the *ticca* leases, but promised to do so thereafter. On this the Collector passed an Order that the collections should be made from the attached estate, without regard to the tenures created by the Appellant. The persons affected by this appealed to the Commissioner, who, on the 27th of December, 1854, passed an Order reversing that of the Collector, and directing that such rents only as the Appellant would have been entitled to had he remained in possession should be collected by the Manager. Amongst the Appellants, whose names and claims are stated in the Commissioner's proceeding, *Muddun Mohun Tewarree* is not found; and, on the other hand, certain persons claiming to be simple *Ticcadars* of the villages in question are so found. On the 14th of March, 1855, the Appellant in obedience either of the original *Perwannah* of the 26th of October, 1854, or some subsequent *Perwannah*, sent to the Collector an *Arzee*, in which he says he has, on inquiry into his records, had prepared a detailed statement (which he forwards) of all the *mouzahs* in *Raj Ramnuggur*, containing the names of the *Ticcadars* and *Zur-i-peshgidars*, and the names of servants to whom particular *mouzahs* have been assigned in lieu of wages and other particulars. And the exhibits, copies of extracts of Settlement Book of collection for the year 1861, of the two *mouzahs* were treated by the Appellant's Counsel as extracts from that statement. Those which relate to the two *mouzahs* in question, state that *Muddun Mohun Tewarree* is the *Ticcadar* of both at *jummas* which make up the sum of Rs. 81; and further that each village is held "on conditions of service." There is in these exhibits also a statement

of sums under the head of expenses, which their Lordships feel some difficulty in explaining, or in reconciling with the hypothesis of either party. On the other hand, Mr. *Pontifex*, for the Respondents, relies strongly on the Exhibit, No. 29, which is signed by one *Lalla Binda Lall* as the *Roojoonovees* on the part of the *Rajah*, and was filed in the Collectorate on the 17th of October, 1854. In that document *Muddun Mohun Tewarree* is stated to be *Mocurreredar* of the two villages; and the rents payable by him amount to Rs. 81.

There are some receipts which show that the *Surbarakur* afterwards received rent from *Muddun Mohun Tewarree* as *Mocurreredar* on various occasions; but these receipts being for small sums do not show whether the total annual rent received was Rs. 81 or Rs. 136. It is further shown, and this is one of the proceedings impeached by the suit, that, on the 9th of April, 1855, *Muddun Mohun Tewarree*, describing himself as *Mocurreredar* of the two villages, petitioned for a refund of the rents held in the Collectorate in deposit, and named a sum of Rs, 189 as the amount of such rents under an Order of the Commissioner, dated the 28th of August, 1856, in which the villages are described as covered by the *Mocurrery* deed executed by the Appellant. There is, however, no other evidence that the deed now relied upon was produced before the revenue authorities; and their Lordships doubt whether an unstamped paper would have been received by any such Officer. It is further to be observed,—and this fact has been strongly pressed against the Respondents,—that, in his petition, *Muddun Mohun Tewarree* described himself as holding the two villages at *jummas* aggregating Rs. 81, under a *Mocurrery* deed, whereas the rent reserved by the deed now produced is Rs. 136.

Their Lordships must observe, that it is difficult, if not impossible, to extract from the proceedings last adverted to any recognition, binding on the Appellant, of *Muddun Mohun Tewarree* as *Mocurreredar* of the villages in question under the deed now propounded, or even under any deed.

The *Jummabundee* filed by the *Roojoonovees* has been attacked, and the character of the party signing it was impugned by *Muddun Mohun Tewarree* himself in his petition in refutation of the claims of one *Lalla Binda Lall*, claiming as the *Mocurreredar* one of the *mouzahs* in question. It is not shown under what circumstances it was filed; and, in any case, it was filed before the Collector's Order of the 26th of October, 1854, and cannot be treated as binding on the Appellant in equal degree with the returns made by him in pursuance of that Order. And, lastly, it states that the rent of the villages is Rs. 81, and is, so far, inconsistent with the deed now produced. The Appellant cannot be held bound by the form of the *Surbarakur's* receipts, or by the proceedings for the refund, to which he was no party.

Their Lordships are not insensible to the defects in the Appellant's proof. They have already intimated that, in their opinion, the evidence preponderates in favour of the hypothesis that whatever was given was given as a reward for past services, and was not recoverable upon the dismissal of *Muddun Mohun Tewarree*, of which dismissal there is in fact no proof. They have also pointed out that the Appellant's case as to the nature of the reward might, if true, have been better proved. But even if it be admitted that the Appellant had failed to establish the particular case alleged by him, it does not follow that the Courts below were right in leaping to the conclusion, that the Respondents had established their right to hold the lands under their *Mocurrery* tenure. It is possible that the reward to *Muddun Mohun Tewarree* may have been an assignment of the rent of the villages to him for his life, or other life interest.

The Appellant is the *Zemindar*; as such he has a *primâ facie* title to the gross collections from all the *mouzahs* within his *zemindary*. It lay upon the Respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion, there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the life-time of *Muddun Mohun Tewarree*.

On the other hand, they have felt that the Respondents have the concurrent judgments of the two Indian Courts in their favour; that some of the doubts thrown upon the Instrument produced might have been removed if the original Instrument, to which exceptions, which do not seem to have been taken in the Court below, have been taken here, had been before them; and that if that document does purport to bear the *Rajah's* seal or signature, no evidence to show that it is a forgery has been given.

They have, therefore, somewhat reluctantly come to the conclusion, that the safer course is to remit the cause for further trial on additional evidence. If it shall come to such a trial, the duty of the Court which tries it, will be to require satisfactory proofs of the genuineness of the *Mocurrery* deed produced; for it is upon that, and not upon the defects in the Appellant's case, that the right of the Respondents to hold these villages under a perpetual and hereditary tenure at a fixed rent must depend. The Order which their Lordships will humbly recommend Her Majesty to make on this appeal is, that the appeal be allowed, and the decrees of both the *Zillah* and the High Court reversed, and that the cause be remitted to the High Court with directions to retry the same or cause the same to be retried upon further evidence on the first issue of facts, and to decide the same, or cause the same to be decided accordingly. With respect to the costs of this appeal, their Lordships propose to take the course which has been followed here in similar cases, viz., to cause the costs on both sides to be taxed, and to make it part of the Order to be recommended to Her Majesty that these costs be costs in the cause to be dealt with by the High Court.

Sahib Perhlad Sein *vs.* Run Bahadoor Singh.

In the fourth of these cases the *Rajah* of *Ramnuggur* is the Appellant, and *Run Bahadoor Singh* and others are Respondents. In this case, as in the last, the Appellant has brought his suit to recover two villages which the Respondents claim to hold on a *Mocurrery* tenure created by him. Their title is founded on three deeds, of which two are *Bekh-birt* deeds which purport to have been executed by the Appellant as Father and guardian of the infant Son for whom he originally claimed the *zemindary* on the 13th of *Juyt*, 1250 (being some time in 1843-44); and the third is a *Sudruth Puttur*, or deed of confirmation, purporting to have been executed by the Appellant in his own right on the 17th of *Bhadoor*, 1255 (1847-48). The Appellant impeached these documents as forgeries; and there may have been other questions to be tried concerning them. The Principal *Sudder Ameen*, however, saw fit to settle one issue in bar in these words, viz.:—"Does limitation apply or not; and when must the cause of action be said to have arisen in this suit;" and on the assumption that the determination of the suit depended on that issue, proceeded at once to try it.

The question raised by the issue was not, whether the deeds impeached were genuine, but whether the Appellant was precluded by the law of limitation from showing that they were not genuine, and the twelve years period of limitation was to be calculated not necessarily from the date of the deeds impeached, but from the time when the Appellant having notice of them might first have brought his suit to impeach them. That time the Appellant alleged to be the 27th of December, 1854, in which case his suit, which was commenced on the 31st of December, 1861, was in time.

The Principal *Sudder Ameen*, however, found the issue against him, and dismissed the suit. His decision proceeds on the ground that on the 7th of December, 1858, the Appellant, by his *Mooktar*, had filed a petition before the Collector, admitting that the Respondent, *Run Bahadoor Singh*, was *Mocurreredar* of the villages in question, and assenting to the payment of some rents in deposit to him out of the Collectorate. The Principal *Sudder Ameen* held that this was an admission of the deeds impeached, and that the period of limitation was to be calculated from the date of the deeds. His decision was affirmed in effect by the High Court, and the question is, whether those decisions can stand. It was almost ad-

mitted at the Bar that they cannot. It is obvious, that the petition, if taken as more proof that the Appellant knew of the title asserted by the Respondents in 1858, does not help the case, for he admits that he knew of it in 1854. On the other hand, to treat it as a conclusive admission of the genuineness of the deeds, and thence to infer that the Appellant, having executed them, must have known of their existence at their date, is to determine against him upon one piece of evidence, which may be capable of explanation, the material question in the cause, before the issue raising that question has been settled, and without giving the party the means of bringing forward all the evidence which he may have to adduce upon it.

Their Lordships, therefore, must in this case advise Her Majesty to allow the appeal, to reverse the decrees of both the Courts below, and to remand the cause for trial upon its merits. The miscarriage being that of the Judge, they think that the costs of this appeal should likewise be costs in the cause, and should be dealt with in the same manner as those of the last case.

Sahib Perhlad Sein *v.* Rajender Kishore Sing.

In the fifth and last of these appeals the *Rajah* of *Ramnuggur* is Appellant, and the *Rajah* of *Bettiah* is the Respondent.

The suit was brought by the Appellant to recover 5,000 *beegahs* of land, or thereabouts, being the whole or the larger part of the lands included between the yellow and red lines on the Map, No. 2, which is one of the exhibits in the cause; and with them the right of realizing certain profits derivable from a Bazaar attached to the fair which is periodically held within them at a place called *Tribenee*. The question between the parties is, therefore, simply one of boundary, viz., whether the property in dispute lies within the limits of the *zemindary* of *Ramnuggur* or within those of the contiguous *zemindary* of *Bettiah*. The northern boundary of that property is the river *Bechund*, which in that locality is the frontier line between the territories of *British India* and the Kingdom of *Nepaul*.

The suit has been decided both by the Court of First Instance and also by the High Court of *Calcutta* upon the question of limitation. The plaint was filed on the 31st of December, 1861.

On this point of limitation the Respondent raised two distinct questions. He alleged that the boundaries between the two *Rajs* had been fixed and adjudicated by a decision of the *Thakbust* (or Survey) authority, dated the 11th of February, 1848; and that under Act, No. XIII. of 1848, the Appellant's suit was barred because brought more than three years after the date of that decision. He also alleged, that it was barred by the general law of limitation.

The Principal *Sudder Ameen*, who first tried this case, held that the suit was barred by both the special and the general law of limitation. The High Court entertaining some doubt as to the application of Act, No. XIII. of 1848 to the particular case rested its decision upon the general law of limitation alone.

In the course of the argument their Lordships intimated their opinion, that this case was not within Act, No. XIII. of 1848, because the operation of that Act is in terms limited to Awards made by the Revenue authorities under *Ben.* Regulations VII. of 1822, IX. of 1825, and IX. of 1833; and the learned Counsel for the Respondent had failed to show that the *Thakbust* proceeding in question was an Award made under either of those Regulations. They now deem it right to observe that having, since the close of the argument, examined the Regulations more closely, they are not prepared to say that the *Thakbust* proceeding of the 11th of February, 1848, may not be an Award under *Ben.* Reg. IX. of 1825 within the meaning of the Act. For although *Ben.* Reg. VII. of 1822 was originally limited in its operation to what are now known as the *North-Western Provinces*, many of its provisions were, by *Ben.* Reg. IX. of 1825, extended to the Lower Provinces of *Bengal*; and looking at the 2nd and 3rd sections of the latter Regulation, and at sections 36 to 44 (both inclusive) of the survey Manual issued by the Board of Revenue, their Lordships think it probable that Mr. *Chapman* as Superintendent of Survey, was duly invested with power to

determine boundary disputes, by an Award under the 34th section of *Ben.* Reg. VII. of 1822, and may have made such an Award by the proceeding in question. The proceeding seems to have been assumed in the Courts below to be an Award within the scope of Act, No. XIII. of 1848; and if the determination of this appeal necessarily turned upon the applicability of that Act to the present case, their Lordships would have had that point re-argued with reference to the Regulations to which they have drawn attention.

Their Lordships, however, have come to the conclusion, that the Courts below have properly held that this suit is barred by the general law of limitation.

The Appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years; and the date which he assigns to his dispossession is the 20th of March, 1851. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietor of *Ramnuggur* was last in possession is consistent with a right to institute this suit. Act, No. VIII. of 1859, sec. 32, shows, that the Plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

In the present case the Magistrate's Order of the 20th of March, 1851, certainly did not cause the dispossession. As far as its effect can be gathered from the extract of Report of the *Foujdary* Court of *Zillah Chumparun*, if it proves anything, it proves that the Appellant was then out of possession, and had been so, at all events, since the date of the *Thakbust* proceeding of the 11th of February, 1848; it does not in any degree prove that he or any former *Rajah* of *Ramnuggur* had been in possession at any former period. The Appellant has, however, produced evidence to show that in point of fact he was in possession after the date of the *Thakbust* proceeding, and up to 1851. But both the Courts below have treated that evidence as unworthy of credit; and their Lordships cannot see any grounds for holding that they were wrong in that conclusion. That there was any possession adverse to the *Rajah* of *Bettiah* after the date of the *Thakbust* proceeding seems highly improbable.

Great stress is then laid upon the Report and proceedings of the Commissioners who in 1847 settled the frontiers of *Nepaul* and *British India*, and on the evidence given in this suit by two of the *Nepaulese* Commissioners. The effect of the official documents is merely to show, that as between the two Governments it was settled in January, 1847, that whatever was north of the *Bechund*, within certain limits beginning from the *Tribenee Ghât*, and extending to *Gurh Somessur*, was to be treated as *Nepaulese*, and all south of that river as British territory. It is true, that one document recommends that the *Amlah* of *Ramnuggur* should be directed not to make any collections north of the *Bechund*, and that another speaks of settling the boundary of *Ramnuggur*. But it is to be observed, that if Map, No. 2, be compared with any good general Map of *India*, and the frontier line of *Nepaul* and the course of the River *Bechund* be carefully examined, it will be found that a considerable portion of the tract south of the *Bechund*, which was the subject of discussion, lies beyond the red line on Map, No. 2, and within the admitted limits of *Ramnuggur*. And, it was far from improbable, that the Commissioners and the Resident should speak of all the lands south of the *Bechund* as *Ramnuggur* without adverting to the precise boundary-line between that and the contiguous *zemindary* of *Bettiah*, with which they had no concern. Again, the testimony of the two *Napaulese* Commissioners proves at most that, according to their information at the time, the collections of the *Tribenee* Fair, and the lands immediately south of the *Bechund* river at that point, were in 1847 in the possession of the *Rajah* of *Ramnuggur*, who has since been dispossessed by the *Rajah* of *Bettiah*. The evidence might be worth something if it stood alone; but when opposed by that which is to be gathered from the contemporaneous *Thakbust* proceeding, it is really worth little or nothing.

From that proceeding it appears clearly,

that before January, 1846, the boundary between the two *zemindaries* was in dispute, and that on the 1st of February of that year, Mr. *Yule*, the *Ticcadar* of *Ramnuggur* under the Collector, invoked the aid of the Superintendent of Survey, complaining that in the *Fuslee* year 1253, the *Bettiah Rajah* had forcibly collected the proceeds of the Fair. The inference is, that if he had ever had possession of the lands on which the Fair is held, he had then been dispossessed. The *Bettiah Rajah*, on the 2nd of May, 1846, brought his case before Mr. *Chapman* (the then Deputy Collector), and asserted that the lands in question had been always part and parcel of his *zemindary*. The Map, No. 2, was then made. The *Amlah* on both sides pointed out what each side considered the boundary-line; and these are designated by the red and yellow lines upon the Map. Mr. *Chapman*, however, delayed to make any final Order in the matter before the decree of the *Sudder* Court affirming the title of the Appellant had been made. It is proved, that the Appellant then executed a *Mookternamah* in the name of *Lalla Sohur Dutt*, and appeared by that person in the subsequent proceedings; and he must be taken to have then adopted the proceedings of Mr. *Yule*, who seems, on the Appellant's appearance, to have retired from the contest. The final judgment of Mr. *Chapman* was on the 11th of February, 1848, as has been already stated. It held, on the proofs of possession before him, that the greater part, if not the whole, of the lands between the yellow and the red lines, with the right to the profits of the Fair, belonged to *Bettiah*, and settled a line of demarkation which, if not identical with the red line, at least includes the lands which are the subject of this suit within the limits of *Bettiah*.

Now, whatever be the effect of that proceeding, and whether it were, or were not, an Award under Regulation VII. of 1822, it cannot be treated as being other than a material piece of evidence upon the question of possession, now under consideration. To discredit it, their Lordships have been referred to the proceedings before the Magistrate on the 21st of March, 1851, and to the decree in the civil suit which was brought thereon. But these seem to their Lordships not to relate to the lands now in question, or to the effect of Mr. *Chapman's* proceeding, but to other lands, and to a question of boundary settled by some other proceeding. Their Lordships think, that this proceeding before Mr. *Chapman*, establishes that the property in dispute was then in the possession of the *Bettiah Rajah*, and that there is no satisfactory evidence that it has ever since ceased to be so.

They further think, that this careful local investigation, conducted in the presence of both parties, and implying that the property in dispute had always formed part of the *Bettiah zemindary*, casts upon the Appellant the burthen of showing by satisfactory counter-evidence at what precise time, if ever, the *Rajah* of *Ramnuggur* was in possession of it. And their Lordships agree with the Judges of the High Court, that this he has failed to do. There may have been assertions of right such as were likely to occur in respect of a tract of wild and jungly land on the confines of two large estates; but of an actual legal possession, and of the determination of it at any given time, there is no proof. And their Lordships must observe, that it is a fallacy to treat the Appellant, as one of the reasons in the petition of appeal seems to treat him, as having necessarily twelve years from the date of the establishment of his title in which to enforce this claim. For he did not come in under a new title; he merely established his right to succeed to the former *Rajah* of *Ramnuggur*; and if the right of that *Rajah* to sue for the property in question was barred by the law of limitation, the right of the Appellant was also barred.

Their Lordships, therefore, think, that the decrees under appeal may be supported on the ground stated by Mr. Justice *Morgan*, viz., that even if the Appellant was allowed to deduct the full period during which this suit concerning the *Raj* was pending, he had failed to show that he had a right of suit which accrued to him during the legal period of limitation.

If, however, it were granted that a right of action accrued to the Appellant at the date of the *Thakbust* proceeding,—and

their Lordships think it impossible on the evidence to fix the dispossession at a later date,—the suit would, nevertheless, fall within the twelve years' limitation, unless the Appellant could show that he is entitled to deduct the whole or some part of the period between February, 1848, and the beginning of 1858. And to support this claim to deduction, he must show that during the period to be deducted, he was, in the words of the Regulation, "from good and sufficient cause precluded from obtaining redress."

Their Lordships would have great difficulty in affirming the proposition that such good and sufficient cause had here been shown to exist. The Appellant's title to the *Raj* of *Ramnuggur* was established in the Courts of *India* in September, 1846; he was put in possession of the property in June, 1848, though between May, 1854, and some day in the beginning of 1858, it was again under attachment. How can it be said that, in these circumstances, he was between 1848 and 1858 precluded from maintaining a suit for protecting his *zemindary*, and recovering lands taken from it by encroachment? It would be very dangerous, in their Lordships' opinion, to lay down as a rule, that the pendency of an appeal to *England* puts to party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

The cases in the 7th *Moore's* East Indian appeals which have been cited, are very distinguishable from the present. In *Troup* v. *The East India Company* (7 Moore's Ind. App. Cases, 104), the "good and sufficient cause" was insanity, a personal disability *ejusdem generis*, with infancy, which is specified in the Regulations. In *Rajah Enayet Hossein* v. *Sayud Ahmed Reza* (7 Moore's Ind. App. Cases, 238), the facts are complicated; but it will be found that the decision proceeded on the ground, that the title upon which the Plaintiff sued had only accrued to him on the 15th of January, 1842, when Her Majesty's Order in Council had determined the right of succession to be in the general heirs according to the *Sheah* law of succession, and that the suit to which the bar was pleaded had been commenced in February, 1852. Here the Appellant's title to *Ramnuggur*, subject to the appeal to *England*, was complete in 1846.

Their Lordships, therefore, must humbly advise Her Majesty to dismiss this appeal, and to affirm the decrees of the Courts below, with costs.

16th and 18th February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

On Appeal from the late Sudder Dewanny Adawlut, North-Western Provinces, Agra.

CHOWDRY PUDUM SINGH,* *Appellant,*

versus

KOER OODEY SINGH, ... *Respondent.*

Hindu Law—Adoption by Widow.

In an adoption made by a Hindu widow, under authority conferred upon her for that purpose by her husband, the authority must be strictly proved, and, as the adoption is for the husband's benefit, the child must be adopted to him, and not to the widow alone. An adoption by the widow alone, would not, for purposes of Hindu law, give the adopted child, even after her death, any right to property inherited by her from her husband.

Held, in the present case, that the evidence did not support the contention that adopted son of the widow had been adopted to the husband.

14th March, 1869.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This is an appeal from a decree of the late *Sudder Dewanny Adawlut* at *Agra*, reversing a decree of the Principal *Sudder Ameen* of *Zillah Meerut*, made in favour of the Appellant.

The suit was instituted by *Chowdry*

* 12, Moore's I. A., p. 350; 2 B. L. R., P. C., p. 101.

Mohur Singh, the Father of the Respondent (who died while the suit was pending,) to recover possession from the Appellant of the whole of the moveable and immoveable property formerly belonging to *Hem Singh*, deceased, a cousin of the Plaintiff, consisting of ancestral property, and of property acquired and amassed by *Hem Singh*, and by his Widow, *Khoosal Kooer*, out of the proceeds of his ancestral estate.

The suit was instituted after the death of the Widow, *Khoosal Kooer*, the Plaintiff's claim being founded on his right of heirship to *Hem Singh*. It appears by the plaint and a genealogical Table annexed to it, that there were other persons descended from the same common ancestor as the Plaintiff, who would have an equal right with him to a share in the succession of *Hem Singh*. The Plaintiff, in his plaint, assigns as a reason for not including them among the Defendants, that "they had not possession of the property in suit, and that if they thought they had any right or interest in the matter, they could proceed against the Plaintiff at their option."

The plaint states, that after the death of *Khoosal Kooer* the Managers of the estate presented a spurious Will to the Collector, setting forth the Defendant as her adopted Son, and by that means he contrived to get possession of the estate. And it alleges, that the Defendant is not the adopted Son of the deceased Widow, *Khoosal Kooer*, and that she had no power to adopt a Son as long as the Plaintiff was alive. That the Defendant does not belong to the family of which *Khoosal Kooer* and Plaintiff are members, and that he is merely the foster Son of one *Suhej Kooer*. That it is not true that *Khoosal Kooer* ever executed a Will, and, had she done so, a Will made on the point of death would not be legal.

The Defendant by his answer to the plaint, states that the villages and properties claimed belonged to *Hem Singh*, the sole and absolute proprietor, though some of the properties were purchased after his death by his Widow, *Khoosal Kooer*. That *Hem Singh* had no issue, and, therefore, he selected the Defendant, who was of the same family and sect as himself, and was then but twelve months old and the youngest child of his parents, with their consent, to be his adopted Son. That he received the Defendant into his arms, and brought him up as his own Son, and authorized his Wife, in case the rites of adoption were not performed during his own life-time, to perform them after his death, declaring that he had constituted the Defendant proprietor of his entire estate, as though the Defendant were his own Son. That accordingly, when *Hem Singh* died, *Khoosal Kooer* carried out his injunctions, and performed the ceremony of adoption of the Defendant. The Defendant further states in his answer, that the property left by *Suhej Kooer*, Aunt of *Hem Singh*, also came into his possession in consequence of his being *Hem Singh's* adopted Son. And that, although being the rightful heir and successor to the estate, he did not need the support of a Will, yet that, as a matter of precaution, *Khoosal Kooer* executed a Will in his favour. That he does not rest his title upon that Will, but bases his claim as lawful and absolute proprietor of the estate on his hereditary rights.

Issues were framed by the *Zillah* Court which were calculated to raise various questions, but the *Sudder* Court, in their judgment upon appeal from the *Zillah* Court, after observing that the issues were very badly drawn, said, "The pleadings show that the only point for determination was, whether the Widow, *Khoosal Kooer*, adopted the Defendant, *Pudum Singh*, by desire of her Husband, *Hem Singh*."

This single question appears to have been the one to which the greater part of the evidence in the suit was directed, and upon which alone the judgment in the *Zillah* Court, and also in the *Sudder* Court, proceeded.

The Principal *Sudder Ameen* dismissed the Plaintiff's claim with costs, being of opinion, that it was clearly proved by the testimony of the Defendant's witnesses,—most of whom, he said, were respectable and trustworthy persons,—that *Hem Singh* adopted the Defendant, *Pudum Singh*, when he was twelve months old, and gave authority to his Wife, *Khoosal Kooer*, to complete the formal ceremony of adoption, and that it was further proved by the testimony of the same witnesses,

that after *Hem Singh's* death, *Khoosal Kooer* went through the ceremonies of adoption in respect to the Defendant.

Upon appeal from this decree to the *Sudder* Court, that Court, upon the documentary evidence in the suit, arrived at a conclusion directly opposed to that of the Lower Court, considering that it entirely excluded the presumption of the truth of the Defendant's story, that the Widow adopted him at the end of 1836 by desire of her Husband.

They, therefore, held, that the Plaintiff was entitled to succeed to a share in the property in suit as one of the next of kin of *Hem Singh*, and decreed in favour of the appeal and of the Plaintiff's claim, and reversed the decision of the Lower Court with costs.

The decree, which was drawn up in conformity with this judgment, embraced the whole of the property included in the plaint, although the Court held, that the Plaintiff was entitled only to a share in the succession as one of the next of kin of *Hem Singh*. The decree, therefore, cannot be maintained, and the evidence furnishes no materials to enable their Lordships to vary it so as to limit it to the share of the property to which the Plaintiff has established a right. It is possible, also, that some portion of the property claimed may have belonged to *Khoosal Kooer* in her own right, and may have passed to the Defendant by her Will, the validity of which, as to such property, the Plaintiff can have no right to question.

But although the decree in favour of the Respondent for the whole of the property claimed by him cannot stand, yet as he would not be entitled even to a share in the succession to *Hem Singh* if there were a valid adoption of the Appellant, their Lordships have felt it their duty to determine that question (the most important if not the sole question dealt with by the Courts below) in order to prevent further litigation respecting it.

The question as to the adoption of the Appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a Widow under an authority conferred upon her for that purpose by her husband. Of course, such authority must be strictly pursued, and as the adoption is for the Husband's benefit, so the child must be adopted to him and not to the Widow alone. Nor would an adoption by the Widow alone, for any purpose required by the Hindoo Law, give to the adopted child, even after her death, any right to the property inherited by her from her Husband.

In order, therefore, to establish the validity of the adoption in this case, it was necessary for the Appellant to prove:—

First. The authority given by *Hem Singh* to his Wife to make the adoption; and

Second. The actual adoption by *Khoosal Kooer* of the Appellant as the Son of *Hem Singh*.

The Appellant proved, by several witnesses to whom the Principal *Sudder Ameen* gave credit, but upon whom the *Sudder* Court placed no reliance, that the Appellant was the younger Son of *Zalim Singh*; that *Hem Singh* asked, and obtained permission of *Zalim Singh* and his Wife, to adopt the Appellant. That *Hem Singh* took away the Appellant, then a child of twelve months old, and carried him to his house, and placing him on the lap of *Khoosal Kooer*, said, "I have brought you this child to adopt as our Son." That a year after, *Hem Singh* said to *Khoosal Kooer*, "If I live long enough, I shall go through the ceremony of adopting the child myself; if not, I authorize you to perform the ceremonies of adoption as soon as he is five years old;" and that *Hem Singh* died a year after giving this authority. The witnesses also proved, that when the Appellant had attained the age of five years, *Khoosal Kooer* went through all the ceremonies of adoption which they minutely described. It does not appear by the evidence of any of the witnesses, that *Khoosal Kooer* declared at the time, that the ceremonies were performed for the purpose of the adoption of the Appellant as the Son of *Hem Singh*, in pursuance of the authority which he had given her. One of them, on the contrary, says that "*Khoosal Kooer* adopted *Pudum Singh* as her own Son, at the request of *Hem Singh*."

If the adoption of the Appellant as the

Son of *Hem Singh* had really been completed by *Khoosal Kooer*, his name ought to have been substituted for hers in the Books of the Revenue Collector, as the property of *Hem Singh* would, by the act of adoption, have been divested from *Khoosal Kooer*, and would have vested in the Appellant as his Son and heir. Some of the witnesses say, that after performing the ceremonies, *Khoosal Kooer* ordered her *Dewan* to give notice of the adoption to the Collector. Either this Order was never given, or it was not obeyed, for it does not appear that any change was made in the entry in the Collector's Books; and *Hem Singh's* property continued to be registered in *Khoosal Kooer's* name down to the time of her death, which took place at least ten years after the Appellant had attained his majority. But *Khoosal Kooer* caused herself to be entered in the Books of the *Canoongoe*, or Record Keeper, of the village of *Koorja*, as the guardian and protector of *Pudum Singh* (the Appellant.)

Now, if this were intended as the record of the fact of an adoption which had divested the property of *Hem Singh* from his Widow, and made her merely guardian of the minor adopted Son, it seems extraordinary, after such a complete lawful adoption as the witnesses represent, that *Khoosal Kooer* did not take the most effectual mode of recording it, by pursuing the regular course of substituting the Appellant's name for her own in the Revenue Collector's Books. In the absence of any such record, the instances of the occasional description of the Appellant as the Son of *Hem Singh* are of no value. The Principal *Sudder Ameen* laid great stress upon a supposed entry of the Defendant's name as under the guardianship of *Khoosal Kooer* in the *Khewut* for proprietary Register of 1256 *Fuslee*, which he said would not have been made if the Appellant were not the adopted Son of *Hem Singh*. Upon turning, however, to the only *Khewut* printed in the proceedings of the date named, it will be seen that there is no entry at all as to guardianship, but under a column headed "Name of *Puttidar*" the Appellant is entered as "*Pudum Singh*, Son of *Hem Singh*." In a statement of mutation of names of *Lumberdars* and *Puttidars*, however, in which *Pudum Singh's* name is entered in the column of *Puttidars*, but not as the Son of *Hem Singh*, there is the signature of *Khoosal Kooer*, with the addition of the words "guardian of *Pudum Singh*;" and it is probable that the Principal *Sudder Ameen* mixed up the *Khewut* and this document together in his mind. It is the only one of similar documents in evidence which is signed by *Khoosal Kooer*, and there is nothing upon the face of it to show that it relates to *Hem Singh's* property.

The description of *Pudum Singh*, as the Son of *Hem Singh*, in the first power of attorney executed by him and *Khoosal Kooer*, is of little importance, as the parties were at liberty to describe themselves as they pleased in this private instrument; and the same observation applies to the entry of *Hem Singh's* name as the Father of the Appellant in the income-tax receipts, as most of the particulars inserted in the different columns could only be known to and filled in by the party by whom the tax was to be paid. The Appellant, in support of the evidence of an adoption, relied upon a proceeding by *Khoosal Kooer* on the 25th of March, 1836, when she presented a petition at the office of the Deputy-Collector of Revenue, describing herself as the Widow of *Hem Singh*, and praying that the name of *Pudum Singh* might be added to her own in the *Zemindary* registers of certain villages. The *Sudder* Court observed upon this proceeding that "the joint entry of the Widow's and *Pudum Singh's* names was in some respects inconsistent with the averment of his adoption, which would have placed the two in the position of parent and child, or guardian and heir." And, they added, "We find that the application referred to property acquired by the Widow after her Husband's (*Hem Singh's*) death, and which is not in suit in the present case."

There is some doubt as to the accuracy of the statement, that the villages named in the petition of *Khoosal Kooer* are not in suit in this case, as it was pointed out in the course of the argument that most of them are included in the plaint. But there still remains an objection to the use of this proceeding in proof of the adoption

of the Appellant, which was slightly adverted to by the Court. It must have preceded the alleged ceremony of adoption. The Appellant was twelve months old at the time of the commencement of the intended adoption. *Hem Singh* lived a year afterwards, and died on the 22nd of October, 1834. The ceremonies of adoption are stated to have been performed by *Khoosal Kooer* when the Appellant was of the age of five years, which, according to the dates, he could not have been on the 25th of March, 1836, when the petition of *Khoosal Kooer* was presented.

All the acts of *Khoosal Kooer* with respect to *Hem Singh's* property appear to have been dictated by a desire to continue to be *Zemindar* during her life, and to secure the succession to it after her death to the Appellant. She may have attempted at the same time to reconcile her continued possession with the alleged wishes of her Husband in favour of the Appellant.

The documentary evidence produced on the part of the Respondent tends much more strongly to throw suspicion upon the veracity or the accuracy of the witnesses who speak to the fact of the adoption by *Khoosal Kooer*, as it is wholly inconsistent with the idea of any such adoption having taken place.

It must always be borne in mind, that *Khoosal Kooer* remained the registered owner of *Hem Singh's* property for the whole of her life. In addition to this circumstance, there are acts and declarations of *Khoosal Kooer* which cannot be reconciled with the fact of an adoption of the Appellant. Stress was laid by the Counsel for the Respondent on a statement made by *Khoosal Kooer* in a suit instituted by her against *Tara Singh*, claiming the succession as heir to the whole of her Husband's property, that, "*Hem Singh* died without leaving any issue male or female." It was observed that this action, which was brought on the 23rd of March, 1836, was contemporaneous with the above-mentioned petition of *Khoosal Kooer* to have the Appellant's name added to her own as the proprietor of certain villages, which was presented on the 25th of March, 1836. According to what has been already remarked, this must have been prior to the time at which the alleged adoption took place, and, therefore, it was then strictly true that *Hem Singh* had died without leaving issue. But yet it is extraordinary, if *Khoosal Kooer* had any intention of carrying out her Husband's wishes with regard to the Appellant, that no mention whatever should have been made of the authority to adopt, and of her purpose to adopt the Appellant when the proper period arrived, in a suit which seemed peculiarly to require a true and full account of the destination of *Hem Singh's* property. Again, in 1841, long after the alleged adoption, *Hem Singh*, and *Tara Singh*, his Brother, having been joint proprietors of a village, and upon the death of *Hem Singh*, *Khoosal Kooer's* name having been entered in the register instead of his, and upon the death of *Tara Singh*, the name of his Widow, *Meha Kooer*, having been substituted, upon the death of *Meha Kooer*, *Khoosal Kooer* caused her name to be recorded as proprietor of the village, which, if there had been an adoption of the Appellant as heir of *Hem Singh*, he would have been.

Although the Appellant does not rest his title to *Hem Singh's* property upon the Will of *Khoosal Kooer*, yet it is impossible to pass over the fact of her having made this Will or to omit all notice of the contents of it. Although, according to the case of the Appellant, *Khoosal Kooer* had failed in her duty by not divesting herself of *Hem Singh's* property upon the completion of her adoption, yet as that act made him heir to his adopting Father, no strength could be added to his title by the Will of the Widow. In consequence, however, of her remaining in possession of *Hem Singh's* property, doubt would probably be cast upon the fact of the Appellant's adoption, and, therefore, her declaration of her having performed the ceremonies in pursuance of her Husband's authority would have been useful as evidence; but instead of describing the Appellant as the adopted Son of *Hem Singh*, the Will of *Khoosal Kooer* is in these terms:—"As *Kooer Pudum Singh*, the adopted Son of your Petitioner, has been in possession of your Petitioner's estates for a long

period, and as the Petitioner has no other heir or successor but him, and as the Petitioner has retained him in possession during her life-time, and he carries on all the business of managing the villages and *zemindaries*, &c., therefore, the Petitioner prays, that the name of *Pudum Singh* be substituted for her own name as proprietor of all the *zemindary* and *Malguzary* villages and *maafee* lands of her estate, and *Pudum Singh* may be recognized as the owner of all her real and personal property."

Upon the death of *Khoosal Kooer*, reports were made of the facts connected with her death by the *Canoongoes* of the different *mouzahs*, in which *Khoosal Kooer* was styled either *Zemindar*, or *Zemindar* and *Lumberdar*, and all of them stated the conditions of settlement of *mouzahs* in these terms:—"Whomsoever *Khoosal Kooer* may constitute her heir in her lifetime, the same shall be entitled to the office of *Malguzar* after her death."

The *Putwary's* memorandum on the death of *Khoosal Kooer* is as follows: "The said *Mussumat* departed this life by the will of God on the 17th of December, 1861, &c., and left *Kooer Pudum Singh*, her adopted Son, aged thirty-one years, as the heir and successor to all her property."

Pudum Singh, being of the age abovementioned at the time of *Khoosal Kooer's* death, it is not likely that he had never heard of his having been adopted as the Son of *Hem Singh*, if such a ceremony had taken place. And, if he had been informed of the fact, it was to be expected that, although he had patiently submitted to *Khoosal Kooer's* usurpation of his property during her life, he would have seized the earliest opportunity of asserting his rights as the heir of *Hem Singh*. But it appears, that this was not the course which he pursued, nor the title by which he claimed the succession. The report of the *Tehseeldar* of *Koorja* on the succession to *Khoosal Kooer* states, "that the *Putwary* and *Canoongoe*, in their respective reports of the death in question, have mentioned *Kooer Pudum Singh*, her adopted Son, as the heir to the property of the deceased *Mussumat*. And that *Pudum Singh* had put in a petition praying that his name might be recorded as *Lumberdar* and *Puttidar* in place of that of *Khoosal Kooer*, deceased, as there was no other heir but himself."

The Counsel for the Appellant endeavoured to explain away the effect of this claim as heir of *Khoosal Kooer*, by the suggestion that, in thus claiming, the Appellant had been misled by the reports of the *Canoongoes* as to the right of succession to the property held by *Khoosal Kooer*. But (as already observed) if the Appellant really had a title to the property as the heir of *Hem Singh*, it is impossible to believe that he could have been ignorant of it; and his claim to the succession in a different character is almost conclusive against the attempted proof of a lawful adoption of the Appellant as the Son of *Hem Singh* by *Khoosal Kooer*, and consequently against the truth of the story told by the witnesses upon the subject.

Their Lordships, therefore, agree with the *Sudder* Court, that the Appellant has failed to prove that he was lawful adopted as the Son of *Hem Singh* by *Khoosal Kooer*, in pursuance of authority conferred upon her for that purpose by her Husband; and that he has, therefore, no answer to the claim of the Respondent to a share of the succession to *Hem Singh's* property. But as the Court has made a decree which gives the Respondent the whole of *Hem Singh's* property, when he is entitled only to a part, that decree must be set aside.

Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare, that it has been established between the parties to the suit, that the Appellant is not the duly adopted Son of *Hem Singh*, and that on the death of *Khoosal Kooer*, *Mohur Singh*, the Father of the Respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of *Hem Singh*, of which his Widow died possessed. And they will recommend to Her Majesty, that with this declaration the cause be remitted to the High Court of *Agra*, to make such inquiries as shall be necessary to ascertain what share of the estate of *Hem Singh* the

said *Mohur Singh* was entitled to, and what part of the property claimed by the plaint was the estate of *Hem Singh*. And as the Appellant has succeeded in proving the invalidity of the decree, although he has failed in his opposition to the Plaintiff's title, their Lordships will further recommend that each party bear his own costs of the appeal.

19th February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

SREEMUTTY DOSSEE and others,* ... ... } *Appellants*,

versus

RANEE LALUNMONEE and others, ... } *Respondents*.

Fact—Pleas not taken below.

In a suit to recover possession, the Plaintiff alleging that the land in dispute from which he had been ousted, had been settled with him by Government in 1833 as part of his *zemindary*, and the Defendant alleging that the land was part of his *lakhiraj* garden land, which had been released by Government from assessment, the Courts below found that the lands in dispute were part of those which had been settled with the Plaintiff. On appeal to the Privy Council, the Defendant attempted to show that, assuming the lands in question to have been part of those settled with the Plaintiff, that settlement had been improperly made.

Held, that this contention was not open to the Defendant upon the record, never having been taken in the Courts below.

JUDGMENT was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The suit out of which this appeal arises was brought by the Respondents, or those whom they represent, to recover possession of the land in question from the principal Defendant, whose title to it is founded on a purchase of some property formerly belonging to a family of the name of *Mullick*, which was mortgaged to *Muttyloll Seal*, and sold under a decree of the late Supreme Court.

It is perfectly clear, and, indeed, it has been fairly admitted at the Bar, that one principal question, if not the only question tried in the Courts below, and on which both Courts have found in favour of the Respondents, was, whether the alluvial land, which is the subject of the suit, had been the subject of certain revenue proceedings under *Bengal* Regulation II. of 1819 for the resumption and assessment of some alluvial land, in which a final decision was passed in the year 1833, or whether, on the other hand, they were part of certain *Lakhiraj* lands forming part of the mortgaged property, and which, having been the subject of other resumption proceedings, had been decreed to the *Lakhiraj* lands belonging to the *Mullicks?*

The principal question, therefore, which was tried, was a question of identity of parcels, and it is difficult to conceive a question which, having been very carefully tried and determined on the banks of the *Hooghly*, is less proper to be retried on the banks of the *Thames*. That seems to have been the feeling of the learned Counsel for Appellants, who have very candidly abandoned any attempt to shake the concurrent judgment of the Courts below upon that point. They have, however, raised a question whether, assuming the lands in question to have been properly found to have been part of those which were the subject of the resumption proceedings in 1833, the Respondents can be said to have established their title thereto, inasmuch as the settlement for the lands in question was improperly made by the Government with those whom the Respondents represent, whereas that settlement ought to have been made with the *Mullicks*.

The effect of the resumption proceedings in 1833 was this. The Government had claimed to resume and assess 117 *beegahs* of land; of those 117 *beegahs* of land it was found that 45 *beegahs* were,

* 12, Moore's I. A., p. 470; 2 B. L. R., P. C., p. 61.

as contended by the *Mullicks*, who appeared on that proceeding, *Lakhiraj* land, part of their garden which had been washed away and reformed, and they accordingly released those lands. The remainder of the 117 *beegahs*, in round numbers 72 *beegahs*, were held to be subject to resumption and assessment of revenue, and it was directed that the revenue should be assessed upon them according to the Regulations.

That proceeding, it is admitted, was final as between all the parties to it. The usual proceedings were subsequently had. The revenue appears to have been assessed upon these lands in the ordinary way. The Appellants now contend, and it is substantially the only argument urged at their Lordships' Bar, that those 72 *beegahs*, and whatever land may have been added to it by subsequent accretion, is to be treated as an accretion upon their 45 *beegahs* of *Lakhiraj* land, and as land for which the Government was bound to settle with them and with no other person.

A question has been raised, by way of preliminary objection, whether such a case is open to them upon this record, and their Lordships having considered the pleadings, are clearly of opinion, that it is not. The principal issue is:—"Whether it is true, that the disputed land is included in the permanently settled *chur Ramkristopore* belonging to the Plaintiffs, was in their possession, and they were dispossessed of the same by the Defendant, *Muttyloll Seal;* or that the said land, as part and parcel of the garden belonging to *Sreenath Mullick*, being according to the Order of the Supreme Court decreed and sold in auction, it was purchased by *Sreemutty Dossee*, and is in her possession?"

Their Lordships, construing that issue as it stands, would certainly be disposed to hold, that it assumes that, whatever was included in the permanently settled *chur Ramkristopore* did belong to the Plaintiffs, and that the question was, whether the disputed lands were within that permanently settled *chur*, or whether it was to be treated as part and parcel of the garden which belonged to *Sreenath Mullick?* But if there could be any reasonable doubt on the subject, their Lordships think that doubt is wholly removed, if the issue be construed and considered by the light of the principal Defendant's answer, in which we find this passage: "Specially when *Sreenath Mullick* was alive, with reference to the 133 *beegahs*, 2 *cottahs*, of *Lakhiraj chur*, appertaining to the said *Ramkristopore*, a suit for resumption was instituted by Government, as Plaintiff; and it was at first decided in favour of Government, in the Collectorate of this *Zillah*. Afterwards, on appeal by the deceased *Mullick*, the claim of Government was dismissed, and his appeal decreed in the Court of the Special Commissioner. The disputed land is comprised within that." That is an assertion, that the land in dispute was not included in the subject of the revenue proceedings in 1833, but was the subject of the other revenue proceedings, which resulted in a decree in favour of the *Mullicks*, affirming the land claimed by them to be *Lakhiraj*.

But then the meaning of the issue is made still clearer by paragraph 6, which states that: "For the purpose of showing their rights, the Plaintiffs have alluded to the decision, No. 101 of the Special Commissioner's Court, and to that No. 279 of this Court; but those allusions are merely allusions. In fact, there is nothing said in those decisions, that they are with reference to the disputed lands." Therefore, there is, on the one hand, an affirmance that the land was the subject of other proceedings; and, on the other hand, a denial that they were the subject of the proceedings of 1833.

Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case upon one view of it fairly tried, to come before this Board, and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below. It is obvious, that if they wished to make the case which they now make, they would, by their answer, have put the case in the alternative—viz., that assuming the land in question to have been the subject of those proceedings of 1833, the title which they now set up was a title under which they might fairly claim to hold. Whether that title could

be substantiated, it is needless for their Lordships to consider, because they are clearly of opinion, that the question cannot be litigated upon this appeal, and, therefore, they abstain from doing so. They would only point out, that considering what was done in the first suit in the *Zillah* Court of the Twenty-four *Pergunnahs*, considering the lapse of time since the settlement was made, and considering what the revenue law, with respect to the claims of parties claiming to have a preferable right of settlement, may be, it appears to them that the Appellants would have very considerable difficulty in establishing their case. They do not feel that it would be right to make any special reservation, which would invite further litigation by the raising of such a case. It might have been raised in this suit, and has not been so. If having rested their defence on a false issue they are precluded by the decrees of the Courts below from hereafter raising the case now made, their Lordships do not feel that it would be right to open the door to them. If they are not so precluded, the dismissal of this appeal will not create a bar to them.

Upon the whole, their Lordships feel that the only Order which they can advise Her Majesty to make upon this record is, that the decrees of the High Court of *Calcutta* in the two appeals, Nos. 721 and 722, affirming the decree of the Principal *Sudder Ameen* of *Zillah* Twenty-four *Pergunnahs* be now affirmed, and this appeal dismissed with costs.

22nd February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

RAJAH ENAYET HOSSAIN,* *Appellant*,

versus

GIRDHAREE LALL, ... *Respondent*.

AND

RAJAH ENAYET HOSSAIN,... *Appellant*,

versus

SUMEERCHAND and others, *Respondents*.

Limitation—Purchaser at Execution Sale.

One of four children set up a deed of gift and a Will, in virtue of which he was, in 1842, placed, by a summary proceeding of the Courts, in possession of the whole estate left by his deceased father. The rights and interests of two other children were, subsequently, sold in execution of a decree for debt, and purchased by the present Plaintiffs. A fourth child instituted a suit against the first mentioned one, to set aside the deed of gift and Will, the result of which was that, in 1855, the Will, which affected two-thirds of the estate, was set aside as having been made without due consent of heirs, the consent alleged in the Will being held to be no consent. The Plaintiffs now sued to get possession of the shares of the two children whose rights and interests they had bought. *Held*, reversing the decision of the High Court, that the Plaintiffs, as purchasers at an execution sale, were in no better position than claimants under any other conveyance or assignment, and their cause of action arising in 1842, they were barred by limitation.

JUDGMENT in both appeals was delivered by—

THE RIGHT HON. THE LORD JUSTICE SELWYN.

These are appeals from the decision of the High Court, which has reversed the

* 12 Moore's I. A., p. 366; 2 B. L. R., P. C., p. 75.

decision of the Court below, and has in substance held, that the Regulations of limitation does not apply to this case.

It appears that the property in question is claimed under a deed of gift, which applies to one-third of it, and under a Will, which applies to the remaining two-thirds. Very shortly after the death of the Testator, which took place in the year 1841, and in consequence of disputes which had arisen in the family with respect to the validity of the deed of gift and the validity of the Will, proceedings were instituted, which resulted in a decree, not of a final character, but which was made in the presence of all the parties on the 19th of November, 1842, and under which the eldest Son of the Testator was put in possession of the property, in which he has remained ever since. It would thus appear to be beyond doubt, that the Regulations, at all events, commenced to run from the 19th of November, 1842, and it is, therefore, incumbent upon those who have taken these proceedings, under the plaint filed on the 18th of February, 1859, to show some circumstances which would take the case out of the operation of the ordinary rule, much more than twelve years having elapsed between those two dates.

Now, the claim which is filed is not, as has been argued at the Bar, a claim founded upon the notion of the person under whom the Claimant claims being a *cestui qui trust* of the eldest Son, under a deed or Will, but a claim under an intestacy distinctly alleging the Mahommedan law, and praying for the division of the estate of an intestate under that Mahommedan law, and a specific claim of the share to which the person under whom the Plaintiff claimed, would have been entitled in the case of an intestacy.

In answer to that, the Regulations of limitation is set up. It appears, that the particular person under whom the Claimant in the first of the appeals now before us derives his title, although he was an infant at the time when the suit of 1841 was instituted, and when the petition, which has been referred to was filed by him in support of the deed of gift and of the Will, became of age in the year 1842, and before the date of the decree, and he must be taken to have had full cognizance of all the facts and matters which were in dispute at and after that time. Although a second suit was instituted by other members of the family in the year 1852, it does not appear that in the subsequent proceedings any new questions have been raised, or that any new facts have been elicited, or that any new discovery of any fraud has been made; and their Lordships are of opinion, that there has not been in this case any such discovery of fraud as can be held to have postponed the operation of the Regulations of limitation.

There is another point which appears to have been taken by the learned Judges of the High Court, and which seems to have been founded on the supposition that there was some distinction to be made in favour of a person claiming under an execution sale, as contradistinguished from the representatives of any person claiming under an ordinary assignment or conveyance.

In the opinion of their Lordships, there is no foundation, in principle or authority, for any such distinction; but the person who comes here as the Plaintiff, and who is the Respondent in the first appeal, must stand in the same position as *Bahadoor* would have stood, if he had been the Claimant, and as the Daughter would have stood in respect to the other share, if she had been the Claimant. With respect to both of them, the Daughter was of age at the time of the proceedings in 1842; the Son, *Bahadoor Hossain*, became of age in 1842; and they have had full notice of all the facts. Their Lordships have already said, that there has been no subsequent discovery of any fraud, nor indeed, as far as appears, any new matter whatever brought in issue between these parties, beyond that which was raised in the proceedings in 1841 and 1842. The learned Counsel who argued the case on the part of the Respondents has been unable to produce any authority in support of any such distinction as has been supposed to exist between a person standing in the position of a Claimant under an execution sale, and a Claimant under any other conveyance or assignment.

It appears, therefore, to their Lordships that in this case the time must be taken

to have begun to run, at all events from the date of the decree, on the 19th of November, 1842, and that there is nothing whatever to bring this case within any of the exceptions to the Regulations of limitation; and consequently, that the decisions of the *Zillah* Court were right, and that the High Court ought to have dismissed the appeal from that decision with costs.

It is admitted, that the second appeal now before their Lordships, raises precisely the same questions as the first.

The Order, therefore, which their Lordships will humbly recommend Her Majesty to make, will be to reverse the decisions of the High Court, and to declare that that Court ought to have dismissed the appeals before them with costs. We think that the costs of both these appeals should follow the event.

23rd February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

RADHA JEEBUN MOOSTUFFY,* *Appellant*,

versus

TARAMONEE DOSSEE, ... *Respondent*.

Deed of Compromise—Service of Idol—Execution of Decree.

Two brothers executed and filed a deed of compromise, dividing between them the family property, and a decree was passed in terms thereof. Under this decree, the elder was to hold possession of certain lands, the rents of which were to go to perform the worship of the family idol. The younger, however, kept the elder out of possession of the lands, who therefore performed the worship at his own charges, and then took out execution for possession and mesne profits, in order to recoup his own expenditure on the family idols. The younger also took out execution, and objected that his brother had not performed his trust as family *shevait*, so that he had been compelled to perform ceremonies at his own expense. His objection was overruled. The elder brother having died without executing his decree, his widow applied to execute it for the amount of the mesne profits due under it.

Held, on the appeal of the younger in his own case, that the non-performance of ceremonies by his brother gave him no ground of complaint, unless he could show that such failure was not caused by any default on his part. *Held*, in the other case, that the widow was entitled to execute the decree for mesne profits of the idol lands, without showing that the ceremonies had been performed by her husband out of his own private funds.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

THEIR Lordships are of opinion, that no ground has been laid for prolonging this unfortunate litigation by the allowance of these appeals.

It is unnecessary to state the earlier proceedings in the first suit. It seems sufficient to begin with the Order of the 30th of August, 1862, which Mr. *Cave* has admitted to be final. By that Order it was held, that *Surbessur* has established his right to take out execution for the mesne profits claimed by him, as well as for the possession of the land included in the fourth article of the compromise; and that it was no bar to his execution that it had been alleged that he had broken trust, inasmuch as he had not carried out the terms in accordance with which it was agreed that he should hold possession.

This Order was neither the subject of appeal, nor, in their Lordships' opinion, could have been successfully made so. There is no ground, as it appears to them, for saying, that the proof of the performance of the religious ceremonies was a condition precedent to the enforcement of the claim for the rents which the fourth article of the compromise gave to *Surbessur*. And without inquiring, whether many of the points which are now taken might not have been raised in the litigation which led to the Order in question, or are concluded by it, it is sufficient to state, that its effect was, that as between the two Brothers, *Surbessur* was entitled to take out the execution which he claimed to take out, and that the Respondent, if he

* 12 Moore's I. A., p. 380; 2 B. L. R., P. C., p. 79.

had any claim by reason of the non-performance of the religious ceremonies, or any other breach of the agreement, was bound to prefer that claim in a regular suit.

In anticipation of that Order, the younger Brother (the Appellant) had commenced the suit out of which the other appeal has arisen. It will be convenient to consider the nature of that suit, and the right of the party to have the decree that has been made in it reversed or altered, before we proceed to the subsequent proceedings in the original suit.

The suit which was so instituted was not exactly such a suit as that suggested by the judgment of the 30th of August, 1862. What the Judges of the High Court said was, that if the Appellant, on the ground of any breach of agreement, claimed a right to dispossess the Respondent's Husband, *Surbessur*, he might prefer that claim in a regular suit. But the suit really instituted was of this nature. It was a suit in which the party alleged, that by reason of the non-performance by *Surbessur* of the duty which he had undertaken under the fourth article of the compromise, he, the Plaintiff, had been compelled to perform certain religious ceremonies at his own cost, and that he had a right of action over against *Surbessur* for the moneys expended in the performance of those ceremonies. It was, therefore, essential, in such a suit, that he should show that he really had that right of action; that there not only had been the breach of duty alleged, but that by reason of it he was entitled to recover the damages which he had sustained from his Brother. And he had, of course, to prove the amount of those damages.

Now, as to the proof of the damages, that failed altogether. He produced only one witness, who proved nothing; he called the Defendant, who denied generally that the claim was well founded. Upon that the Judge of first instance made a decree against him, and dismissed the suit.

The case was carried, by appeal, before the High Court, and they affirmed the decision. They remarked on the miscarriage of the Judge in refusing to allow the Plaintiff to cross-examine the Defendant when called, and their Lordships fully concur in the propriety of that censure. Nevertheless, if the Defendant had been cross-examined, all he could have proved would have been so much of the Plaintiff's case as rested on the performance of the religious ceremonies, and by possibility, though that was not very probable, the cost to which the Plaintiff had been put in the performance of them; but that, in their Lordships' opinion, would not have made out that he had any right of action. For the existence of that right of action you must go back to the original compromise, and, in their Lordships' opinion, the Plaintiff had wholly failed to prove that he had such a right of action, because, upon the compromise and the acts of the parties, the case stood thus:—The compromise gave certain lands, and the rents of those lands, to the elder Brother, coupled, we may admit, with the performance of a trust, but a trust of that nature which is constantly vested in the managing or elder Brother of a Hindoo family, a trust which implies some considerable beneficial interest. If the non-performance of that trust, or the non-performance of those ceremonies, could, by any possibility, give such right of action to the Appellant as that asserted in his suit, it surely was necessary for him to show that it was not by reason of any default on his part that the non-performance of the trust took place.

Now, the undisputed facts of the case are, that the younger Brother did not perform his part of the agreement, that he retained his share of the rents of the land; and that the elder Brother was put to take out execution under the decree founded on the compromise, in order to get the funds which that compromise gave to him.

Therefore, it seems to their Lordships, that this suit, brought by the Appellant, substantially failed upon the ground which is suggested by the Judges in their judgment of the 2nd of February, 1864, viz. that there was no cause of action at all, and in these circumstances it would be unreasonable to send down that case for a new trial, because the Judge did not allow the cross-examination of a witness, whom, moreover, by reason of his subsequent death, it is now impossible to examine.

These observations, therefore, dispose of the second appeal, and I now revert to the proceedings in the original suit. *Surbessur* died pending the second suit, and without having taken out execution under the decree of the 30th of August, 1862. His Widow then applied to take out execution, and as she merely sought to take out execution for that which had been adjudged to belong to her Husband, and was, therefore, part of his estate, there seems no ground whatever for disputing her right, or imposing upon her the obligation of proving something which *Surbessur* had not been called upon to prove.

The Principal *Sudder Ameen* seems, therefore, in their Lordships' opinion, to have taken a right view of the question. He overruled the objections to the execution, which had been urged by the Appellant.

The case then went by appeal to the High Court, and two of the learned Judges of that Court then took the view which I have just alluded to as being, in their Lordships' opinion, erroneous, saying that she could not stand in her Husband's shoes: that it lay upon her to prove, that *Surbessur* had actually expended his own moneys in performance of the ceremonies, and they, therefore, in the first instance, overruled the Order and judgment of the Principal *Sudder Ameen*. There was, then, an application for review before the same learned Judges; and upon their being referred to the decree in the other suit, and to some additional evidence, but principally to the decree in the other suit, they came to the conclusion, that the Widow must be taken to have established, chiefly, if not wholly, by that decree, that of which they had required proof from her, viz. that *Surbessur* had expended his own moneys in the performance of the ceremonies, that, therefore, their former Order was wrong, and that the final Order to be made was, that she should be entitled to issue execution,—in fact, to affirm the Principal *Sudder Ameen's* Order. A subsequent Order was made, declaring her entitled to interest on the amount for which the original execution had been sued out.

Their Lordships are unable to assent to the reasoning of the learned Judges of the High Court. They think, for the reasons which I have given, that the original Order, reversing the Principal *Sudder Ameen's* Order, was wrong; but if that Order had been properly made, they would have been unable to adopt the reasoning of the learned Judges, as to the effect of the decree in the suit of the Appellant, which certainly does not prove that *Surbessur* expended his own moneys in the performance of ceremonies. The utmost which that decree can be taken to prove is, that the Appellant had failed to show that he had performed separate ceremonies upon his own account, or that he was entitled to recover the sum claimed in that suit in respect of those ceremonies.

The effect, however, of the final Orders of the High Court is to give to the Widow that to which their Lordships consider she is entitled; and, therefore, the Order which they will humbly recommend Her Majesty to make is, that both these appeals be dismissed, and that the Orders of the Courts below, which are the subjects of them, be affirmed.

23rd February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

THOMAS ALEXANDER WISE,* *Appellant*,

versus

JUGGOBUNDHOO BOSE, ... *Respondent*.

Regulation XV. of 1793, Sections 8 and 9—Usury.

Regulation XV. of 1793, sections 8 and 9, forbids the maintenance of any suit arising out of an usurious transaction.

THE following is the history of the transactions out of which the suit arose:—

In the year 1831, the Respondent's

* 12, Moore's I. A., p. 477; 2 B. L. R., P. C., p. 69.

Father, *Kissen Koomar Bose* applied to *Josiah Patrick Wise* for a loan of S. Rs. 20,000, to be paid off in six years. *J. P. Wise* was a British subject, and a Brother of the Appellant, and of the late Captain *William Wise*. He was at that time carrying on business at *Dacca* as a Merchant. After some negotiation a loan of S. Rs. 20,000, bearing interest at 36 *per cent. per annum* or 3 *per cent. per mensem*, was arranged between *Kishen Koomar Bose* and *J. P. Wise*.

The Statute, 13th *Geo.* III. c. 63, sec. 30, was in force when this transaction was entered into. It prohibited British subjects in the *East Indies* from taking directly or indirectly interest above 12 *per cent. per annum*, and it declared all Bonds and contracts whatsoever for payment of principal, or for any usury, above 12 *per cent. per annum* utterly void.

The material sections of *Beng.* Reg. XV. of 1793 which affected this case were to the following effect:—

IV. If the cause of action should have arisen on or after the 1st of January, 1793, the Courts are not to decree any interest on any sum whatsoever above the rate of 12 *per cent. per annum.*

V. If a lower rate of interest should have been stipulated no higher rate than the rate so stipulated was to be decreed.

VI. No accumulations of interest beyond the amount of the principal.

VII. And no compound interest were to be decreed.

VIII. The Courts are not to decree any interest whatsoever in any case where the Bond or instrument given for the security and evidence of the debt shall have been granted on or subsequent to the 28th of March, 1780, and should specify a higher rate of interest than is authorized by the Regulation to have been given and received subsequent to that date.

IX. Nor to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th of March, 1780, where a greater interest than is authorized by the Regulation shall have been received, or stipulated to be received, if it be proved, that any attempt has been made to elude the rules prescribed in the Regulation by any deduction from the loan, or by any device or means whatsoever, "nor to give any other judgment but for the dismission of the suit, with costs to be paid by the Plaintiff."

Judgment was delivered by

THE RIGHT HON. THE LORD JUSTICE GIFFARD:

Their Lordships are unable to entertain any doubt upon this case, either with respect to the facts, or with respect to the law which is applicable to those facts.

The facts are simple and plain. It is perfectly clear, that the original Lease was connected with the Bond, and that that Lease was a beneficial Lease. But the matter does not stop here, because, when you come to the under-lease, although it was subsequent in point of date, it has reference back to the date of the original Lease; and if you look at the assignment from the Servant at the time when the Servant ceased to be in the service of Mr. *J. P. Wise*, that assignment deals with the whole as one entire transaction. Their Lordships, therefore, can come to no other conclusion than that the transaction was one entire transaction, and that it was a transaction which was tainted with usury.

Then, with respect to the argument, that Captain *Wise* had no knowledge of what took place, it appears, that to all intents and purposes, Mr. *J. P. Wise* was his Agent. It is not alleged, and still less is it proved, that the Native who lent his money was at all aware, that there was any distinction between one part of the transaction and the other. In point of fact, Mr. *J. P. Wise* was acting for an undisclosed Principal, the loan being a lending upon one transaction, which transaction was clearly usurious; therefore, Captain *Wise* is in this position: either he must go against his Agent and repudiate the transaction altogether, or if he does not repudiate the transaction, he must take it with all its consequences.

That being so, brings us to the terms of Regulation XV. of 1793. There are two sections affecting the question, the 8th and the 9th. The 8th section deals with the case in which the usurious interest is

disclosed on the face of the instrument, and is different to the 9th section. There might be a very good reason for that. There might well be, where there was no fraud, and where the whole thing was disclosed, a right to recover the principal, whereas, in a case where there was fraud, that right might be taken away. The terms of the 9th section appear to their Lordships to be perfectly clear, because the Court is not "to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th of March, 1780, where a greater interest than is authorized by this Regulation shall have been received, or stipulated to be received, if it be proved, that any attempt has been made to elude the rules prescribed in it by any deduction from the loan, or by any device or means whatever;" and then there comes this: "nor to give any other judgment but for the dismission of the suit," and we cannot conceive that that means anything but the dismission of the suit, so far as it has relation to that usurious contract, though of course it would be different, if there was one count on one transaction, and another count upon another and a totally different transaction; in point of fact this matter, if not actually concluded by the judgment, is virtually concluded by the expression of opinion in the former case of *Wise v. Kishen Koomar Bose*, for in 4 Moore's I. A. Cases, 219; 1 P. C. J., p. 336, we find this sentence: "If, therefore, in this case, we were to pronounce a judgment whereby the principal should be recovered, without interest, such a judgment would be in complete defiance of that Regulation, by which we are bound." We have nothing to do but to repeat these words, in which we fully concur; therefore, on both grounds, first, because the transaction was usurious, and, second, because of the terms of the Regulation, their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed with costs, and the decree appealed from affirmed (*a*).

(*a*) See *Shah Mukhum Lall* v. *Baboo Sree Kishen Singh*, *ante*, p. 403.

24th February, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

On Appeal from the High Court of Judicature at Madras.

KATCHEKALEYANA RUNGAPPA KALAKKA TOLA OODIAR,* ... } *Appellant,*

versus

KACHIVIJAYA RUNGAPPA KALAKKA TOLA OODIAR, ... } *Respondent.*

Grounds for decision—Issues.

The reasons for their decisions must, in all cases, be recorded by the Judges of the High Courts in *India*. In a suit for maintenance, where the objection was taken on appeal to the Privy Council that no issues had been directed in the Courts below, held, that an order of the High Court, referring the matter to the lower Court, for enquiry, "to ascertain the amount of maintenance which might appear to be justly and properly payable with reference to the means of the Defendants and the other facts of the case, and to proceed to decisions in the manner indicated in section 351 of the Civil Procedure Code," was equivalent to a direction of issues, and rendered any further issues unnecessary.

JUDGMENT was delivered by

THE RIGHT HON. THE LORD JUSTICE SELWYN:

Their Lordships have considered this case, and they must in the first place express their regret, that the record contains no statement of the grounds of the decision of the High Court which is now under appeal. The Charter of the High Court of Judicature, section 42, expressly requires, that the reasons of their decisions should be recorded by the Judges, and transmitted for the information of this Court, and it is the subject of great regret, especially in a case which comes before their Lordships *ex parte*, that the grounds

* 12, Moore's I. A., p. 495; 2 B. L. R., P. C., 72.

of the judgment appealed from should be wanting in the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in this present suit.

The first objection which is taken is, that in this case no issues were directed in the manner which has been prescribed by the practice of the Courts in *India*. But the decree of the 19th of December, 1862, which directs that the matter shall be referred to ascertain the amount of maintenance, which may appear to be justly and properly payable with reference to the means of the Defendant, and the other facts of the case, and to proceed to the decision in the manner indicated in section 351 of the Code of Civil Procedure, removes any such objection, because, that is, in substance, an Order for inquiry, and an Order for inquiry raising the very points upon which the Appellant has relied in the arguments before this Court; for it is a direction to ascertain the amount of the maintenance which may appear to be justly and properly payable with reference to the very point which it was urged ought to have been taken into consideration, viz. the means of the Defendant, in connection with the other facts of the case. It appears to their Lordships to be impossible to object to such an inquiry as that, upon the ground of its not being sufficient. It is, therefore, equivalent to issues, and rendered any further issues entirely unnecessary. The first ground of objection, therefore, fails.

We proceed, then, to the second ground, namely, that there was in this case an improper rejection of evidence. Now, it appears to their Lordships that, under an inquiry such as that to which I have alluded, it was obviously competent to either party to produce evidence in support of his case during the conduct of that inquiry; and if evidence had been properly tendered on the part of the Appellant, and had been improperly rejected by the Judge, such improper rejection of evidence would have constituted a valid ground for appeal. But we find that, in fact, there was an appeal from the decision of the Judge, —a decision arrived at in the prosecution of that inquiry,—and the eleven grounds for the appeal from that judgment are stated. In considering these eleven grounds, we find, in the first place, that the Appellant raised the objection that the Plaintiff's case was barred by the Statute of Limitation; and secondly, the Plaintiff not having produced nor given notice to the Defendant to produce the *Istimrar Sunnud* of the *Zemindar*, no judgment could be passed as to the nature of the property. Now, that appears to be again raising the same question which had been decided before, namely, as to whether this property was acquired property, or whether it had been inherited? It appears to have been originally acquired by one *Zemindar*, but it had descended to the then *Zemindar*, and, therefore, it could not then be properly considered as acquired property. That had been already decided, and that point, once before decided, seems to be intended to be raised again by the second ground of appeal. The third ground proceeds to raise the objection as to the Plaintiff's Mother being entitled to maintenance, and then the fourth is, "The Civil Judge's estimate of the income of the *zemindary* is erroneous, and even opposed to the Plaintiff's own allegation." The fifth is, "The Civil Court has not correctly estimated the wants of the Plaintiff." We need not go at length into the other grounds, but it is to be observed, that these grounds proceed mainly upon an insufficiency of the evidence produced by the Plaintiff, and that they do not in the least degree point to any evidence having been tendered by the Appellant, or having been improperly rejected by the Judge; and under these circumstances, even if the Appellant had any such ground of appeal, if he did not think fit to produce it before the Court, where such an appeal might regularly have been prosecuted, and where such a ground would have afforded a sufficient ground for such an appeal, in the opinion of their Lordships, it is not competent for him to maintain it now; and it appears to have been raised for the first time in the petition of the 6th of August, 1864, where it is said, "Because your Petitioner was not permitted to prove what the net income of the *zemindary* was." Their Lordships,

therefore, are of opinion that that second ground of complaint also fails.

Then it is said, that the decision is erroneous, inasmuch as it is based upon an assumption that the income of the *zemindary* was Rs. 50,000, which is more than has been alleged in the original plaint, which only claimed maintenance as against an income of Rs. 40,000. But in the opinion of their Lordships, this is a misconception of the terms of the judgment. The judgment appears to have proceeded upon this. The Claimant alleges, that the income of the *zemindary* is Rs. 40,000, but the Judge finds, that upon a former occasion, many years ago, it is true, the Appellant had admitted the income to be Rs. 50,000; and that on a former occasion, also many years ago, in the year 1831, a sum of Rs. 250 *per mensem*, or Rs. 3,000 a year, had been awarded to another Brother of the *Zemindar* for maintenance. The Judge, proceeding upon that, says, "I find an allegation of Rs. 40,000 on the one side, an admission of Rs. 50,000 on the other, and a former Order allotting for maintenance Rs. 3,000; and, in the absence of any evidence to the contrary, the fair inference to be drawn from these documents is, that Rs. 2,000 is a reasonable sum for maintenance, with the addition of a house." Under these circumstances, their Lordships are of opinion, that it cannot with justice be said that the Judge has proceeded upon the foundation of the income being Rs. 50,000, and, therefore, in excess of the allegation made by the Plaintiff.

It remains only to notice the other point with respect to the residence. It may, we think, be fairly assumed, that this question was taken into consideration by the Judge in fixing the amount of the maintenance. It was a matter for the discretion of the Judge, and a matter with which this Board would be very reluctant to interfere, unless it could be shown that the Court below had miscarried in some very gross and striking manner. Now, in the opinion of their Lordships, there is no such miscarriage in this judgment, having regard to the documents which were proved, and to the absence of any other evidence. It appears to their Lordships not to be unreasonable to award the sum which has been awarded by the Judge, with the addition of the residence, and, therefore, their Lordships will feel it their duty humbly to advise Her Majesty that this decree should be affirmed, and the appeal dismissed.

2nd March, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (The Judge of the Court of Admiralty,) the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner at Oude.

IKBALOODOWLAH,* ... *Appellant*,

versus

SAH BUNARSEE DOSS and MOOKBUMOODOWLAH, } *Respondents.*

Trover—Limitation—Transfer of Notes—Suit remitted back for Re-hearing.

Suit in the nature of an action of trover, by the Plaintiff, to recover Company's paper, as heir, such Notes being part of his deceased Mother's estate, against a Purchaser without notice and the Vendor, his Brother, alleging first, that the dealing with the Notes on the part of his Brother was illegal and contrary to the Plaintiff's rights as heir; and secondly, that in a previous suit against his Brother, regarding the Notes, he had obtained a decree against him in respect of one of the Notes sued for, but had not enforced judgment. The suit was dismissed by the Courts in *India* on the grounds (1) of limitation, under Act, No. XIV. of 1859, and (2) as barred by the previous suit. On appeal, such decree reversed, as it appeared, that the real point in issue, the validity of the transfer of the Notes, had not been heard, and the suit remitted back to the Judicial Commissioner at *Lucknow*, to give directions to the Court of First Instance to re-hear the case, with liberty to either party to amend the pleadings.

Costs of appeal to abide the result of the re-hearing.

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* 12, Moore's I. A., p. 507.

11th March, 1869.

Judgment having been reserved, was now delivered by

The Right Hon. the Lord Justice Giffard:

This appeal is brought from a decree of the Judicial Commissioner of *Oude*, confirming a decision of the Civil Judge of the Court of *Lucknow*, which dismissed the Plaintiff's suit.

The Plaintiff by his suit sought to recover from the first Defendant, *Sah Bunarsee Doss*, certain Promissory notes, commonly called Company's paper, of the Indian Government, which he alleges to have been illegally sold during the Indian mutiny. He claims either restitution of the Notes, or alternatively, their value. He states that his claim is based on inheritance. It is obvious on the face of the plaint that he means to describe inheritance as the base or root of his title to the property, and that he alleges the illegal sale or transfer of, and the illegal dealing with, the Notes, as the wrong done to him, and that the alleged violation of his right constitutes his cause of action. The Plaintiff was the eldest Son of his Mother, who died possessed of a considerable property, consisting of land, moveables, and certain Promissory notes, of which those in question are part. It was a Mahomedan family. The family consisted of two Sons and a married Daughter. The eldest Son claimed the land under an alleged gift from his Mother in her life-time, a gift the validity of which was disputed by his Brother at least. The Sister survived her Mother but a few days: the Brothers and Sister were entitled to the Mother's property as heirs under the Mahomedan law: the Brothers taking equally each the double of their Sister's share, and on their Sister's death they took certain shares with her Husband in the Sister's share. Soon after the Mother's death, the Sons and Daughter proceeded to make some division of the moveables: the elder Son claimed the land: that title was litigated by the younger Brother, but it does not appear with what justice or success. The more valuable part of the moveable estate consisted of Government paper, amounting to Rs. 59,100, in which each Son's share would be of the value of Rs. 23,640; and the Daughter's of Rs. 11,820. The Daughter is stated to have received her share of this part of the property. The Daughter's Husband appears to have disclaimed.

The Plaintiff's right of suit in this action, is founded upon an alleged illegal dealing by the younger Brother with his elder Brother's share of this property, and he seeks to extend his right and remedy against the first Defendant, by treating him as an illegal Purchaser under and consequent upon his Brother's alleged spoliation. The mode in which the Plaintiff alleges this wrong to have been effected is this, viz., that the Notes were secured under the separate seals of the heirs, in a House belonging to the estate, in which the Mother died, and her Sister continued to reside; that the younger Brother, about the commencement of the Mutiny, broke the seals, carried off the property, and, alone sold and purported to transfer it. If this statement be true, and reference be had to the nature of the property sought to be recovered in this suit, viz., Company's paper, and reference also be had to the first Defendant's Letter of the 30th of July, 1865, it follows, that the first Defendant would be under the legal obligation of showing title to the Notes purchased. The law applicable to the acquisition of title to Notes passing by indorsement, as these appear to have been capable of being passed, must not be confounded with that applicable to the acquisition of title in ordinary chattels.

The Plaintiff had, previous to the institution of this suit, brought a suit of a similar nature against his Brother, the second Defendant, and one *Shonath*, to whom two of the Notes had been traced. In that suit the recovered judgment against his Brother, who did not deny the case made, but executed it on insufficient grounds. The Plaintiff, having succeeded in this suit, is not shown to have taken any steps to enforce his judgment against his Brother. There is no proof whatever that the Brother is insolvent, or incapable of satisfying that judgment; nor is there

any proof, whether the elder Brother's alleged title to the land is valid, nor of the value of that part of the property of the deceased.

After this judgment had been obtained, the Plaintiff having acquired some information (at what precise time, however, does not appear), desired to enforce it by process against the promissory Notes, the subject of the present suit, which he alleged he had traced to the possession of the first Defendant. If this could be done at all, under the execution of the process of the Court, it could be done only by attaching specific property still in the possession of the person against whom execution of the decree was sought to be extended. But such a proceeding would be totally irregular and infructuous against a person who had parted with the Notes.

The application appears to have been for an attachment and sale. A process of injunction was issued instead. This was held by the Court as a wilful abuse by the Plaintiff of the process of the Court, and its own Officer was treated as an accomplice in the wrong; but as it would be substantially little more operative than the process actually prayed, and neither process in terms sought discovery, there appears to be quite as good reason to attribute this proceeding to ignorance and blundering as to conscious fraud in the Plaintiff or his advisers. The result was to obtain from the first Defendant an admission of which the Plaintiff claimed to make use as evidence, but which the Court rejected as proof.

The Plaintiff having obtained this advantage, which involved a partial discovery, filed his plaint in this suit, to which the first Defendant's defence was: first, that the Plaintiff ought not to be allowed to reap any benefit from the discovery which he had thus obtained. Secondly, that Notes sold in the *Bazaar* under the genuine seal of the Owner were validly sold. Thirdly, the limitation law; and fourthly, that the Plaintiff had already sued on the ground of inheritance, and had obtained a decree. The evidence adduced by the Plaintiff seems to have been entirely documentary. The admission of the Brother in the former suit was used in this, and as against the Brother it was legitimate evidence, though not evidence such as to establish the case of wrong against his co-Defendant. The Letter of the first Defendant of the 30th of June, 1855, on the occasion of the injunction, was also attempted to be put in evidence. There was no clear or distinct evidence of the state of the indorsements on the paper, and no sort of evidence was given or attempted, of any legal transfer of the paper to the first Defendant.

In this state of things the first Court dismissed the Plaintiff's suit—first, on the ground that the suit was barred by limitation; and next, that holding a money decree against his Brother, the Plaintiff had no right to another against *Sah Bunarsee Doss;* and lastly, the Letter of the 30th of June, 1865, was excluded, but in their Lordships' judgment erroneously, on the ground of its having been obtained by the Plaintiff as being a party to an illegal and collusive Injunction.

From this decree the Appellant preferred his appeal to the Judicial Commissioner. *Sah Bunarsee Doss* put in an answer to the appeal.

The Judicial Commissioner dismissed the suit with costs as against *Sah Bunarsee Doss*, on the ground that there was nothing whatever to show, nor any reason to suppose, that the transaction on the part of *Sah Bunarsee Doss* was not *bonâ fide*.

The statement of these decisions shows that the case of the Plaintiff has been viewed and treated by the Courts as though the *onus* of proof rested on him to rebut a presumable *bonâ fide* title by transfer in the first Defendant, *Sah Bunarsee Doss*. But the case made as to these papers is, that they were not in a state wherein a transfer, by delivery to a *bonâ fide* holder, would confer a title. On the contrary, it is stated that the legal title was in the Mother, and required a transfer by indorsement from her or all her heirs. Supposing that a mere imposition of a seal by a native Lady would be recognized as a legal transfer by indorsement, of which there is no allegation or proof, still such a transfer would not be valid after the death of the Mother. An invalid transfer might still confer a valid equitable title, either in part or in entirety; but such a transfer, being

exceptional and dependent on special circumstances, cannot be raised by legal intendment or presumption. Consequently, the Plaintiff's case required an answer, unless met on other grounds; those on which the Court proceeded, of suspected collusion between the Brothers, would, if alleged and proved, have constituted a valid defence. A Plaintiff, however, ought not to have a defence of this sort urged against him at the hearing without due notice by the pleadings and issues of a case of fraud; and, as in a suit before the same original Tribunal, the admission made by the younger Brother had been credited and acted on, and formed the basis of a decision against him in the Plaintiff's favour, the Plaintiff had the less reason to come provided with proof to rebut that charge. The existence of a judgment against the Brother is no bar to this suit.

Again, the objection that the suit is barred by limitation seems to have been founded on a neglect to consider the Act of Limitation applicable to the suit, viz., the Act, No. XIV. of 1859, which, on the facts alleged, furnishes no ground whatever for it.

Then there is another objection founded on the want of a Certificate. This appears not to have been taken in the Court below, and is entirely inapplicable to a suit of this character.

The Act which provides for the granting of a Certificate is intended for the protection of Debtors to a deceased's estate; but *Sah Bunarsee Doss* was never a Debtor of the Mother, nor did his taking the share, or property, or part of the share, or property, of the Plaintiff, by an invalid title, constitute him a Debtor to the estate. The right of action is founded entirely on wrong, and not on privity of contract. Their Lordships, therefore, must humbly advise Her Majesty to allow this appeal, and direct that both decrees be reversed, and that the cause be referred back to the Judicial Commissioner, in order that he may give the necessary directions that it be reheard by the Civil Judge of the Court of *Lucknow*, with liberty to either party to add to or amend the pleadings; and that the costs of the appeal on both sides should be taxed, and be costs in the suit, and abide the result of the suit.

In arriving at this conclusion, their Lordships have no intention whatever of giving any judgment on the merits. They are simply of opinion, that the facts ought to be inquired into on proper pleadings and evidence, including the first Defendant's Letter of the 30th of January, 1855, if the Plaintiff so desires it; and if the Plaintiff should prove his title as against the first Defendant to the whole or part of the Notes, then that the first Defendant ought to be called on to show, if he can, either title in himself, or some grounds displacing the Plaintiff's right to complain of his acts; and that thus the facts and the real merits of the case should be arrived at.

Their Lordships are further of opinion, that the second Defendant ought not to have been dismissed; for if the Plaintiff has any right against the first Defendant, it may be that the first Defendant, if he makes satisfaction to the Plaintiff, ought to have the benefit of any subsisting judgment against the second, or, at all events, to have some remedy by way of indemnity or otherwise over against him; it must in this point of view be obviously for his benefit that the second Defendant should be bound by all the proceedings in this suit; the Plaintiff having brought the second Defendant before the Court, he, under the circumstances, ought not to be dismissed unless the whole suit should eventually fail on the merits against the first Defendant.

8th, 9th and 15th March, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir R. Phillimore (The Judge of the Court of Admiralty), and the Right Hon. the Lord Justice Selwyn.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

NEELKISTO DEB BURMONO,* *Appellant*,

versus

BEERCHUNDER THAKOOR and others, ... } *Respondents.*

Succession to Raj—Family Custom—Seniority.

Where, in a question as to the right of inheritance to a *Raj*, it was admitted that there was a custom that the reigning *Rajah* should name a *Jobraj* and a *Burra Thakur*, of whom the first succeeds to the throne, and the latter to the office of *Jobraj*; but it was contended on the one hand, that if the reigning *Rajah* had appointed a *Jobraj*, his choice should have been guided partly by an alleged promise or intention on the part of the former *Rajah*, and partly by the Appellant's preferential title as legal heir by seniority amongst the near kindred; and on the other, that choice of the reigning *Rajah* was absolutely free, and could not be controlled by the wishes of the former *Rajah*—*Held*, where there was evidence of power of selection, the actual observance of seniority even in a considerable series of successions could not of itself defeat a custom which established the right of free choice.

Where family custom required the union of two things to constitute the legal heir, viz., seniority in age and nearness of kin, and the claimant has but one of these qualifications in himself, viz. seniority, he does not entitle himself to succeed. Where a custom is proved to exist, it supersedes the general law, which however still regulates all beyond the custom.

15th March, 1869.

THEIR LORDSHIPS' judgment was delivered by

THE RIGHT HON. LORD CHELMSFORD:

This is an appeal from a decision of the High Court at *Calcutta*, which reversed a decision of the Principal *Sudder Ameen* of the *Zillah* of *Tipperah*. The suit was one in the nature of an ejectment brought by the Appellant, the half-Brother of the late *Rajah* of *Tipperah*, *Essanchunder*, against the Respondent, *Beerchunder Thakoor*, the uterine Brother of *Essanchunder*, and against the other Respondents, to recover a very valuable *zemindary*, being that part of the royal possessions of the *Rajah* of *Tipperah* which lies within the Indian territories of the British Crown. The *Rajah* of *Tipperah*, though in respect to these lands subject to the laws and Courts of *British India*, is in fact an independent Prince with a considerable territory known as the *Tipperah* Hills, and as the title to the *zemindary* and to the *Raj* is the same, the dispute respecting the former involves a question of the right of succession to the *Musnud* or Throne of the independent Principality. The Respondent, *Beerchunder Thakoor*, has been acknowledged by the British Government as *de facto* Sovereign of *Tipperah*, but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the Throne, and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the Crown upon a disputed title to lands within the jurisdiction of the Indian Courts.

The Appellant, included originally as Defendants to the suit four persons besides the Respondent, *Beerchunder Thakoor*, viz., the third, fourth, fifth, and sixth-named Respondents in the appeal, being the spiritual guide, and the servants of the deceased *Rajah*. He charged that these four Defendants colluded with *Beerchunder Thakoor*, to obtain by fraud the *Raj* and the *zemindary* in question. Another Defendant, the second on the record, was made a Defendant on his own petition. He was an illegitimate Son of *Kristo Kissore*, the Father of that Defendant and *Beerchunder Thakoor*; and the Ladies whose names appear on the record, being the Mothers of infants whose legitimacy was disputed, were made parties by the act of the High Court on a Petition addressed to it in the progress of the litigation. In disposing of this appeal, however, it is unnecessary, in their Lordships' view, to consider the cases made for or

* 12, Moore's I. A., p. 523; 2 B. L. R., P. C., p. 13.

against any of these parties. It will be sufficient for the purpose of their decision, to treat the suit as being in the nature of an ejectment brought by the Appellant against the Respondent, *Beerchunder Thakoor*, alone.

Maharajah Essanchunder, had one legitimate Son, *Brogendro Chunder*, who survived him. He was not made a Defendant in this suit. He died after its commencement at some early stage of its progress, but this event affects in no way the questions either of law or fact at issue in this suit.

After *Essanchunder's* death, *Beerchunder Thakoor* claimed and obtained the Throne. His claim was founded on an appointment of him as *Jobraj* by *Essanchunder* the deceased *Rajah*, who, it was alleged, had the day before his death, being the 16th *Srabun*, 1269, or the 31st of July, 1862, duly appointed *Beerchunder Thakoor*, *Jobraj*, his legitimate Son, *Brogendro Chunder*, *Burra Thakoor*, and an illegitimate Son, *Kurta*. The fact of this appointment was denied by the Plaintiff, who charged it to be false and fraudulently concocted between *Beharry Gosseen*, the family Priest, *Brojomohun Thakoor*, *Goorodoss Burdhun*, and *Bissonauth Goopto*, all Officers in considerable trust and employment under the deceased *Rajah*, and who are respectively the third, fourth, fifth, and sixth Defendants on the record.

Before the institution of the Plaintiff's suit, the second Defendant, *Chuckerdhuj*, filed a suit of a similar character with the present against *Beerchunder Thakoor* and others, and the present Plaintiff intervened in it as a Defendant. That suit and the present were treated as substantially involving the same questions, and were heard together; much of the evidence in this suit was taken in the other. The suit of the second Defendant, *Chuckerdhuj*, was dismissed by the Principal *Sudder Ameen* on the ground of his illegitimacy; he did not appeal from that decision, and his claim may, therefore, be treated as no longer in question.

It is not necessary to consider minutely the pleadings in the cause, or the issues settled between the parties. Their Lordships will only observe, in answer to an argument of Mr. *Field* upon these issues, that, in their judgment, they do not in any degree relieve the Appellant from the obligation which lay upon him as Plaintiff in a suit, in the nature of an ejectment, of recovering by the strength of his own title, and of showing not merely that the Defendant's title was bad, but, that failing that title he, the Plaintiff, was entitled to the possession of the lands in question.

The questions to be determined upon this appeal are simply these:—

First, had *Essanchunder Manicko* the power of appointing *Beerchunder Thakoor*, *Jobraj* in preference to the Appellant?

Second, did he in fact so appoint *Beerchunder Thakoor?*

Third, supposing there was no valid appointment of *Jobraj*, who was entitled to succeed to the *Raj* and the *zemindary* in question, or is now entitled thereto?

The two latter questions were decided in favour of the Appellant by the Principal *Sudder Ameen;* all three questions have been determined by the High Court in favour of the principal Respondent.

It is admitted, that the right of succession to both *Raj* and *zemindary* is governed not by the general law, but by *koolacher*, or family custom. This custom had been the subject of investigation, trial, and decision in the Courts of the East India Company in the early part of this century in the case of *Ramgunga Deo* v. *Doorgamunee Jobraj* as reported in 1 Sud. Dew. Adaw. Rep. 270, and also *Urjun Manic Thakoor* v. *Ramgunga Deo* (2 Sud. Dew. Adaw. Rep. 139,) and *Ranee Soomitra* v. *Ramgunga Manik* (3 Sud. Dew. Adw. Rep. 40.) These cases establish that, according to the custom, a reigning *Rajah* should name a *Jobraj* and *Burra Thakoor*, of whom the first succeeds to the Throne, and the latter to the office of *Jobraj*. Both parties to this appeal admit the custom so far. It is, however, contended by the Appellant, that if *Maharajah Essanchunder* appointed a *Jobraj*, he was bound to appoint him partly on account of an alleged promise or intention on the part of the former *Rajah*, *Kristo Kissore*, and partly on the ground that he was the oldest living member of the class out of

which, according to the family custom, a *Jobraj* could alone be selected. On the other hand, the Respondent insists, that the choice of the reigning *Rajah*, at least within a certain class, is absolutely free, and cannot be controlled by the wishes of a former *Rajah*, had any such in fact been expressed in favour of the Appellant.

On the argument of this appeal before their Lordships, the Appellant's preferential title by seniority to the *Jobrajship* was sought to be established by evidence of a family custom to be collected from the instances given in the genealogy of actual successions. But where there is evidence of a power of selection the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes the right of free choice, and had the instances been uniform and without exception, that alone would not have been sufficient to support the Appellant's case. Such uniformity of practice was, however, not proved, for several instances appear of infants appointed to the office of *Jobraj*, whilst relatives within the custom, and older in years, were living. This evidence, therefore, failed. Still it was open to the Appellant to contend, as he did, that, in default of any appointment to either office, seniority of age constituted a title by descent to this *Raj*; and to this latter branch of the argument insisted on by the learned Counsel for the Appellant, their Lordships will now direct their attention.

The question now to be considered is, whether, assuming no valid title to the office of *Jobraj* to have been conferred on the Respondent, *Beerchunder Thakoor*, the Appellant establishes a title by seniority. It is not denied that his title to succeed must be made out as legal heir to the last *Maharajah Essanchunder*. The Plaintiff is senior in years to *Beerchunder Thakoor*; he was the half-Brother of *Essanchunder*, and *Beerchunder Thakoor* is *Essanchunder's* Brother by the whole blood. By the general Hindoo law, *Beerchunder Thakoor* would be the heir to *Essanchunder Manicko*, in preference to his half-Brother, were it a disputed succession to divided property. The Counsel for the Appellant have however contended, that this preference of whole blood to half blood does not extend to a *Raj*, and to support this contention they relied on the rule which obtains in certain cases of undivided ancestral estate, when Brothers of the whole and half blood are on the same footing.

The rule on which they insisted is this, that in the case of a *Raj* or Kingdom, or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were joint estate, part of an undivided joint ancestral estate, and apply the law applicable to such an estate, with a view to the selection of the eldest from those who would be equal in degree as coparceners. This position was advanced in the High Court without success. The Court observed that no authority had been cited in its support, and treated the doctrine as novel and unknown to them. The argument has been strongly urged by Mr. *Bell*, and their Lordships will give their reasons for concurring in the opinion which was expressed by the High Court somewhat more fully than was done in that Court.

The normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship, and estate.

In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things. The family in which a title to a Kingdom exists in one member follows this general law but it follows it in part only, for the succession to a Kingdom is an exception to it from the very nature of the thing (see 1 *Strange's* "Hindu Law," p. 198 [2nd Ed.]), the family may have property distinct from that to which a sole heirship belongs, and may continue joint. Still when a *Raj* is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the Throne and the Royal lands is, as in this case, one and the same title; survivorship

cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir. In *Katama Natchear* v. *The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 610; *Ante*, p. 25), it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindoo law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice; and that of survivorship. Where the latter rule cannot apply, the former must be resorted to. Now, this rule of religious obligation and priority marks the Brother of the whole-blood as preferably heir in succession to the estate of his Brother, over the Brother of the half-blood only. The reason given is, that he offers more sacrifices, and benefits more the manes of the dead of his family; in their eyes a real substantial ground of preference. In nature, also, he is nearer, and, therefore, satisfies the description nearest of kin. Since, then, the custom in this family, where no appointment of *Jobraj* or *Burra Thakoor* has been made, requires the union of two things to constitute the legal heir, viz., seniority in age and nearness of kin (which in truth is in conformity with the general law of Royal descent), and the Claimant has but one of these qualifications in himself, viz. seniority; he does not entitle himself by the family custom. There is no trustworthy evidence that the custom supersedes the general rule as to the precedence of the whole over the half-blood. The custom is silent on that point. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom: on general principles, therefore, the Hindoo law must be resorted to in this case, and that does not favour the Appellant's claim; for unless where survivorship furnishes an exception, the whole-blood is preferred.

The decision of this question alone would justify the dismissal of this appeal; but their Lordships think it right to review also the decision of the High Court on the facts as to the appointment.

The facts stated by the *de facto Rajah* and deposed to by his witnesses on this part of the case, are few and simple. The fact that the *Rajah* had appointed a day and hour for the celebration of the ceremony of opening a new Hall, cannot be doubted. The disputed nomination of the *Jobraj* is said to have been made on that occasion, and during that ceremony the *Rajah* is stated to have directed the intended *Jobraj*, *Burra Thakoor*, and *Kurta* to bathe and come to his presence. Dresses had been prepared, it is said, by orders overnight to the bearer. The dresses were brought on silver dishes to the *Rajah's* presence; the *Jobraj*, *Burra Thakoor*, and *Kurta* were invested with their dresses, appeared, made their *salaams*, were verbally appointed, gave presents of gold *mohurs*, and, so appointed, received the customary *nuzzurs*.

This contest is in truth a contest as to the title to reign; a matter, rather, of State policy than one proper for judicial decision. Into such disputes, passions stronger than those which affect the minds of ordinary litigants may well be supposed to enter, and fear and favour may sway in an unusual degree the minds of those who depose on either side. The power of an absolute Prince over the fate of those who surround him may enable him to array a body of witnesses deposing to facts to which it may be difficult to offer any positive contradiction. The addition by false testimony of an incident or two, or of a few words, to an actual scene or ceremony, may, if credited, determine the title to a Throne; and it is scarcely possible to conceive a case more requiring than this does, the nicest scrutiny and examination of the evidence. The Defendant, *Beerchunder Thakoor*, is *de facto* Sovereign, and as such has been recognized by the Indian Government, the paramount arbiters in a case of disputed succession. The High Court has founded its judgment on the

positive testimony which was given in support of the appointment. The objections stated by the Court below to the testimony of the witnesses, twenty-one in number, are not that they are of a bad character, or that their manner and demeanour induced the Court to disbelieve them; but they are of such a nature as a Court of appeal might be well able to judge of without being under any inferiority to the Judge who tried the case. The exact agreement in the story, even to its details, by all the witnesses, the supposed difficulties as to the ready production of dresses and gold *mohurs*, the dependence of all the witnesses, more or less, on the *Rajah's* power and favour, the absence of all mention of the appointment in the early letters of the *Gooroo* to the Superintendent, the want of notification to the British authorities, and of invitations to the members of the family absent from the ceremony, though resident in the Palace, with the ignorance as to any such appointment stated by Ladies of the Palace of high rank, the want of the accustomed religious ceremony and non-observance of Regal State in the usual Throne-rooms,—these, with some minor objections, led the Judge below to discredit a story fully and consistently deposed to by witnesses of a class not ordinarily untrustworthy, nor to be lightly disbelieved. In addition to this, the *de facto Rajah* was considered to be throwing difficulties in the way of the Appellant, who desired to examine the *Gooroo* and some other witnesses; and the singular character of the answer of the latter, which avoided any recognition of the titles of *Jobraj* or *Thakoor*, or *Kurta*, augmented the matter of suspicion. Their Lordships are far from saying, that the objections urged with so much force by the Counsel for the Appellant are undeserving of a very serious and attentive consideration; they appear to have received such consideration in the High Court, and their Lordships, during the argument, and since, have carefully considered and weighed them. The probabilities, however, are, in their Lordships' opinion, strong in support of the fact of a nomination of the *de facto Rajah* by his deceased Brother to the office of *Jobraj*. An experience of Indian cases shows that few of them, however true, are free from admixture of exaggeration and invention; and it is not necessary to the affirmance of this judgment that their Lordships should believe entirely all the attendant circumstances detailed by the witnesses who support the nomination.

The *Rajah* was infirm in health; his state was evidently one calculated to inspire doubt and alarm; he had two years before declined to appoint to the offices of *Jobraj* and *Burra Thakoor*: he was supposed at that time to desire to be succeeded by his own Son; but from his reluctance to name him when he was of tender age, he may reasonably be supposed to have considered the appointment of an adult Sovereign the best for his Kingdom. When his own health was seriously impaired, it would become not only to him, but to those around him, a subject of anxious thought how the *Raj* should be preserved. The Appellant had an enemy in the *Gooroo*, who exercised great influence over the mind of the *Rajah*, and sickness and the near prospect of death would not diminish that influence. His Son was still young; the *Rajah* might naturally suppose him unable to compete with one who laid claim by right to the succession upon an alleged superior title. He might dread also the Appellant's influence over the Hill tribes, whether that influence were real or supposed, or the offspring of a jealous fear. The *Gooroo* might think it best to arrange matters with one *Thakoor*; and the appointment of the two Sons of the *Rajah*, one, though illegitimate, to the office of *Kurta*, gives an air of probability to the supposition that some arrangement may have preceded the actual celebration of the opening of the Hall, especially as some rumours of an intended appointment appear to have reached the ears of a witness who deposes on the side of the Appellant. Notwithstanding, therefore, the former reluctance of the *Rajah* to appoint either the Appellant or *Beershunder Thakoor*, the changed circumstances prevent the conclusion that his mind was still opposed to the appointment of one of them, his own Brother of the whole-blood, whom he might desire to associate with his Son, for the advantage of his Son, of himself, and

of the Kingdom. Nor is the concurrence of his spiritual adviser in this view, under the changed circumstances of the case, an improbable supposition.

The *Rajah* was not then in a state in which he was likely to resist any strong pressure upon him to make some appointment to secure the succession. Many feelings might exist in a weak and suspicious mind to explain the absence of the usual ceremonies, invitations, and notification. Fear of the Appellant, and of his influence; jealousy of the English Officials, and apprehensions, however groundless, of annexation to the British rule; doubts whether some delay or obstruction might be interposed, might induce his advisers to snatch at an opportunity offered by the approaching ceremonial to add the more important to the less important ceremony. Rival parties appear to have existed in the Palace. It seems little credible that a story of an act having been performed before a large audience which never took place should have been adopted by the conspirators in a fraudulent usurpation, as so much larger a scope for contradiction would thereby be given by such a mode of fabricating the story; and the falsehood of the alleged nomination would be needlessly exposed to many persons. It is still more improbable that the conspirators, without the slightest necessity, should be found so dangerously communicative of their conspiracy.

The utter worthlessness of this part of the Appellant's case lends considerable support to the Defendant's story: the *Gooroo* made no sign till he himself was dismissed or disgraced. And the reliance which the High Court justly placed on the early resistance by the new *Rajah* to this man, in whose power he would have been had they been common actors in this scheme of fraud, cannot be discarded in considering the weight of the whole body of evidence.

Though, according to the Appellant's story, the *Rajah* had placed his character, and, perhaps his power and Throne, at the mercy of the *Gooroo*, he, before the litigation had ended, appointed another Agent, and deposed the *Gooroo* from power. Can it be supposed that if the plot was really planned, no thought of it had occurred to the Respondent, *Beerchunder Thakoor*, until many hours after the *Rajah's* death. A moment of time would have sufficed to give rise to the thought that the Throne might be reached by contrivance, and yet the evidence discloses this man as at once weak, timid, and needlessly communicative, crying and exclaiming that the *Raj* was ruined, and then entering into an inner chamber to concoct a fraud, which some of the conspirators seem immediately eager to reveal. The evidence for the Appellant on this part of the case is inconsistent. One witness stated that the *Gooroo* told him of the nomination in the afternoon between the hours of three and four of the 17th *Srabun;* whilst the others, speaking of a much later hour of the same day, tell their story of the distress manifested by the *Gooroo* and *Beerchunder Thakoor* because no nomination had been made.

One Letter which is treated as a forgery by the High Court, and in defence of which no argument has been advanced before their Lordships, is ascribed to *Beerchunder Thakoor*, who is represented by it as informing the Government that he has no hopes of the *Raj* but from their mercy, whilst at this very time he must reasonably be presumed, if guilty, to have formed the design to usurp the Throne. The family took sides in this dispute, part siding with the Appellant and part with the *de facto Rajah*. The Ladies in the recesses of the Palace might well know nothing of their own knowledge of what actually took place at the ceremony in the Hall. The story they repeat may have been so represented to them; but this kind of evidence is negative against positive testimony. It is so regarded, and rightly, in the judgment of the High Court. The Mother of the legitimate Son of the deceased *Rajah* supports the appointment, and so do the mothers of the two illegitimate Sons. To the argument that they are swayed on the side of the *Rajah* may be opposed the argument, that in these contests of factions in a native Palace, little of unbiased testimony can be looked for. The Appellant seems not to have wanted friends and supporters there, and even *Chuckerdhuj* found support in simi-

lar quarters in favour of his groundless claim.

On the subject of the obstruction offered to the Appellant's procurement of evidence, the Respondent may have feigned a fear of the Appellant's measures at his Capital, in order to oppose his being present at the examination of the named witnesses; but, on the other hand, it is idle to suppose that no one but the Appellant himself could have been found to ascertain the identity of the Ladies whom he wished to examine. The Respondent may have feared not the true testimony of the *Gooroo*, but the effect of a fabricated story on the mind of a Court. Amidst all this mass of conflicting probabilities impeaching or supporting the disputed nominations, the High Court proceeded on positive testimony, weighty enough to decide the issue, if not successfully impeached. Unless native testimony is to be thrown aside entirely, and decisions are to pass on conjecture or suspicion instead of evidence, their Lordships think the High Court did not err in coming to a conclusion that the positive testimony must prevail in this case.

The High Court were able to judge of the sufficiency of the reasons alleged by the *Sudder Ameen* for discrediting so numerous a body of respectable witnesses. They, it should be remembered, had been the trusted Officers of the deceased *Rajah*, and were continued by *Beerchunder Thakoor* in the same posts and at the same salaries. From whom but the servants, officers, friends and members of the family of the deceased *Rajah* could his successor be expected to derive his evidence? These would be the persons most likely to be present at the ceremony of the opening of the Hall: and the objection that all were subject to the will of the *Rajah* can at most be but an argument, and not a conclusive one, for discrediting such testimony. The case is barren of any opposing evidence of persons of equal value who were present in the Hall, and who state that they saw nothing of the alleged ceremony of nomination. Again, the concurrence of testimony of many intelligent witnesses, without circumstantial variety, where the facts are very few and simple, and all would be naturally attentive observers of the scene, furnishes no ground for suspicion; and if the evidence showed some sign of drilling or tutoring in the mode of narration, that, however improper, would not constitute a sufficient reason for discrediting evidence of many trustworthy witnesses, since the evidence of witnesses to a true story is too often subject in native Courts to such a kind of manipulation.

The reasons assigned, therefore, by the Judges of the High Court for differing from the Court below, and believing the evidence which the Lower Court rejected, appear to their Lordships to be satisfactory, and they think that the Appellant has not succeeded in showing that the appointment insisted on by the *de facto Rajah* did not in truth take place. For these reasons their Lordships must humbly advise Her Majesty, that the decree of the High Court of Judicature at *Fort William* ought to be affirmed, and this appeal dismissed with costs.

10th March, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the Admiralty Court), the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Agra, North-Western Provinces.

RAE MANICK CHUND,* ... *Appellant*,

versus

MADHORAM and others, ... *Respondents*.

Land separated from Estate by a change in course of a River—Reg. XI. of 1825, s. 4, cl. 2—Immemorial Custom.

When a party has proved that land which formed part of his estate has by a sudden change in the course of the river been separated, he is entitled to

* 13, Moore's I. A., p. 1; 3 B. L. R., P. C., p. 5.

recover such land under clause 2, section 4, Regulation XI. of 1825.

When a party claims such land upon the ground of immemorial custom, he must prove such custom.

The *Canoongos* papers are not sufficient evidence to prove immemorial custom.

The proceedings shewing that such custom obtains on the banks of the river, will be no evidence to prove that it obtains on the banks of another.

At the conclusion of the Appellant's argument judgment was pronounced by

The Right Hon. Sir James William Colvile:

Their Lordships are of opinion, that the only arguable question upon this appeal is, whether it has been established, within the meaning of the 2nd section of Reg. XI. of 1825,(*a*) that there is an immemorial custom by virtue of which the River *Ganges* at the point in question is taken to be the boundary between the estates on either bank, so that alluvial land, like that in question, belongs to one or other of those estates according to the actual course of the River?

If that custom is not established, their Lordships are perfectly satisfied that the Appellant had succeeded in the Court below in establishing every circumstance which was necessary to bring his case within the 2nd clause of the 4th section of the same Regulation;—that he had shown that the land was separated from his estate by a sudden change in the course of the River, and had clearly identified it as cultivated land which had formed a portion of his estate.

Upon the question of immemorial custom, he had the judgment of the *Zillah* Court in his favour. The learned Judges of the *Sudder* Court have reversed that judgment, on the ground, that they thought there was sufficient evidence of the custom to warrant them in so doing. That is not their Lordships' opinion.

The reasons assigned by the learned Judges do not support their conclusion.

They rely principally on the Letter of the Collector, Mr. *Morris*, which was

(*a*) The following are the principal clauses in this Regulation affecting the question at issue:—

Sect. II. "Whenever any clear and definite usage of *Shekust paywust*, respecting the disjunction and junction of land, by the encroachment or recess of a River, may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estates, divided by a River (such as that the main channel of the River dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the River, by encroachment on one side, and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land, between the parties whose estates may be liable to such usage."

Sect. IV. cl. 1. "When land may be gained by gradual accession, whether from the recess of a River, or of the Sea, it shall be considered an increment to the tenure of the person whose land or estate it is thus annexed, whether such land or estate be held immediately from Government, by a *Zemindar*, or other superior Landholder, or as a subordinate tenure, by any description whatever. Provided that the increment of the land thus obtained shall not entitle the person in possession of the estate or tenure, to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood, to exempt the holder of it from the payment to Government of any assessment for the public revenue, to which it may be liable under the provisions of Reg. II., 1819, or of any other Regulation in force."

Cl. 2. "The above rule shall not be considered applicable to cases in which a River by a sudden change of its course may break through and intersect an estate, without any gradual encroachment, or may by the violence of stream separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity, and preventing the recognition of the land so removed. In such cases the land, on being clearly recognized, shall remain the property of its original owner."

Cl. 3. "When a *chur* or Island may be thrown up on a large navigable River (the bed of which is not the property of an individual,) or in the Sea, and the channel of the River, or Sea, between such Island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government."

written in an early stage of the proceedings mentioned in the record to the *Sudder* Board of Revenue; but it seems to their Lordships, that they have put an entirely erroneous interpretation upon that Letter. That Letter, as their Lordships read it, amounts to this,—That the main stream of the *Ganges* had hitherto been held to constitute the boundary of the two *Pergunnahs* for Police and fiscal purposes; and that if that rule were to determine the proprietary right to alluvial land, it would no doubt follow that the land in question belonged to the *zemindary* on the southern side of the River. But the Collector went on to state his opinion, and to give reasons for that opinion, that the question of proprietary right was not to be determined upon that principle. Therefore, the Judges of the *Sudder* Court seems to have been in error in treating the opinion of the Revenue Officer so given as an argument for coming to the conclusion to which they arrived. And it may be further observed that the *Sudder* Board of Revenue, the authority to which the Collector's Letter was addressed, does not appear to have taken that view.

Then as to the other evidence upon which the Judges of the *Sudder* Court rely, it seems to their Lordships to be far from sufficient to justify the conclusion that an immemorial custom had been proved. The *Canoongoe's* evidence, which has been chiefly relied upon, is clearly too slight for that purpose. The proceeding with reference to the *Gogra*, which is set forth in the record, if it amounts to a decision that such a custom as that which is now set up obtains on the banks of that River, affords no evidence that a similar custom exists on the banks of the *Ganges* where it forms the boundary between the *Pergunnahs*, *Jhoosi* and *Chail*. The language of the Regulation implies that the custom to be proved is a local custom.

Upon the whole, then, their Lordships are of opinion, that in holding that the custom was established, the Court below was wrong.

The only further question for their Lordships to consider is, whether they should reverse the decree under appeal, and affirm the decree of the Court of first instance, or whether they should remit the case, as the Judges of the *Sudder* Court seem at one time to have thought of remitting it, for a new trial? It appears that the parties were fully informed what issue they had to prove; they should have come prepared with evidence to prove, if it was capable of proof; and they have failed to do so.

Their Lordships think, therefore, they ought to take the first of the before-mentioned courses, viz. reverse the judgment of the Court of appeal, and affirm the judgment of the *Zillah* Court.

Considering, however, that the case of the Respondents may have failed from mere defect of proof, and that similar cases may arise between other parties in the neighbourhood of this locality, their Lordships are desirous to state, by way of caution, that this judgment should not be quoted in any future case between other parties as a conclusive decision of this Court of appeal, to the effect, that no such custom as that which has been here alleged exists. All they intend to decide is, that it lay on the Respondents to prove the custom which it was essential to their title to prove, and that, as they have failed to do so, the title of the Appellant must prevail.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the late *Sudder Dewanny Adawlut* at *Agra*; to order that, in lieu thereof, a decree be made dismissing the appeal to that Court from the decree of the *Zillah* Court of the 27th of July, 1864, with costs. And the Respondents must also pay the costs of this appeal.

12th March, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore.

Assessor,—The Right Hon. Sir Lawrence Peel.

KALEEPERSHAD TEWARREE,* *Appellant*,

versus

LALLA BINDA LALL, ... *Respondent*.

A *Zur-i-peshgi* deed the validity of which forms a subject of dispute of the present appeal, was, in a prior case, set aside by the H. C., but was found to be a valid instrument, on appeal from that decision, by the Judicial Committee; and the case out of which this appeal arose involved the same question and turned upon the decision of the Judicial Committee in the former case. In the circumstances the decision of the H. C., throwing aside the *Zur-i-peshgi* deed, on preliminary grounds, was reversed, and the cause remitted to the H. C., with a declaration that the document was valid, and a direction to the H. C. to dismiss the appeal from the *Zillah* Judge to the H. C. with costs, in case the Respondent should fail to appear in the H. C., but if he appear to hear and determine the appeal on merits.

As for costs it was ordered that in the event of the appeal being decided against the Respondent the Appellant's costs of appeal to *England* should be borne and the costs (if any) paid under the decree of the H. C. repaid by the Respondent.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

THE only question is, whether their Lordships can decide this appeal without remitting it back to the Court below, as the case substantially involves the same question, and turns on the decision of their Lordships just pronounced in the case of *Kaleepershad Tewarree* v. *Rajah Sahib Perhlad Sein* (*Ante*, pp. 429 & 450.) Can their Lordships decide the case in its present form on its merits? If we are not in a condition to try the question, the appeal must either stand over or be remitted, or we can recommend Her Majesty, that the decree appealed from be reversed, subject to notice being given to the Respondent in *India*.

Minutes were then agreed to, which are embodied in the following Order in Council:—

"It is hereby ordered, that the decree of the High Court of Judicature, at *Fort William*, in *Bengal*, of the 21st of May, 1863, be reversed, and the cause remitted to the High Court, with a declaration, that the *Zur-i-peshgi* deed, alleged to have been granted by the *Rajah* of *Ramnuggur* to the Appellant and his Brother, is a valid instrument, and the High Court is hereby directed, in case the Respondent does not appear within a reasonable time to be fixed by the High Court, to dismiss his appeal from the *Zillah* Judge of *Sarun* to the High Court, with costs, and if the Respondent does so appear, then the High Court is to hear and determine that appeal on its merits, and in case the Respondent shall fail to appear in the High Court, or in case the appeal shall be decided against him, then the Appellant's costs of this appeal are to be paid by the Respondent, and the costs (if any) paid under the decree of the High Court of the 21st of May, 1863, are to be repaid."

15th March, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bombay.

THE BANK OF HINDUSTAN, CHINA AND JAPAN, LIMITED, IN LIQUIDATION,* ... *Appellants*,

versus

THE EASTERN FINANCIAL ASSOCIATION, LIMITED, IN LIQUIDATON, ... *Respondents*.

Indian Companies' Act X. of 1866, s. 174 —Power of Liquidators to compromise under sanction of the Court.

Under section 174 of the Indian Companies' Act, the Court has power to sanction compromises of

* 12, Moore's I. A., p. 343.

* 13, Moore's I. A., p. 15; 3 B. L. R., P. C., p. 8.

calls, debts, and liabilities, before the list of Contributors has been settled or the competence of the Shareholders has been ascertained.

The Privy Council will be reluctant to interfere with the discretion of Courts having jurisdiction to sanction a compromise by the liquidators of a Company winding-up under section 174 of the Indian Companies' Act, where all the facts have been placed before the Court in *India*, and there is no reason to suppose that the proceedings for a compromise have been tainted with fraud.

Ex parte Totty distinguished (1).

THE RIGHT HON. THE LORD JUSTICE SELWYN:

IN this case their Lordships must assume the validity of the Order of the 26th of July, 1866, against which no appeal has been presented, and by which the Eastern Financial Association has been ordered to be wound up. This Order is the foundation of the proceedings, and assuming its validity, there are two questions raised by the present appeal; first, whether the compromise which was sanctioned by the Order of the 26th of June, 1867, was one which the Court was competent to sanction; and secondly, whether the Court, assuming it to have the power, ought to have exercised that power under the circumstances of this case.

The words of the 174th section of the Indian Act are, "That the Liquidators may, with the sanction of the Court, where a Company is being wound up by the Court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, subsisting or supposed to subsist between the Company and any Contributory or alleged Contributory, or other Debtor or person apprehending liability to the Company; and all questions in any way relating to or affecting the assets of the Company, or the winding-up of the Company generally; and on such terms as may be agreed upon, with power for the Liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharge in respect to all or any of such calls, debts, or liabilities." These words are very wide and general, and they are similar to those contained in section 160 of the English Winding-up Act of 1862. It may be conjectured, that the great amount of costs and expenses incurred in the winding-up of these Companies induced the Legislature to increase the powers of the Court with respect to compromises, in order to the diminishing of the amount of those costs. The words which are to be found in this section, especially the words "liabilities to calls, debts, and liabilities capable of resulting in debts, subsisting or supposed to subsist," and the words "alleged contributory," plainly show that the compromises intended to be sanctioned might be entered into before the list of Contributories had been settled, or the liabilities or competence of the Shareholders had been ascertained. It appears to their Lordships that the compromise in question is a compromise with Contributories or alleged Contributories, and consequently that it is a compromise within the words of the section in question.

The authority of the case of *Ex parte Totty (a)* has been much pressed upon the consideration of their Lordships, but the real ground of the decision in that case is explained in the marginal note of the case, which states that "A Company was being wound up compulsorily, after an abortive attempt had been made to wind it up voluntarily, and the Official Liquidators agreed with thirty-five Shareholders to compromise their liabilities for a fixed sum, those Shareholders insisting as a condition that the *data* upon which the compromise was founded should not be divulged. The compromise was sworn to be founded upon details of property and circumstances, which if made known would operate detrimentally to the thirty-five Shareholders and to the interests of the Company. The Official Liquidators applied to the Court to sanction the compromise under that condition, in pursuance of the 19th section of 21st and 22nd *Vict.* c. 60, some of the Creditors opposed on the ground of the *data* not being stated, and the application was refused, with costs." And on appeal the decision was affirmed. But in that case, there was no question as to the liability of the thirty-five Shareholders; the question was as to the amount which was

(1) D. & S., 273; S. C. 6 Jur., N. S., 819.

(a) 29 L. J. (Ch.) (N. S.), 702.

likely to be recovered from those thirty-five Shareholders, and that, of course, was the question which the Court had to decide when it came to consider, whether such a compromise was advisable or not; and the grounds upon which that question was to be determined were, from the very terms of the compromise itself, to be kept secret. The mere statement of these facts is sufficient to distinguish that case from the present, in which there are two very different questions; first, whether these persons who are alleged to be Contributories are Contributories at all? and secondly, whether, assuming them to be fixed upon the list of Contributories, they would be able to pay any, and if any, what proportion of the amount of the calls which might be made upon them?

Now, the first of these questions, viz., whether they are Contributories at all, depends very much upon the time which is to be fixed for the commencement of this winding-up. That is a most material point, upon which the ultimate determination of the question, as to who are the persons liable to be fixed upon the list as Contributories would depend. All the facts relating to that point are apparent upon the affidavits and upon the Orders of the Court itself; for in truth it mainly depends upon the effect which is to be given to the very singular Orders which appear to have been made for the winding-up of this Company; there having been a winding-up order in the first instance, then a proceeding in the nature of a voluntary winding-up, then a discharge of the former Orders, and then ultimately the Order of the 26th of July, 1866, which is the foundation of the present proceedings. Now, all these matters were perfectly patent to the Court, and to all the Shareholders; and they gave arise to the doubt which existed as to the date at which the winding-up of this Company ought to be considered as commencing.

So also with respect to the competency of the Shareholders. The Judges had before them, on the evidence in this case, and from their knowledge of the then state of circumstances existing at *Bombay*, reason to doubt whether the persons who were on the list of Contributories, as alleged Contributories, would be able to pay any considerable sum, supposing they were ultimately fixed upon the list. In the present case, therefore, there was no agreement for secrecy, there was no object in secrecy, there was no attempt at secrecy; everything was brought fairly before the attention of the Court; and consequently, in the opinion of their Lordships, the case of *Ex parte Totty* (a) cannot be considered an authority inconsistent with the decision at which the Indian Court has arrived.

That brings us, then, to the consideration of the second question, viz., whether, assuming that the Court had power to sanction such a compromise, that power was properly exercised in the present case.

Now, the power is, as has already been said, one of so wide and extensive a character, that it is doubtless one which ought to be exercised with very great caution; but, on the other hand, in accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in *India* when two Courts there had arrived at the same conclusion in such a case as this, unless it could be shown that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought, and in this case that discretion appears to have been exercised with very great caution. The fact of the opposition of the present Appellants to the proposed compromise was stated to the Court in the affidavit which was filed on the part of the Official Liquidators. All the Creditors had due notice of the intention to bring this question before the Court, and the Appellants themselves were heard by Counsel in opposition to the Order which was proposed to be made for sanctioning the compromise. It appears upon the evidence that all the Creditors in *Bombay*, that is, all the Creditors who had the best means of forming a judgment upon the question, —at all events, upon the second of the two

(a) 29 L.J. (Ch.) (N. S.), 702.

questions, viz., the competency of the Shareholders, assuming them to be fixed upon the list,—all of these Creditors assented to the terms of the compromise. From the first there were only three Opponents, and of these, the present Appellants, who are themselves a Company under Liquidation, alone appear here before their Lordships; and it is stated in the affidavit, and not denied, that the persons concerned in the management of the affairs of this Appellant Company, now under liquidation, had sent out orders to *Bombay* not to accede to any compromise whatever. In addition to this, Mr. *Hamilton*, one of the Official Liquidators, states in his affidavit that he, after the retirement of another Liquidator, considered himself as bound to act, and that, in point of fact, he did act, as protector of the interests of the Creditors. He says, that he has given careful consideration to all the circumstances of the case so far as they bear upon the question of the advisability of this compromise, and that in his judgment there is no doubt, that it is one which is very advisable, having regard to the interests of the Creditors. He says, that all the Books of account had been from the first open to the inspection of the Creditors, and that some of the principal Creditors have, in fact, for a considerable time retained possession of some of the Books and accounts, or copies of them. No question has been raised as to the *bonâ fides* of all or any part of the proceedings which are now before us; all the material circumstances of the case were brought at the time to the attention of the Court, and were matters in respect of which the High Court of *Bombay* was much more competent to arrive at a satisfactory conclusion than this Board can possibly be.

As, therefore, their Lordships have, in the first place, no doubt as to the jurisdiction of the High Court to make the Order in question, and in the second, as they see no ground for controlling the discretion which that Court has exercised in accordance with the wishes of the great bulk of the Creditors, their Lordships will feel it their duty humbly to advise Her Majesty that the Order of the High Court of Judicature at *Bombay* ought to be affirmed, and this appeal dismissed with costs (*a*).

23rd and 24th June, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore, (Judge of the Admiralty Court), and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

GOPEEKISHEN GOSHAMEE,* *Appellant*,

versus

BRINDABUNCHUNDER SIRCAR CHOWDHRY, SREESCHUNDER SIRCAR CHOWDHRY AND GUNGAPERSHAD GOSHAMEE, ... } *Respondents.*

Limitation—Reg. III. of 1793, s. 14.

Where a Plaintiff sued for a debt due under a *Karanamah*, held, that, in order to bring the case within the exception in the law of Limitation, it was sufficient to show, by clear and positive proof, that, within the period prescribed, he had asserted his right to his claim under the *Karanamah*, and that the Defendant admitted this claim to be as of right. It was not necessary that a precise sum should have been mentioned by either party, or that a promise to pay should have been made by the Defendant.

12th July, 1869.

JUDGMENT having been reserved, was now delivered by

THE RIGHT HON. SIR JOSEPH NAPIER:

The material questions in this case are, first, whether the *Karanamah* on which the suit is based was executed for the consideration, and by and to the parties alleged in the plaint; and secondly, whether the Complainant has brought his case within the exception in the old law of limitation, *Ben.* Reg. III. of 1793, sec-

(*a*) See *In re Commercial Bank Corporation of India and the East*, Law Rep. 8. Eq. 241, where a similar Order was made.

* 13, Moore's I. A., p. 37; 3 B. L. R., P. C., p. 37.

tion 14, which prohibits the hearing and determining the merits, if the cause of action shall have arisen twelve years before the commencement of the suit, "unless the Complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money," &c.

In addition to the reasons set forth in the judgment of Mr. Justice *Bayley*, in support of his opinion, that the *Karanamah* was executed, as alleged in the plaint, their Lordships think it proper to observe, that no evidence has been offered, in order to disprove the hand-writing of the parties by whom the *Karanamah* purports to have been executed, or of the attesting witnesses thereto. Instead of giving or producing any such evidence, the principal Defendant has confined himself to the surmises and arguments of his Pleader in his answer to the plaint.

Their Lordships are of opinion, that the first question should be answered in the affirmative. Taking it then as established by the evidence that the *Karanamah* was executed by the principal Defendant and his Father as alleged, it is next to be considered, whether the defence of the law of limitation has been met by proof of demand and admission, sufficient to bring the case within the exception in this law.

The action, though in form a claim of the entire sum secured to the Plaintiff and his Brother (*Gungapershad Goshamee*) by the *Karanamah*, with interest thereon, is in effect, for the Plaintiff's moiety. *Gungapershad Goshamee* does not make any claim on his own behalf for the other moiety; he refused to join as co-Plaintiff, and was made a Defendant *pro formâ*, for the reasons alleged in the plaint, but he has not filed any answer thereto. He was, however, examined as a witness.

It is clear upon his evidence that, between the years 1847 and 1857, he received from the principal Defendant upwards of Rs. 12,500 on account of a larger claim; and he does not bring forward evidence of any claim which he then had against this Defendant, other than for his share of the debt which was secured by the *Karanamah* to himself and his Brother jointly. These payments were made after the death of the Father of the principal Defendant, who, with the principal Defendant, had executed the *Karanamah*. There is adequate proof that after these payments were made to *Gungapershad Goshamee*, the principal Defendant tried to induce the Plaintiff to settle the claim for his moiety upon terms such as those which *Gungapershad Goshamee* was alleged to have accepted, but that the Plaintiff insisted on payment in full.

Their Lordships are satisfied upon the evidence, that the payments made to *Gungapershad Goshamee* were, on account of his moiety of the joint claim, under the *Karanamah*; and that the offers made to the Plaintiff related to his claim to the other moiety. No other claim is proved, or could be presumed, to which these payments and offers were appropriated. *Manderston* v. *Robertson* (4 Man. & Ry., 440).

These offers were made not to buy off vexatious or doubtful litigation, but to settle a claim secured by an obligation, which fixed its amount.

Their Lordships consider, that upon the true construction of the law of limitation applicable to this case, and in order to bring the case within the exception, it was sufficient for the Plaintiff to show, by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the *Karanamah*, and that the Defendant admitted this claim to be as of right. It was not necessary that a precise sum should have been mentioned by either party; or that a promise to pay should have been made by the Defendant.

"Clear and positive proof" is such as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which it establishes to a moral certainty; and it is by the combined effect of the whole evidence that we have to judge, whether the proof is "clear and positive."

It was contended, that there is no proof that a demand of the amount of the debt in dispute was specifically made by the Plaintiff; or that the Defendant admitted the truth of such a demand, or promised

to pay it: that as to the admissions of indebtedness, there is some doubt, whether any of them were made to the Plaintiff himself; and that there was not any which amounted to a promise to pay the debt due under the *Karanamah*, or to an acknowledgment of any specific sum; that they were but attempts at a compromise, which failed.

The authorities which have been mainly relied on, in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case, were cases of actions on promises, decided on the Statutes of the 21st *Jac.* I., and the 9th *Geo.* IV. c. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the Statute, but upon the principles of the Common Law with respect to the cause of action. The issue joined, made it incumbent on the Plaintiff to prove a promise made within six years, and such as to agree with that laid in the declaration. In such cases, acknowledgments, whether by words or acts, are of no avail, save so far as they sustain the promise alleged; there is no exception within which they come; and these cases are to be regarded simply as actions brought on promises made within six years. But the cases in which acknowledgments are operative by way of exception, are of a different character. In these, the action must be maintained on the original security; and an acknowledgment within the prescribed period of limitation, shows that the obligation was then subsisting and unsatisfied; a promise to pay is not required.

It has, therefore, been decided that in an acknowledgment within the 3rd & 4th *Will.* IV. c. 27, sec. 40, it is not necessary that the amount of the debt should be specified, nor a promise made to pay it. *Carroll* v. *Darcy* (10 Ir. Eq. Rep. 329). It has also been held, that an admission of a Bond debt contained in the answer of the Executors of the Obligor, although in a suit to which the Obligee was not a party, was sufficient to take the case out of the operation of 3rd & 4th *Will.* IV. c. 42. *Moodie* v. *Bannister* (4 Drew., 432).

It is one thing to acknowledge a debt and another to promise to pay it, and this distinction is recognized by the terms of the law relied on by the Defendant. The decisions on the sufficiency of acknowledgments within the exceptions in recent Statutes of limitation, have (as Sir *Edward Sugden* has observed) "proceeded on a liberal but yet a fair and just construction of these Statutes." *Blair* v. *Nugent* (3 Jo. & Lat., 677).

Giving a like construction to the law of limitation that applies to the present case, their Lordships are satisfied, that all that is required to be shown to bring the case of the Plaintiff within the exception, has been shown sufficiently. If the conclusions at which they have arrived upon the material facts of the case needed confirmation, they are fortified by the omission of the principal Defendant to tender himself as a witness in support of his defence in a case, the circumstances of which were all within his own knowledge; and by the unsatisfactory character of the evidence given by *Gungapershad Goskamee*, who has kept back (evidently from hostility to the Appellant) the Books which he ought to have produced. Such a course suggests the natural inference, that the evidence which has not been produced, was felt to be adverse, and subjects the parties who take such a course, to the construction that is least favourable to the views and interests which they seek to support by imperfect or inferior evidence.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be allowed; that the judgment of the High Court at *Bengal* and the judgment affirmed thereby, should be reversed and set aside; and that the Appellant should have judgment for his moiety, with interest at the full legal rate and costs. He must also have the costs of this appeal.

24th and 25th June, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly (Master of the Rolls,) the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the Admiralty Court,) and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

RAJAH LEELANUND SINGH,* ... ... } *Appellant*,

versus

RAJAH MOHENDER-NARAIN, and RAJAH JYEMUNGUL SINGH, ... } *Respondents*.

Suit for the rectification of a boundary line by setting aside an award—Revenue Survey—Boundary question—Privy Council.

In a question of boundary the Judicial Committee, the Court of last resort, is extremely reluctant to reverse the judgment of an Indian Court, and will not do so, unless they are upon the facts and evidence, satisfied that the decision of the Court below was clearly wrong.

There is a strong presumption against a Plaintiff who seeks to set aside an Award made by Government Officers on a revenue survey, after full local inquiry, for the purpose of obtaining a rectification of the boundaries between two estates, and the *onus* of proof that the Award was wrong lies on the party impeaching it.

THIS was a boundary suit, instituted by the Appellant, the ower of *Pergunnah Singhol*, against the first Respondent, the Owner of *Pergunnah Ahsur Biscoond*, and the other Respondent, the Owner of *Pergunnah Ahsur Chundun*, and *Chundun Bhooka* and *Junkeepore*. The object of the suit was to obtain possession of 5,000 *beegahs* of chiefly Hill and Forest land, as appertaining to the Appellant's *zemindary*, with mesne profits.

The facts of the case, which entirely depended on the evidence of identification of certain parcels of adjoining lands of the two *Pergunnahs*, and the grounds of argument, are fully stated in their Lordships' judgment.

The appeal was argued by

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant, and by

Mr. *J. D. Bell*, for the Respondents.

10th December, 1869.

Their Lordships' judgment was reserved, and now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant is the present possessor of the large *zemindary* known as the *Kurruckpore Mehals*, which includes the whole of *Pergunnah Singhol*; and one of the *mouzahs* composing that *Pergunnah* is called *Kusbeh Budholee*. This *zemindary* formerly belonged to one *Rajah Kadir Ali*, from whom it descended, first to his Son, *Ikbul Ali Khan*, and afterwards to his Grandson, *Ruhmet Ali Khan*; but in 1842 it was sold for arrears of Government revenue, and was then purchased by *Rajah Bidanund Singh*, the Father of the Appellant.

Abutting upon *Pergunnah Singhol*, and on the west and south of it, is *Pergunnah Chundun Bhooka*. This includes the *mouzahs* of *Jankeepore*, *Ahsur Chand alias Kuchwa*, and *Ahsur Biscoond*. The two former of these form part of the *zemindary* of the Respondent, *Rajah Mohendernarain Singh*, who is the Son and successor of *Rajah Nirbye Singh*. The other village forms part of the *zemindary* of the other Respondent, *Rajah Jyemungul Singh*, who is the representative and successor of *Rajah Nawub Singh*.

The question in the suit is one of boundary between the two *Pergunnahs Singhol* and *Chundun Bhooka*, *i. e.*, whether the 5,000 *beegahs* which the Appellant, as Plaintiff, seeks to recover possession form part of *Kusbeh Budholee*, and, therefore, lie within the proper boundary line of *Pergunnah Singhol*; or whether they are included partly in the villages of *Jankee-*

* 13, Moore's I. A., p. 57.

pore and *Kuchwa*, and partly in that of *Biscoond*, and, therefore, lie within the proper boundary line of *Chundun Bhooka*.

From this statement, however, it follows that the portions of the disputed land which are held by the Respondents respectively may be so held by them by different titles; and that although the principal question of fact, viz., the true position of the boundary line between the two *Pergunnahs*, is common to both, the one may, in respect of long possession, be in a more favourable position than the other; and that that which may be evidence against the one may not be evidence against the other. And this being so, it is perhaps unfortunate that the Appellant's claims against the two Respondents should be litigated in one and the same suit. The suit is brought not only for the recovery of the lands in question, but, as a necessary step towards that object, to set aside certain Awards passed by the Officers employed to conduct the Revenue survey in this District, and to obtain a rectification of the boundary line as defined by them. The suit was brought within the period in which the law allows such Awards to be contested in a regular suit. But their Lordships need hardly observe, that the Plaintiff in such a case has to overcome the strong presumption which the decision of such a question as this by competent Officers after full local inquiry, made with the aid of a scientific survey of the locality, is calculated to raise against him.

It may be convenient, in the first place, to state shortly what is the effect of the survey proceedings which are impeached. The line laid down by the survey as the northern boundary of *Pergunnah Chundun Bhooka*, and the southern of *Pergunnah Singhol*, is not a River, but seems to be almost identical with the chain of Hills which on the Map of *Hoolas Roy* (A), which has been so much discussed in this case, are delineated as running east and west between the *Jorbarara* and the stream which he calls the *Punjhairee Khoord*. To these Hills we may give the name, which is applied to them in some of the proceedings, of "*Suhoodree*."

There was throughout the survey proceedings a dispute between the Appellant and the Respondent, *Mohendernarain Singh*, or *Nirbye Singh*, his Father, touching the possession of the lands sought to be recovered from the last-named Respondent. The earlier proceedings treated that portion of the land in dispute as falling within the *mouzahs* of *Pergunnah Chundun Bhooka*, which belong to *Mohendernarain*. Mr. *Brown*, the Deputy Collector, was dissatisfied with this finding as being inconsistent with *Hoolas'* Map A; he objected to *Brijbhookun's* Map B, and directed that there should be a further investigation, and a comparison of the Country with the Map A. He also proposed to go himself to the spot and decide the question of possession. He never did so; and the question was finally decided by Mr. *Quintin*, the Superintendent of Surveys, after local inquiry and investigation, in his proceeding of the 24th of December, 1847.

The case as to the lands sought to be recovered from the Respondent, *Jyemungul Singh*, is somewhat different. When the survey of these lands first took place, the Appellant raised no claim to them. The contest was between the Respondent, *Mohendernarain Singh*, saying that they belonged to his village of *Ahsur Chand alias Kuchwa*, and *Jyemungul Singh*, saying that they belonged to his village of *Biscoond*. The decision was in favour of the latter.

In the final proceeding of December, 1848, before Mr. *Ward*, also a Government Superintendent of Surveys, and two years after the commencement of the dispute between the Respondent, the Appellant did intervene as third party, and ineffectually claimed the lands as part of *Pergunnah Singhol*. But his omission to come forward before that time affords a strong presumption that he was, at the commencement of the survey, out of the possession of these lands, if he had ever been in it.

These survey Awards are founded on evidence of the actual possession. They are not, if questioned in time, conclusive on the question of title.

Their Lordships will now consider upon what evidence of title the Appellant seeks to impeach them.

The earliest piece of evidence is the pro-

ceeding of 1816, before a Mr. *Sutherland*, described as a Registrar of the Civil Court of *Monghyr*, who appears, under the law then in force, to have exercised a jurisdiction in questions of possession similar to that which is now exercised by the Magistrates under Act, No. IV. of 1840.

The complaint was brought by *Rajah Kadir Ali* against the Lessees of part of *Pergunnah Chundun Bhooka*, and seems to have been directed rather against encroachments upon wild and jungle land, for the purpose of collecting the Forest products, than against any actual occupation of cultivated soil. One *Rajah Juswunt Singh*, however, describing himself as the proprietor and *Zemindar* of *Pergunnah Chundun Bhooka*, intervened; and the question, what was the true boundary between the *Pergunnahs*, was thus raised between the two *Zemindars*.

Those stated by the *Zemindar* of *Singhol* were:—"To the west is *Geedha Ghaut* and *Churhee Khoord* (by which we understand a line drawn from *Geedha Ghaut* to *Churhee Khoord*), to the east is *Dabeedah*, and the north is a great Mountain, and south is *Punjhairee Khoord*."

The statement of *Juswunt Singh* was that the boundary of his lands extended "from the west of *Dabeedah* straight along as far as the *Soordhobee* and *Sunkareerekh* and *Sireekabutan*." It is not easy to identify all these names; but the conclusion to which their Lordships have come is, that this statement makes the southern boundary of *Singhol* that line of Hills above called *Suhoordree*, which is admitted by the Respondents to have been the dividing line as regards actual possession and enjoyment, and has been fixed as such boundary by the survey proceedings. If this be so, it follows that *Juswunt Singh* asserted no title to the land lying to the north of these Hills, and between them and the *Jorbarara;* and that he did not treat that stream, or any other stream, under the name of "*Punjhairee Khoord*," as the boundary between the two *Pergunnahs*. On the other hand, the issue thus raised between the parties seems to admit that the *Punjhairee Khoord* was to the south of that line of Hills; and that the controversy was about the lands claimed in the present suit, or part of them.

Mr. *Sutherland's* decision was in favour of *Kadir Ali*, and directed that the disputed land should remain in his possession according to the before-mentioned boundaries, until the decision should be rescinded by an action under Regulation X. of 1793. In 1817, one *Budhnarain* was sent by Mr. *Sutherland* to mark out the western boundary between the *Pergunnahs*, in accordance with the last-mentioned decision; and that, starting from *Geedha Ghaut* and proceeding southward to some point or another, he did place certain boundary pillars, is undisputed. His own statement, made on oath in January, 1830, is, that they extended southward as far as the *Punjhairee Khoord*, and that that stream is south of the *Punjhairee Kalan*.

Juswunt Singh and *Nirbye Singh*, who then first appear on the stage, declined to take any part in this demarcation, and intimated that they intended to dispute Mr. *Sutherland's* Order in a regular suit. No such suit was, however, brought.

It will be convenient here to inquire upon what parties this proceeding of 1816 was binding, and what lands did it cover?

It may be taken to have bound *Juswunt Singh*, who was a party to it, and those who claim through him. It may, therefore, be taken to have bound *Nirbye Singh*, and after him the Respondent, *Mohendernarain Singh*. But is it binding on *Jyemungul Singh*, or was it binding on his Father and predecessor, *Nuwab Singh?* That depends on the question how far either derived title from *Juswunt Singh;* and the evidence is unforfunately either very scanty or altogether silent on their connection with *Juswunt Singh*, and as to the time at which, and the manner in which, *Pergunnah Chundun Bhooka* became divided between two distinct *Zemindaries*. The Principal *Sudder Ameen*, in his judgment, speaks of *Juswunt Singh* as the "*Moories*" of the Defendants. And "*Moories*" is, we apprehend, the same word as "*Meeras*," which, in Professor *Wilson's* Dictionary, is defined to be the person through whom an inheritance is derived. On the other hand, the judgment of the *Sudder* Court speaks of the

proceeding of 1816 as made against the ancestor of one of the Defendants. Again, the Report of *Hoolas Roy* alludes to the proceedings on a partition between *Nirbye Singh* and *Nuwab Singh*, and speaks of *Juswunt Singh* as the elder Brother of both. *Chunderchain Singh*, a witness of *Jyemungul Singh*, also speaks of such a partition.

That the Respondents, therefore, held their respective portions of *Pergunnah Chundun Bhooka* under a title which, up to some date, is a common one, seems probable; but there is little, if any, direct evidence of the fact, and still less of the date at which the separation in title commenced.

There is no statement in the proceeding of 1816 of the specific quantity of the land then in dispute; and the complaint seems to have been of invasion on the part of the Tenants of *Juswunt Singh*, occupying lands to the west of the westward boundary. *Juswunt Singh*, however, claimed all the land which lay south of the line of Hills which he said was the southern boundary of *Singhol* and west of *Dabeedah* (which we take to be the range of Hills on the east of the now disputed land). The question was, whether south of the line of Hills the eastern boundary of *Pergunnah Chundun Bhooka* was the *Dabeedah* range, or a line prolonging the line from *Geedha Ghaut* to that line of Hills up to the *Punjhairee Khoord;* and the controversy so stated seems to embrace the whole of the land now in dispute.

The Respondent, *Jyemungul Singh*, whether bound or not by the proceedings of 1816, is certainly not bound by those from 1829 to 1832, in which *Hoolas Koy* and *Motu Roy* made their conflicting reports. These proceedings were occasioned by a dispute which arose between *Rajah Nirbye Singh* and the then *Zemindar* of *Singhol*, after the supposed partition between *Nirbye Singh* and *Nuwab Singh*, and were confined to that portion of the disputed land which is west of the *Punjhairee Kalan*. It did not, therefore, embrace the land which the Appellant now seeks to recover from the Respondent, *Jyemungul Singh*.

It was in these proceedings that, in order to get rid of the effect of the Order of 1816, *Nirbye Singh* first raised the point, that the *Punjhairee Khoord* mentioned in that proceeding, was identical with the stream marked in Map A as the *Jorbarara*. Neither the Respondent, *Jyemungul Singh*, nor his immediate ancestor, *Nuwab Singh*, was a party to that issue, nor is the former responsible for the inconsistency which it involves, in claiming a boundary inconsistent with the admitted possession. On the contrary, some of the witnesses produced by him in this suit speak of the southern boundary of *Pergunnah Singhol* as the line of Hills which has been assigned as such boundary by the Survey proceedings, and such was the boundary asserted by *Juswunt Singh*, in the proceeding of 1816.

We cannot find that *Jyemungul Singh* has in any way made the identity of the little *Punjhairee* and the *Jorbarara* a material question, unless it be by the 13th paragraph of his answer. And, in that, he seems merely to raise the question, whether *Budhnarain* had lain down the western boundary, or the dispute of 1816 had extended further to the south than the latter stream. He does not admit that the southern boundary of the *Singhol* is the little *Punjhairee*, whether north or south of the line of Hills. On the contrary, by paragraph 15, he distinctly asserts that the line of Hills is the true boundary.

If the case rested here, their Lordships, considering the scanty evidence afforded by the proceeding of 1816, would have felt that no sufficient ground had been laid for setting aside the survey proceedings against the Respondent, *Jyemungul Singh*, or even against *Mohendernarain Singh*. The real difficulty in the case has been occasioned by the way in which the cause has been conducted in the Courts of *India* by the Counsel for the parties, who seem in argument to have accepted as a fact, that the southern boundary of *Pergunnah Singhol* was a river called the *Punjhairee Khoord*, and to have disputed concerning the position of this stream, and the accuracy of the Map of *Hoolas Roy*. They probably took this course because they felt pressed by the effect of the proceeding of 1816. The Principal *Sudder Ameen's*

judgment proceeds almost entirely upon the preference which he gives to the Map of *Hoolas Roy* over that of *Brijbhookun*. But the Map of *Hoolas Roy* is really a document of very slight authority. He differed from the other Arbitrator who was appointed conjointly with him to settle that particular dispute; and no final Order was passed in that matter. His Map and report were before the revenue authorities when they made the survey and the survey Awards, and were ultimately disregarded by them. When this case came on appeal before the *Sudder Dewanny Adawlut*, the Judges of that Court observed, as their Lordships think with great justice, that they were bound to treat the survey proceedings as correct, so far as the appearance of the Country is recorded therein, and failing to find in the survey map any stream which corresponded with the stream set down in *Hoolas*' Map, they rejected that Map, reversed the Principal *Sudder Ameen's* decision, and dismissed the Appellant's suit. Afterwards, on a suggestion that there was in the survey Map a stream which might correspond with the *Punjhairee Khoord* of *Hoolas*' Map, they granted a review, and directed a further local investigation into the existence of this stream by an *Ameen*. The *Ameen* made a report, in which he describes an intermittent stream, dry in some places, flowing in others, which he traced in the *Jungle*. The Judges of the *Sudder Dewanny Adawlut* upon this report adhered to their former judgment, dismissing the suit. When the appeal was heard here we had not before us their reasons for this conclusion, and we caused a communication to be made to *India*, of which the result is, that the final judgment of Mr. *Raikes* is now before us. That Judge, with better means of forming a judgment on such a point than their Lordships have on the materials before them, came to the conclusion that the stream described by the *Ameen* did not correspond with the *Punjhairee Khoord* laid down in *Hoolas*' Map; or with the description given by the Appellant's *Vakeels* of the alleged boundary of his *zemindary*. Their Lordships, after full consideration of the case, are not prepared to say that that conclusion is erroneous. They must observe that, upon a boundary question they would be extremely reluctant to reverse the judgment of an Indian Court, unless they were clearly satisfied that it was wrong. If it had been shown that there was a well-defined stream corresponding, or nearly corresponding with that laid down in *Hoolas*' Map, they might have felt that, considering the proceedings of 1816 and the way in which the parties have conducted their case, the survey Awards ought to be reversed. But as the evidence stands, they feel that the position, course, and very existence of the *Punjhairee Khoord* are left in such uncertainty, that if the boundary laid down by the survey proceedings were altered, it would be impossible, with any certainty, to fix the boundary to be substituted for it. And, in these circumstances, they must humbly recommend to Her Majesty, that the decree under appeal be affirmed, and this appeal be dismissed with costs.

28th June, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Recorder of Moulmein.

AGA SYED ABDOOL HOOSAIN,* *Appellant*,

versus

ADAM LENAINE AND RICHARD SNADDEN, ... } *Respondents.*

Contract—Action—Sale pendente lite—Tort—Trover—Parties—Res judicata—Act, No. XXIII. of 1861, sec. 2—Miscarriage.

The Appellant having obtained a decree against one *Lenaine* alone, its effect, being, simply to direct the restitution by *Lenaine* of 95 logs of timber

* 13, Moore's I. A., p. 69.

claimed by the Appellant. *Held*, that, section 2 of Act XXIII. of 1861, was no bar to a regular suit, in the nature of an action of trover, whereby damages were claimed, to the extent of Rupees 23,304-6-4, including interest from the time admitted as the date when one *Snadden* obtained the 95 logs of timber, brought by the Appellant, not only against *Lenaine*, but also against *Snadden*, who was a purchaser of the timber from *Lenaine*, and who was no party to the original suit, no party to the original decree, and in no way bound by it; the object of the second suit, being not restitution of the 95 logs, and therefore not an execution of the decree at all; but, its object being to recover damages for a tort alleged to have been done by both *Lenaine* and *Snadden*.

THE RIGHT HON. THE LORD JUSTICE GIFFARD:

THEIR Lordships in this case are of opinion, that the Court below has proceeded on a misapprehension of the effect of the 2nd section of the Act, No. XXIII. of 1861, on which the judgment of that Court appears to have been founded.

That section is in these terms (His Lordship read the section 2 of the Act, No. XXIII. of 1861, and proceeded):—The decree in this case on which the judgment in the Court below was founded, is in these terms:—"The Court Orders and decrees that the decision in this case, dated 1st of May, 1861, be revised, and decrees to the Appellant, *Aga Yacoob Ally*, the ninety-five Logs of Timber claimed by the Respondent, *Lenaine*, in the original suits, together with his own (*Aga Yacoob Ally*, Appellant's) costs and fees in all three Courts."

That decree is against *Lenaine* alone, and its effect is, in point of fact, simply to direct restitution by him of the particular 95 Logs of Timber.

The present suit is not only against *Lenaine*, but also against *Snadden*, who was the Purchaser from *Lenaine*, and who was no party to the original suit, no party to the original decree, and not in any sense bound by it. The object of this suit is not restitution of the 95 Logs, therefore, not an execution of the decree at all; but its object is to recover damages for a tort alleged to have been done both by *Lenaine* and *Snadden*.

That being so, their Lordships are clearly of opinion, that the 2nd section has no application to such a case. It has no application as against *Snadden*, because *Snadden* was no party to the original suit. It has no application further, because it cannot be said that proceeding for a tort is any method of executing this decree.

Their Lordships do not think it necessary for them in the present state of these proceedings to go further than this. Of course, when the matter goes back, every ground of defence, excepting this particular one, will be open to the parties; but their Lordships are clearly of opinion, that there has been a miscarriage in this respect, and, therefore, the decree of the Court below must be reversed and discharged, and the Appellant must have his costs of the appeal, and so their Lordships will advise Her Majesty.

28th June, 1869.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor.—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of North-Western Provinces.

GOSHAIN TOTA RAM,* ... *Appellant,*

versus

RAJAH RUCKINEE BULLUB, *Respondent.*

Act VIII. of 1859, s. 39—Reception of Documents after filing of Plaint—Ground of Appeal—Rule of the Privy Council as to concurrent Decisions of two lower Courts on a point of Fact.

The Lords of the Privy Council do not, as a rule, disturb the concurrent decision of both the Courts below upon a question of facts, unless it very clearly appears there has been some miscarriage of justice, some mistrial, or that the conclusion is very plainly erroneous.

Reception of documents under section 39, Act VIII. of 1859, by the Court of first instance, cannot be a ground of appeal. The sanction of the Court

* 13 Moore's I. A., p. 77; 3 B. L. R., P. C., p. 34.

receiving of documents clears the defect of their not having been tendered with the plaint.

JUDGMENT was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This is an appeal against the concurrent decisions of the two Courts below, which have found that the Respondent, the Plaintiff in the action, is entitled to be restored, rather to an office in the nature of the headship of a Temple, than to the possession of lands in the ordinary sense in which lands are sued for in ejectment, and that the title set up by the Appellant cannot prevail against him.

Their Lordships have so constantly said, that in such circumstances, they will never disturb the concurrent decision of both Courts below upon a question of fact, unless it very clearly appears that there has been some miscarriage of justice, some mistrial, or that the conclusion is very plainly erroneous, that it is hardly necessary to repeat it.

In the present case, it is contended, that the documentary evidence which has been put in by the Plaintiff in the suit—the Respondent on this appeal—was improperly admitted. It does not seem to their Lordships that that is the case, or, at least, that there has been such an admission of evidence as would be fatal to the decision of the Courts below. No doubt the evidence was not, in accordance with the new Code of Procedure, brought in at the time of filing the plaint. It was brought in at two subsequent periods. There seems, therefore, to have been an irregularity in that respect, which is adverted to in the judgment of the *Sudder* Court.

Their Lordships, however, do not find that the 39th section of Act, No. VIII. of 1859, makes the admission of any documentary evidence that is not so brought in, so improper as to be a ground of appeal against the ultimate determination of the suit by the Court which has admitted it. On the contrary, what that section at the end of it says, is—"Any document not produced in Court by the Plaintiff when the plaint is presented, shall not be received in evidence on his behalf at the hearing of the suit, without the sanction of the Court."

In the present case there seems to their Lordships to be abundant proof, that the evidence was received with "the sanction of the Court." A great part of it (some of the documents and accounts being in the Bengalee language) seem to have been referred to a subordinate Officer, an *Ameen*, for inspection and verification, and it was ultimately acted on by the Court. It is perfectly clear, therefore, that if the sanction of the Court can purge the original defect, it has been so purged.

Their Lordships sitting here, have not been in the habit of determining appeals upon the mere fact, that certain evidence may have been improperly admitted. It has always been a rule of this Committee to do substantial justice between the parties, to take the Record as it is sent over, and to see, whether there is sufficient evidence on the whole Record to justify the conclusion to which the Court below have come. The *Sudder* Court, although in these cases they adverted to the irregularity in the proceedings of the Principal *Sudder Ameen*, have expressed their opinion that the Defendant was not ultimately prejudiced by the course which had been pursued.

The contention on the side of the Appellant is, that this is in the nature of an action of ejectment, and that there is really no evidence whatever of the title of the Respondent, who, being Plaintiff in the cause, was bound to make out the title. It appears, however, to their Lordships, that there was ample evidence to go to a jury, that the persons who actually resided in the Temple were the mere Agents of the *Rajah Gourbullub*, and that there was also ample evidence to go to the jury, that *Rajah Gourbullub* was the adopted Son of the person whom he claimed to represent. In that state of things their Lordships think, that the burthen of proof was properly treated as shifted upon the Defendant, and the transaction upon which he relies seems to their Lordships, as it seemed to the Courts below, to be one of a suspicious character. Both those Courts have found, that it was not a true transaction, and that even if the instrument had been

really executed by *Mussamat Radha Munee* with a knowledge of its contents, no title to the Temple would have passed thereunder. Their Lordships are not prepared to say that either of those conclusions is wrong.

Under these circumstances, their Lordships see no grounds for disturbing the decision of the Courts below, and must humbly recommend Her Majesty to dismiss this appeal with costs.

29th June, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

NILMADHUB DOSS,* ... *Appellant*,

versus

BISHUMBER DOSS, BISHENROOP DOSS, HURROGOBIND DOSS, BHUGOBAN CHUNDER ROY, and JOYGOPAUL BANNERJEE, ... *Respondents*.

Construction of Deed of Gift—Pallok Putra not an Adopted Son—Valuation of Suit—Costs.

A Hindu died after having made a *kibbanamah*, or deed of gift, giving the bulk of his property to the eldest son of one of his brothers, designating him as his *Pallok Putra*. The donee thereof died without issue, but leaving a widow him surviving. On the death of his widow, his cousins sued his step-brother for possession of their share of his property, on the allegation that he had been adopted by their uncle, and consequently the relationship between him and his step-brother had been severed, and that they were equally entitled with the step-brother to succeed. The Defendant denied the fact of adoption. The High Court held that the intention to adopt, and the fact of adoption, were proved by the terms of the deed of gift.

Held by the Privy Council, reversing the judgment of the High Court, that the words of the *kibbanamah* ("but as I had no son or daughter, I took you as my *Pallok Putra*, in the month of *Aghran* 1211, B. S. (1803,) with the *Anumati* (permission) of your parents, for the purpose of securing funeral oblations of water and funeral cake, and having brought you up like a son, performed the ceremonies of your *Sangskar*, &c., and have constituted you my representative") were not those which properly import the adoption of son by gift—*Dattaka Putra*.

Held, that the presumption which arose from the religious duty of a childless Hindu to adopt was, in this case, opposed to as strong a presumption that a Hindu would not break the law by giving in adoption an eldest or only son.

In estimating the value of a suit the costs must not be included in the amount in dispute.

Mr. *Mortimer*, for the Respondent:—

THERE is a preliminary objection to this appeal being entertained. The sum at issue in the suit does not amount to Rs. 10,000. Neither the decree of the 11th of February, 1863, or the Order of the 2nd of October, 1863, involve directly or indirectly any claim, demand, or question to property amounting to the value of Rs. 10,000; nor has the High Court made any declaration as required by the 39th section of the Letters Patent of 1865, constituting the High Court, that this is a fit case for appeal here, and no special leave to appeal has been granted by this Tribunal. Mr. Justice *Seton-Karr* has improperly added costs to make up the appealable value.

THE LORD JUSTICE SELWYN:—

It would be very prejudicial to the Appellant to allow, at this stage of the appeal, the objection now urged to the right of appeal on the ground of the want of appealable value. If there is any foundation for such objection, it ought to have been taken when the petition of appeal was lodged; this would not only have saved expense, but would have given an opportunity to the Appellant to have shown that there was nothing in the objection, which is our present opinion.

12th July, 1869.

Judgment was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The question raised by this appeal is whether the Respondents (the Plaintiffs in the suit) are entitled to recover from

* 13, Moore's I. A., p. 85; 3 B. L. R., P. C., p. 27

the Appellant three-fourth shares of certain property, the whole of which he claims to hold as the sole heir of his natural half-Brother, *Ramlochun Doss*, deceased. This property is admitted to have been part of the separate self-acquired estate of one *Gooroopro*shad *Doss*, who was the second of three Hindu Brothers; the elder, *Gungadhur*, being the Father of the Respondents; the younger, *Purmanund*, being the Father of *Ramlochun Doss*, and (by another Wife) of the Appellant and two Brothers, now deceased. From *Gooroopro-shad Doss*, who died in January, 1830, it passed, under the circumstances which will be hereafter considered, to *Ramlochun Doss*, who died in the month of November of the same year. He was succeeded by his Widow and heiress, on whose death the succession opened to those who were then the nearest collateral heirs of her Husband.

If the right of succession is to be determined by the test of natural consanguinity, the Appellant, as the only living half-Brother of the deceased, is the sole heir. But if, as the Respondents contend, *Ramlochun Doss* was adopted by *Gooroopro-shad Doss*, so as to cease to be a member of his natural family, and to become the Son of *Gooroproshad Doss*, then, in contemplation of law, the Respondents and the Appellant are related to *Ramlochun Doss* in equal degree; *i. e.*, as first Cousins, and are entitled to equal shares in the property. Hence the determination of this appeal depends upon the determination of the question, whether the Respondents have established that there was, in fact, such an adoption.

The adoption is alleged to have taken place in 1804. The witnesses who have deposed to it have been treated by the Principal *Sudder Ameen* who tried the cause in the Court of First Instance as unworthy of credit. Their Lordships are not prepared to say that they have been so treated unjustly. The testimony of some of them is directed to prove both the original adoption in 1804; and that, in the ceremony of boring the ears of *Ramlochun Doss*, which took place ten or eleven years later, *Gooroopro*shad *Doss* performed a part which was inconsistent with any character but that of adoptive Father. Other witnesses speak only to one or the other of these facts. Tney are contradicted by the witnesses for the Appellant, and in this conflict of evidence, and, considering the imputations cast on their credit by the Judge who saw and heard them, their Lordships are of opinion, that their testimony, unless very strongly confirmed by the documents produced in the cause, cannot be taken to have established the alleged adoption.

The proof of another material fact, viz., the existence at the time of the alleged adoption of an elder Brother of *Ramlochun Doss*, named *Rajiblochun*, also mainly depends on the testimony of the same witnesses. This fact is denied by the Appellant; and it is inconsistent with the statements made by *Gungadhur*, the Father of the Respondents, and the elder member of the family, in 1831. There is no mention of *Rajiblochun* in any document of earlier date than the plaint in this suit. And their Lordships are of opinion, that his existence has not been proved, and that they must deal with this case on the assumption that in 1804, *Ramlochun Doss* was the eldest, if not the only, Son of his natural Father.

Of the documentary evidence a large portion tends to negative the alleged adoption. The *Kabalas* produced show that between the years 1817 and 1825 *Ramlochun Doss* purchased various small parcels of land, sometimes in his sole name, sometimes in the joint names of himself and his half-Brother, *Puddolochun*; but that in all such transactions he was known and described as the Son of *Purmanund Doss*, his natural Father, and not as the Son of *Gooroopro*shad *Doss*. There is no documentary evidence, other than *Hibbanamah* afterwards considered, which shows that he was ever held out to the world during *Gooroopro*shad *Doss's* life as the adopted Son of his Uncle.

What, then, is the confirmation of the Respondents' case which is to be derived from the terms of the *Hibbanamah*, or from the acts of the Appellant under it? Their Lordships agree with the learned Judges of the High Court, and differ from the Principal *Sudder Ameen* in holding

that that instrument must be taken to be genuine.

Mr. *Mortimer* has argued for the Respondents, that the general effect of the *Hibbanamah*, and of the contemporary document therein referred to, was a sort of family settlement of the property of *Goorooproshad Doss*. Their Lordships are disposed to think that this view of the transaction is correct. It certainly seems true that under colour of a sale for Rs. 2,000 of half the property to the three half-Brothers of *Ramlochun Doss*, they took a beneficial interest of considerable value, subject to the obligation, as the receipts show, of making certain allowances to the three Respondents. But if this be so, such a disposition by *Goorooproshad Doss* of his property goes rather to negative than to support the hypothesis of a formal and absolute adoption. It is not likely that, if *Goorooproshad Doss* had regularly adopted *Ramlochun Doss*, so as to make him in law his own Son, and to deprive him of a right to participate in the inheritance of his natural Father, he would have left away from him ten-sixteenths of the estate. On the other hand, the disposition is reasonable, if supposed to be made by a childless Uncle desirous of making some kind of provision for all his Nephews, but of giving the principal share of his property to a favourite Nephew, to whom he stood in some peculiar relation, short of that of Father and Son.

The evidence, therefore, of adoption to be gathered from the *Hibbanamah* is to be found, if anywhere, in the statement:—"But as I had no Son or Daughter, I took you as my *Palluck-pootro* in the month of *Aughran*, 1211, B. E., with the *Unomutty* (permission) of your parents, for the purpose of securing funeral oblations of water and funeral cake, and having brought you up like a Son, performed the ceremonies of your *Sungskar*, &c., and have constituted you my representative."

If these words must be taken to import a declaration of a regular and ordinary adoption, and are incapable of any other interpretation, they are of great weight, and when coupled with the proof of the action taken by *Ramlochun Doss* under this instrument, would go far to determine the case.

Much has been said of the old presumption which arises from the religious duty which is upon every childless Hindoo to adopt a Son. Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindoos die daily without having fulfilled this obligation, or made provision for its fulfilment after their death.

Again, if there is, on the one hand, a presumption that *Goorooproshad Doss* would perform the religious duty of adopting a Son, there is, on the other, at least as strong a presumption that *Purmanund* would not break the law by giving in adoption an eldest or only Son, or allowing him to be adopted otherwise than as a *Duyamushyayana*, or Son to both his Uncle and his natural Father. This latter kind of adoption would not serve the connection of the child with his natural family.

It is admitted on all hands, that the expressions in the *Hibbanamah* are not those which properly import the adoption of a Son by gift—*Dattaca Pootro*—and that it is only by reason of the gift that the filial relation to the natural Father is extinguished; or the right of the Son in the estate of the giver ceases is shown by the *Dattaca Chandrika*, sec. II. art. 19. The consulted *Pundits* differ as to the interpretation of the expressions in the *Hibbanamah*. All agree that they do not in terms import the adoption of a "*Dattaca Pootro*;" but whilst some argue from the direction as to the performance of the funeral obsequies, that the person designated as "*Palluck Pootro*," must be taken to be a "*Dattaca Pootro*;" other use that very direction as an argument for the contrary conclusion, because, in the case of a "*Dattaca Pootro*," such a direction would have been superfluous. To their Lordships it appears that nothing is to be gathered from these *Vyavasthas* but the conviction that the *Hibbanamah* in question admits of more than one construction. And they think that that construction of it is to be preferred which is consistent with the presumption that *Purmanund* did not commit a breach of duty by giving away an

eldest, or only Son; with the fact proved by the *Kabalas*, that long after the alleged adoption, *Ramlochun Doss* continued to be represented and known as the Son of *Purmanund*, and with the further fact (certainly not disproved), that he participated in the inheritance of his natural Father. Nor it is necessary to decide, whether *Ramlochun Doss* was the mere foster Son of *Gooroopro shad Doss*; or was so filiated by him as to become *Dwyamushyayana*, since in neither case would his natural relation to his own family be extinguished. It is sufficient to find that the *Hibbanamah* does not necessarily affirm him to have been "a Son given and received."

It remains to be considered, whether what was done by *Ramlochun Doss* under the *Hibbanamah* is inconsistent with this construction. He neither claimed nor took the property of *Gooroopro shad Doss* as adopted Son and heir-at-law. He took by virtue of the *Hibbanamah*, or deed of gift. The only plausible argument which the Respondents can derive from his petition for mutation of names is his application of the term "Father" to *Gooroopro shad Doss*. But this is not absolutely inconsistent with the hypothesis that he was only the foster Son of *Gooroopro shad Doss*; and is perfectly consistent with the theory that he was the Son of both Fathers. On the other hand, though it may be true that the Respondents are not bound by the statements of their Father, *Gungadhur*, as they would be if they were claiming title through him, yet those statements, made as long ago as the year 1831, by the senior member of the family, are not altogether without weight. They are not to be presumed to be false; and they both deny that the adoption took place, and affirm that *Ramlochun Doss* was the eldest Son of his Father.

Upon the whole, therefore, their Lordships are compelled respectfully to dissent from the view taken by the learned Judges of the High Court of the effect of the *Hibbanamah* and the other evidence in the suit. They have come to the conclusion that the Respondents have failed to establish that any adoption which severed the relation of *Ramlochun Doss* with his natural family took place; and that the superior title of the Appellant ought to prevail. They must, therefore, humbly advise Her Majesty to allow this appeal; to reverse the decree of the High Court; and in lieu thereof, to direct that an Order be made dismissing the appeal to the High Court, with costs. The costs of the appeal must follow the result.

Their Lordships deem it right to add that, although they overruled the objection to this appeal, which was taken on the ground that the amount in dispute was below the appealable amount, because it was, in their judgment, taken too late, they must not, therefore, be taken to assent to the propriety of the Order made by Mr. Justice *Seton-Karr*, who, in estimating the amount in dispute, took into consideration the costs of suit.(a)

30th June, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

H. A. BRETT, Collector of *Salem*,* ... ... } *Appellant*,

versus

ELLAIYA, ... *Respondent*.

Enam—Charitable foundation for Brahmins, held in severalty—Permanent Pottah at fixed rent—Default of payment of quit-rent by co-sharers—Reassessment—Jurisdiction—Mad. Reg. IV. of 1831.

Suit by a co-sharer in the income of a charitable foundation for *Brahmins*, in *Enam*, held in severalty, to recover from the Government Collector the

(a) See Doorga Doss Chowdry *v.* Ramanauth Chowdry, 8 Moore's Ind. App. Cases, p. 262; 1 P. C. J., p. 774, where it was held, that costs of suit could not be added to the principal sum and interest in calculating the appealable value of Rs. 10,000, the amount restricted by the Order in Council of the 10th of April, 1838.

* 13, Moore's I. A., p. 101.

amount of quit-rent charged by him in excess of a Permanent *Pottah* on his shares. *Held*, that the default of his co-sharers in payment of their quit-rents, did not authorize the Collector in re-assessing the Plaintiff's shares at an increased rent.

Held, further, that the Court had jurisdiction to entertain the suit, as *Mad.* Reg. IV. of 1831, applies only to suits brought to try the validity of grants emanating from, or confirmed, or affected by, the direct act of the Governor in Council.

12th July, 1869.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. THE LORD JUSTICE GIFFARD:

This is an appeal from a decision of the High Court of Judicature at *Madras*, made on special appeal, whereby is reversed a decision of the Civil Court of *Chittoor* given in favour of the Appellant, the Defendant in the original suit.

The appeal comes before their Lordships *ex parte*, and it is desirable to state in detail the case as it is to be collected from the pleadings and issues, in order that the objections to the judgment appealed from may be examined with reference to the case actually before the High Court.

The suit was brought in the *Zillah* Court of *Salem* by the Plaintiff, a *Brahmin*, against Mr. *Brett*, the then Collector of that District. The plaint states succinctly the nature of the claim, which is this: The Plaintiff therein describes himself as a co-sharer of *Neikarappatu Agraharam*, which means a maintenance for *Brahmins*. He claims to recover Rs. 335. 2 as. 2 p., being the rent collected from him in excess of the permanent *Jodikai Pottah* granted to him by the Government. He then proceeds to state the circumstances of that grant as follows:—"On the assumption of the Country by the Honourable Company, a permanent revenue was settled in the time of Mr. *Macleod* for the four shares enjoyed by my ancestors and myself in the said *Neikarappatu Agraharam* for a long time; for my one *Karai*, consisting of four shares, a *Pottah* has been granted to the effect that a *Jodikai* revenue should be paid to the Government at 53 pagodas and $7\frac{13}{16}$, or Rs 67. 13 as. 2 p." He then proceeds to state the due payment of his revenue, and that on a pretence that arrears were due on the whole village, it was, inclusive of his shares, attached unjustly, without ascertaining from whom the arrears were due, and collecting the same from the Defaulters; and that a revenue in excess was fixed with a difference of rates, and was strictly demanded, as stated by him thereafter in his plaint. He then alleges, that he paid the money under duress to avoid disgrace and sale of his lands, and stating the excess exacted during three years to be the sum for which he sues, he seeks to recover that demand, and prays that the annual revenue for the future may be adjudged to be collected from him under the *Pottah* of Mr. *Macleod*.

The answer filed by the Acting Collector on behalf of Mr. *Brett*, after stating the object of the plaint, insists first on a want of jurisdiction in the Court to entertain the complaint, as it was unaccompanied by a written Order of the Governor in Council under the *Mad.* Reg. IV. of 1831; and on the other part of the case it prays, that the suit may be dismissed for want of due specification of the particular lands on which the alleged excess had been imposed.

A supplemental answer was subsequently put in, which states further, in answer to the complaint, that the village was held not in severalty, but jointly, and that consequently the shareholders were jointly as well as severally liable for the quit-rent due on it.

The reply insisted, that the settlement was made for each plot, and a separate *Pottah* given to each sharer; that no joint *Pottah* was given for the whole, nor the money collected accordingly, nor a joint receipt given. It contains besides answers of an argumentative nature to the objection on the point of jurisdiction which it is not necessary to state in detail.

The rejoinder re-asserts and insists on the objection to the jurisdiction of the Court, and concludes by saying, that the Defendant does not consider it necessary to rejoin to any other part of the reply.

Upon this state of the pleadings the issues were framed. The points stated for the Defendant to prove are:—

First, that the village was not held in severalty, but jointly.

Second, that the Plaintiff, as a shareholder, was jointly responsible with the several holders.

Third, that the excess of *teerwah* was legally due, and under what authority or Regulation.

It appears, therefore, that the Court imposed on the Defendant the *onus* of proving the legality of the re-assessment, and of showing under what authority or Regulation it proceeded.

The Defendant did not appeal from the framing of these issues; nor does it now appear to their Lordships that, in the framing of them, the Court miscarried by imposing any species of proof upon the Defendant from which the law exempted him.

If the new assessment was not legally imposed on the Plaintiff, his liability under the old assessment remained, and his title to recover in this suit was established.

The Court of *Salem* decided in favour of the Plaintiff on the point of jurisdiction, and on the issues it found in favour of the Defendant.

On appeal to the Civil Court of *Chittoor*, to which the appeal was referred by the Order of the High Court, the decision appealed from was affirmed.

The Plaintiff then preferred a special appeal to the High Court, and that Court reversed the decision of the Civil Court at *Chittoor* on the third issue, on the other issues agreeing with the judgments below. The objection as to the jurisdiction was not enumerated amongst the grounds of appeal, and was not renewed before the High Court.

The objection to the jurisdiction of the Court was, however, renewed before their Lordships on the hearing of this appeal. As the proceedings before their Lordships disclose the grounds on which this objection rests, and as, if valid, it would apply to the whole litigation from its inception to its close, rendering all the proceedings null and void *ab initio*, their Lordships think it right to say that, in their judgment, the decision of this point in the Court of First Instance was entirely correct; and that the Regulation, which must be construed strictly, applies only to suits brought to try the validity of grants emanating from, or confirmed, or affected by, the direct act and order of the Governor in Council, and that no proof exists in the cause to bring this *Enam* claim within the provisions of the Regulation IV. of 1831.

The judgment appealed from was besides impeached for error before their Lordships, on these grounds: that the High Court had treated the acts of the Government as founded on *Mad.* Reg. XXVII. of 1802; that they had considered the case as one of resumption, and not as one of forfeiture; and had not given due effect to the *Hookoomnamah*, as evidencing the right under which the Collector had acted.

There is some difficulty in their Lordships' minds in supposing that the High Court would have dwelt so much on the Regulation in question, had it not been in some manner relied on for the then Respondent. It must be remembered that the third issue imposed on the Defendant the necessity of showing under what law or Regulation he had acted in varying and augmenting the old assessment on the Plaintiff's shares; and the Court was entitled to receive distinct information on that point. Had the power exercised in this instance been an acknowledged power of the Government, acted on and submitted to in that part of the Country, the Collector could, in the opinion of their Lordships, have had no difficulty in proving its continued exercise. Had it grown up as a custom of the Country, though without any written law to sanction it, the terms of the issue were wide enough to admit proof of such custom as legalizing the acts complained of. The High Court, however, states in its judgment, that no such proof was produced, and none has been presented to their Lordships beyond the *Hookoomnamah*, on which Mr. *Forsyth* mainly relied.

Their Lordships are anxious to guard themselves from being understood as questioning, or in any way drawing into doubt, any practice which that instrument may indicate as to *Enamdars*. Such an instrument being only a direction from a Government Board or Officer to others engaged in the Revenue Department cannot indeed create of itself any new law, or im-

pose any new obligation on existing tenures from which they were antecedently free; but it may indicate in many cases subsequent to it the terms of engagements, and be proof of conditions of tenure in such cases.

As to *Enams* of an admitted precarious tenure, it might serve as notice of an intention to resume them on failure of the obligation of the *Enamdars* to pay their actual assessment. This case, however, must be determined on the facts alleged and proved. The Plaintiff alleges his tenure to be ancient,—antecedent, indeed, to the assumption of the Country by the East India Company; he admits, indeed, that the lands held by him were re-assessed by Mr. *Macleod*, but he states that assessment to be permanent, and that he held a permanent tenure under a *Pottah* from Mr. *Macleod*. This case is inconsistent with an assessment variable at the will of the Government. The Defendant nowhere denies in his pleadings the permanency of the tenure in this sense, nor pleads that the *Enam* was in its nature revocable at pleasure, or that the assessment could be raised at the pleasure of the Government; he pleads only that the village, though enjoyed in shares, was held jointly and not in severalty, and so the Plaintiff's share was liable for defaults of other shareholders.

Mr. *Forsyth* argued, correctly, that this increase of assessment was not properly a resumption proceeding. But in this particular case the Government claims a right to increase the assessment on one who holds under an ancient and permanent tenure (for that averment is not denied,) by reason of a default not arising from himself or any person holding his share. This is not a common incident of tenure, and is not involved in the right to hold the whole lands as hypothecated for the whole rent, though shares are held in severalty and subject to several assessments; it, therefore, lies on the Defendant to prove by what authority this increase in the amount of the rent has been made. The ordinary remedies for revenue in arrear fall short of such a power; the non-payment of revenue may arise from causes implying only the misfortune of the holder, and in reason and justice, in the absence of contract or consent, a forfeiture should not be implied from a mere default of that nature, still less should the terms of an instrument alleged to evidence a right to declare a forfeiture be constructively enlarged. Now, if the terms of the *Hookoomnamah* be referred to, they do not necessarily include such a case as the present. They are capable of being read as extending only to the forfeiture of the shares of the actual defaulters; in express terms the case of a co-sharer under a separate assessment, and not in default, is not included in it, and its language would not lead one in such a case to consider it as meant to subject him to its operation. Furthermore, the Court rightly observes that, by reason of its posteriority in time to the tenure of the Plaintiff, that tenure cannot become subject to its operation; and their Lordships concur in the opinion expressed by the High Court on this point. Their Lordships think, that a power of such an exceptional and anomalous kind as that which has been brought into operation, and insisted on in this case, ought to be shown to have a certain and legal origin, and cannot, in the absence of any Statute, or Regulation—none such appears to exists—be presumed or established by a Court upon anything short of clear evidence of its continued exercise and prevalence. There has been no evidence amounting to proof of anything of the kind.

For these reasons their Lordships will humbly recommend to Her Majesty that the appeal be dismissed.

13th July, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

RAJAH SURANENI VENKATA GOPALA NARASIMHA ROW, BAHADOOR,* ... ... } *Appellant*,

versus

RAJAH SURANENI LAKSHMA VENKAMA ROW, ... } *Respondent*.

Mitakshara—Partition—Evidence of Partition—Inheritance.

According to the *Mitakshara*, an agreement for a partition, although not carried out by actual partition of the property, is sufficient to constitute a division of the family so as to entitle the widow of a deceased brother to succeed to his share of the ancestral property in preference to the surviving brothers.

The fact of the family having separate house and field, is, according to the *Mitakshara*, sufficient evidence of partition.

The *onus* of proving re-union is upon the party pleading that there has been a re-union after partition.

Katama Natchiar v. *The Rajah* of *Shivagunga* (1) explained.

THEIR Lordships' judgment was pronounced, as follows, by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This appeal has been very ably argued by Mr. *Latham*, who has stated in support of it everything which in their Lordships' opinion could be said; but the facts and the authorities are too strong for him, and their Lordships are unable to see any ground upon which the appeal can be supported.

The proof in this case has, perhaps, been somewhat complicated, and rendered less effective than it otherwise might have been by the introduction of an issue which is now admitted to be out of the case; the issue as to the alleged adoption.

The only question now arguable is, whether at the date of the death of the Respondent's Husband this family was a divided or an undivided Hindoo family, because the course of succession entirely depends upon that fact. The property is admitted to be ancestral, and it is now also admitted that the *zemindary* which forms part of it is not one of those impartible *zemindaries* of which there are many in the south of *India*, but must be treated, as in fact it appears upon some of the earlier documents to have been decided to be, as in its nature partible; therefore, the question is simply, whether at the date I have mentioned, the family was still an undivided family, as it was up to a certain period, or whether it became divided by virtue of the agreement, and which has been the chief subject of the argument before us.

Now, although Mr. *Latham* has pointed out here and there some minute differences in the wording of the two agreements, their Lordships find it impossible to distinguish the arrangement come to in this case from the arrangement which had been entered into in the case of *Appovier* v. *Rama Subba Aiyan and others* (11 Moore's Ind. App. Cases, 75; *Ante*, p. 218,) in which this Committee held, that although the agreement for a partition had not been carried out by actual partition, by metes and bounds of the property, it was, nevertheless, binding upon the contracting parties, and operated as a division of the family. Their Lordships observe, that the judgment delivered by Lord *Westbury* was, in fact, an affirmance of the judgments of two of the Courts below, and was fully supported by the authorities then before the Court. It is, however, satisfactory to find in the present case, that the High Court of *Madras*, not adverting to the above case in *Moore*, which probably had not then come to their knowledge, has in its learned judgment arrived at the same conclusion, and that upon independent grounds, and upon the earlier authorities. The passage which they quote

* 13, Moore's I. A., p. 113 · 3 B. L. R., P. C., p. 41.

(1) *Ante*, p. 25.

from the *Mitacshara* fully supports the proposition involved in the judgment. The passage runs thus: "If partition be denied or disputed, the fact may be known and certainly be obtained by the testimony of kinsmen, relatives of the Father or of the Mother, such as maternal Uncles, and the rest being competent witnesses as before described;" that is one mode of proving partition. It then goes on in the disjunctive, "or by the evidence of a writing or record of the partition," which we have here. And then it says, "It may also be ascertained by separate or unmixed House and field;" that is, if other evidence of partition be wanting, it may be supplied by proof that the Houses and fields had been actually divided and were held separately.

It follows, from what has been said, that in their Lordships' view, this question is really concluded by authority.

It has, however, been argued by Mr. *Latham*, that even if this agreement amounted to proof of a partition, yet upon the evidence in the cause their Lordships ought to come to the conclusion either that the argument was waived, or that there had taken place that which might, according to Hindoo Law, have taken place, namely, a reunion of the two Brothers. Their Lordships, however, looking at the issues in the cause, cannot find that those points have ever been raised. Certainly, there is no suggestion of such a thing as a reunion, which would imply that there had been an actual division, and then a coming together by mutual agreement of the two Brothers; and their Lordships are further of opinion, that they must presume, that although there was no division of the *zemindary*, or of the lands, by metes and bounds, yet that the arrangement proceeded upon the footing of the deed, that the rents were divided according to the stipulations of the deed, and that if the contrary took place, it lay upon the Plaintiff to show that such was the case. It seems to their Lordships that he has entirely failed to do so, and, therefore, they can see no ground whatever for interfering with the judgment of the Court below.

Their Lordships deem it right (although it has really no bearing upon the decision of this appeal) to make a remark upon one passage in the otherwise very learned and able judgment of the Court below. The passage is this, "If it" (that is, the *zemindary*) "was not partible, and the Brothers were, as the Plaintiff contends, undivided at the Brother's death, the Widow would, according to the decision of the Privy Council in the case of *Katama Natchiar* v. *The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 539; *Ante*, p. 25,) be entitled to the whole estate; so that, whether the Plaintiff's own view, or that which we take here, is correct, the Plaintiff is not entitled to succeed in this action" (*a*.) Now, that seems to proceed upon a singular misapprehension of the effect of the *Shivagunga* case. It is immaterial, as I said before, to the decision of this case, because it is admitted that the *zemindary* was not impartible; but the *Shivagunga* case was this: the family was shown to be undivided, but the impartible *zemindary* was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was, that in that case the *zemindary* should follow the course of succession as to separate property, although the family was undivided; but if that *zemindary* had been shown to have been an ancestral *zemindary*, as in this case, the judgment of the Board would no doubt have been the other way.

Their Lordships think it necessary to make this observation, in order to avoid future misconception as to what was decided here in the *Shivagunga* case.

They must humbly recommend Her Majesty to dismiss this appeal, with costs.

(*a*) Moore's I. A., p. 134.

13th and 14th July, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

INDERUN VALUNGYPOOLY TAVER,*... ... } *Appellant*,

versus

RAMASAWMY PANDIA TALAVER and THUNGAMMA NACHIAR, ... } *Respondents*.

Hindu Law—Marriage—Sudra Caste—Illegitimate Children—Inheritance.

According to the Hindu law prevalent in *Madras*, legitimate children of illegitimate parents of the *Sudra* caste, can contract a legal and valid marriage.

According to the Hindu law, illegitimate children of the *Sudra* caste can inherit, and are entitled to maintenance.

The marriage between persons of different sections of the *Sudra* caste is valid and legal.

JUDGMENT was pronounced by

THE RIGHT HON. THE LORD JUSTICE GIFFARD:

The question on this appeal is, first, whether there was a marriage in fact; and, secondly, if there was a marriage in fact, then whether there was a marriage in law?

We have the judgment of both the Courts below coming to the conclusion, from the evidence, that there was a marriage in fact; there was evidence before them, on the consideration of which they might fairly come to that conclusion. Unless a finding of that sort—where two Courts are unanimous in their opinion—is unsupported by, or contrary to, the evidence, it is not the course of this Board to interfere with that finding.

There were eight witnesses who spoke to the marriage having taken place, then two of the three *arzis*, and besides the very material fact of the Appellant having admitted before the *Tahsildar*, or done that which was tantamount to an admission, that such a marriage had taken place.

With reference to the *arzis*, the two first *arzis* which have been alluded to are very plain and very explicit. The first of them is in these terms:—"*Kulalvoy Moli*, whom I had married before my succession to the *zemindary*, had, in defiance of the prescribed observations of my caste, separated from me before giving birth to any issue, and married *Vellaiya Tavan*, of *Nauja Nadu*. That *Taugammai Nachiyar*, whom I married after inheriting the *zemindary*, and made my *patta sri* (or Royal Wife,) might beget issue, vows were made to *Tirumalai Sevamaiyar*, of *Teukosi*, and by the grace of that Deity, and by your good wishes, she has borne me a Son and a Daughter. Before this I had, on your Order, No. 1, dated the 24th January, 1856, proceeded to offer up my prayers to the said *Twamiya*. To do the same once more, now it is necessary that I should send my royal Wife and my Children. As for their assistance, about thirty persons, both bearers of Palanquins and servants, will be sent to accompany them, I request that an Order may be issued providing against any obstruction of them on their way."

The second *arzi* is as follows:—"I had been for a long time suffering from paralysis, and now I have slightly recovered. When first I was married to the Daughter of *Govindapera Pandya Talaivan*, I was exceedingly young, and the Bride was my senior in age, but perceiving her levity of conduct, I repudiated her. Subsequently, in contravention of the prescribed usage of the *zemindary*, she married *Vellaiya Tavan*, of *Nauju Nadu*. I then married *Taugammai Nachiyar*, the Daughter of *Kumaraswami Tadiya Talaivar*, of *Kadambur*, who has borne me a Daughter and Son. I now learn that as I am taken ill, it is intended fraudulently to report to the Government, in disparagement of my dignity, that my first Wife, who, on being divorced by me for misconduct, had married

* 13, Moore's I. A., p. 141; 3 B. L. R., P. C., p. 1.

another, has borne me a male child. I deny that he is my Son; I further disclaim any relationship to him. As a report of these matters at the time of her repudiation would have derogated from my respectability, I abstain from notifying the same. These matters have also been brought to the notice of the Sub-Collector. I, therefore, pray that your benevolence may afford protection to my Children and my younger Brother."

Those *arzis* are plain and explicit enough, and probably little doubt would have been entertained on the matter, but for the *arzi* of the 3rd of July, 1858 (*a*). With reference to that *arzi*, without saying whether the signature is or is not genuine, but assuming that it is, if we take first of all the date of it, the 3rd of July, 1858, the *Zemindar* having died on the night of the 7th in a state of paralysis, and then look to its contents, little effect can be given to it. We cannot read the third *arzi* without seeing that it was obtained with an object, and that it bears internal evidence of not being the voluntary, and scarcely, we should think, the conscious act of the *Zemindar*. First of all it refers to the preceding *arzis* in this way:—"With reference to the *arzis* addressed by me to your Honour and to the Sub-Collector, in regard to my disease on the 1st June, an order having been issued to the *Tahsildar* of the *Talook* of *Saukara Pania Kovil*, he came and saw me, showed to me the *arzi* which had been addressed by me, and asked me about it. I saw my signature in the *arzi*, and admitted it." And then follow these statements: "I have also reported to the *Tahsildar* that the Daughter of *Pandia Talavan* of *Chengottai* had been married to me at my infancy; that she, being guilty of misconduct, married *Vellaiya Tavan* of *Nauja Nadu* again, and got Children by him; that I brought and kept the Daughter of *Kadambur Kumaraswami Talaivar*, and got two Children by her, but that she was of a different caste." These last expressions certainly do appear to their Lordships to be put into the mouth of the *Zemindar* with a view to the case which has since been brought forward, especially the alleged difference of caste; and, taking the whole together, their Lordships are of opinion, that, as against the two other *arzis* no effect or weight is due to this *arzi*, and that there is no sufficient reason for differing from the finding of the two Courts.

Then, if there was a marriage in fact, was there a marriage in law? When once you get to this, viz., that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law. The *Zemindar*, according to the usages of his Country and nation, on parting with his first Wife, would be naturally desirous of marrying again, and having male issue. It would be a most unlikely thing for a person of his caste to go through the ceremony of marriage, if it was known that that marriage was a marriage which was invalid in law. Then upon what is it urged by the Appellant that the invalidity of the marriage, in law, depends? It depends upon this, and upon nothing else, viz., that all the parties being, as is clear from the evidence, of the *Soodra* caste, it is said, that because it is shown that the Father of the Mother of the present Plaintiff and Respondent was illegitimate, therefore, the child of that Father could not contract a valid marriage, and was in substance of no caste at all. The only foundation for this is the opinions of the *Pundits;* those opinions are not satisfactory; no decision or authority is brought forward supporting any such proposition. The opinions are matter of reasoning; and where they refer to authority, it is to authority which applies to persons of two different but higher castes, not to the *Soodra* caste at all, and still less to what may be called different classes or divisions of one and the same *Soodra* caste.

Their Lordships are not aware that there is any authority—there has been none quoted, and it does not appear that there is any authority supporting any such proposition as that which is contended for by the *Pundits;* and, though their Lordships do not agree in every thing that has been stated in the High Court of appeal, they are satisfied that in the *Soodra* caste illegitimate children may inherit, and have a right to maintenance; and that in this

(*a*) 13, Moore's I. A., p. 146.

very instance the illegitimate Father of the Mother of the Plaintiff, as well as his Daughter, were treated as members of the family: and on the whole, seeing that these parties are both of the *Soodra* caste, and that the utmost that has been alleged really is, that the *Zemindar* was of one part of the *Soodra* caste, and the Lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be countenanced.

For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and dismissed with costs.

14th and 15th July, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the Admiralty Court), the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ROBERT WATSON & CO.,* *Appellants*,

versus

THE COLLECTOR OF ZILLAH RAJSHAHYE, DOST MAHOMED KHAN CHOWDHRY, RANEE ANUNDOMOYE, and HORACE JOHN ABBOTT, ... *Respondents*.

Dismissal of Suit—Issue—Non-production of Evidence.

The power to dismiss a suit with liberty to bring a fresh one for the same matter is limited to cases where the suit fails by reason of some point of form: such liberty should not be given, where, after issue joined, the Plaintiff has failed to make out his case.

A transfer of his tenure by a *Putneedar* is not binding on the *Zemindar*, unless made strictly in accordance with the provisions of Regulation VIII. of 1819.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

Their Lordships have formed so clear an opinion on both the points on which the determination of this appeal depends, that they do not think it necessary to prolong the discussion by calling on the other side.

The first question, and that which is the sole question, raised by the case of the Appellants is, whether the High Court was wrong in holding that the plea of *res judicata* ought to prevail.

The suit is brought to set aside the sale of a *Putnee Talook*, which took place as long ago as 1849. There was considerable delay, even in the institution of the former suit to set aside that sale, which was not brought till the year 1856. The case is obviously one in which it was the duty of the Courts below, as it is the duty of their Lordships, to look closely to the right of the Appellants, the Plaintiffs in the suit, to impeach proceedings which took place so long ago, and under which so many fresh rights may have accrued.

Be that, however, as it may, the first question is, whether the High Court was right in holding that, notwithstanding the reservation contained in the decree dismissing the suit of 1856, the question was to be treated as *res judicata*.

We have not been referred to any case, nor are we aware of any authority which sanctions the exercise by the Country Courts of *India* of that power which Courts of Equity in this Country occasionally exercise, of dismissing a suit with liberty to the Plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in *England* as a nonsuit, known in those Courts. There is a proceeding in those Courts called a nonsuit, which operates as a dismissal of the suit without barring the right of the party to

* 13, Moore's I. A., p. 160; 3 B. L. R., P. C., p. 48.

litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them.

The decision in this first suit was carried by appeal before the *Sudder* Court. It was treated in the first instance as not being the subject of such a summary appeal as would have taken place in the case of what is ordinarily known as a nonsuit, but as being necessarily the subject of a regular appeal. A regular appeal was accordingly brought, and was heard by three Judges, and, as their Lordships read the opinion of those three Judges, each of them seems to have had very considerable doubt, to say the least, whether it was competent to the Judge in the circumstances to make any such reservation.

The result, however, was that they refused to remand the suit for re-trial, and dismissed the appeal. They did not, however, make any correction of the reservation, and so the case stood until the question arose again in the present suit. In the present suit the Principal *Sudder Ameen* seems to have considered that he was bound by that reservation, and, therefore, he decided that issue in favour of the Appellants.

He decided against them on the other question, which is now to be disposed of, namely, of their title to sue. They, therefore, appealed against his decision, and the High Court, without going into the second question upon which the case had been decided in the Court of first instance, appears to have called upon the Appellants to show that, notwithstanding the former decree, they were still entitled to sue.

It has been argued that that decree not having been appealed against by the Respondents in the original suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court in a case in which the former decree had been pleaded as *res judicata*, and in which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case.

They are of opinion, that the appeal must fail upon the first ground. They are, however, further of opinion, that the appeal must also fail, and that the decree of the Principal *Sudder Ameen* is to be supported upon the second ground, namely, that the present Appellants have shown no sufficient title enabling them, supposing it was open to any person at this distance of time to do so, to question the propriety of the sale of the *Putnee Talook*.

It will be convenient to consider first, what has been the ostensible devolution of the *Talook;* next, what is the nature of such a tenure; and, lastly, how it is sought to establish that the title to that *Talook*, and the consequent right to impeach the sale, have passed to the present Appellants.

The *Talook* was created in favour of Mr. *John Compton Abbott*, in May, 1837, by a Deed of Sale. It is in the ordinary form, their Lordships apprehend, of a grant of a *Putnee* tenure, and it provides for that for which the Regulation makes provision, namely, the notice to the *Zemindar* of any alienation of the *Talook*, in order that it may be duly registered. The words are, "If you make a gift or sale, or give away in *durputnee*, the eight *annas* of the above-mentioned *dehee*, being your own *Putnee*, you must give in-

stant notice of the same in my *Sudder Cutcherry*." On the 7th of *Pous*, 1248, which we are told was in 1841, Mr. *Abbott* sold, for the expressed consideration of C. Rs. 11,465-12, this *Putnee* to a firm known as *French, Hodges* & Co. In the deed there is a requisition to the Purchasers to cause themselves to be duly registered in the archives of the *Zemindar*, and although the instrument was not registered in the ordinary register of deeds till 1844, it is probable that they were before that date duly entered and accepted by the *Zemindar* as the *Putneedars*.

Of this there is some evidence in the petition which will be referred to hereafter, of the Assignees of *Cockerell* & Co., for they speak of *French, Hodges* & Co., as "our *Benamee* owners of the *Talook* at the time of the sale."

The sale took place in 1849, and the proceedings from the Collector's office show, that it was treated as the sale of a *Putnee* standing in the names of *French, Hodges* & Co.; inasmuch as it appears from them that the surplus proceeds of the sale passed to and were divided amongst the judgment Creditors of that firm.

That is, then, the ostensible devolution of the *Putnee Talook*. Of course the later deed of the 4th of April, 1855, in which Mr. *Compton Abbott*, assuming to be the absolute Owner of the *Putnee Talook*, which had been long previously sold, conveyed it formally to *Watson* & Co., the present Appellants, can have no bearing on the question of title.

It only shows, that if under the deeds by which the Appellants now endeavour to trace such title or right, the *Putnèe Talook* had got back into Mr. *Abbott*, or the right to question the sale of 1849 of that *Talook*, belonged to Mr. *Abbott*, he has transferred that right, whatever it was, to the Appellants.

It has been admitted at the Bar, that in order to show that the title to this *Putnee Talook*, and the consequent right to question the sale, has passed to the Appellants, it is necessary to rely on certain general words in the various deeds that transfer certain interests in the *Bansbarreah* indigo concern, and to hold that the *Talook* was in fact an incident to the Factories, and that those words must be taken to have passed them.

It appears, that at the time when the *Putnee* was granted, Mr. *John Compton Abbott* was the sole proprietor of the *Bansbarreah* concern, and it may be conceded that (as Mr. *Leith* has argued) the general object with which an Indigo planter takes this kind of tenure, is to acquire that power over the *Ryots* which a *Zemindar* has, and which enables him to stipulate that upon parts of their lands at least they shall grow indigo at his rates, for the benefit of his Factory. Nevertheless, in acquiring these rights, *Putneedars* acquire other very considerable rights: they acquire the *Zemindar's* rights over a large District, comprising lands, all of which do not grow Indigo, and it is perfectly conceivable that one Partner in a Factory may have that sort of *Talook*, and the consequent power which the ownership of the *Talook* gives; that he may use that power for the benefit of the Factory, and yet that the *Talook* itself may form no part of the assets of the Factory. Then, again, it is to be considered as between the parties between whom this question arises, that the *Zemindar* who has sold and the Purchaser who has bought at the Collector's sale have nothing to do with the motives under which the *Talook* was originally taken,—have nothing to do with those arrangements which the ostensible owner of the *Talook* may make; that the *Zemindar* has granted a tenure of a particular kind, the incidents of which are well defined by law, to a tenant, and that he has a right to look to the ostensible tenant, and is not bound to take notice of the various interests which may be created otherwise than by an authorized alienation. This much is clear, it is certainly not proved by positive evidence; it is only an interference drawn from the assumed nature of things—that this *Talook* was part of the assets of the *Bansbarreah* concern.

Now, before going to the deeds on which the Appellants rely, it may be convenient to look at some of the provisions of the *Ben.* Reg. VIII. of 1819, which apply to this kind of tenure. The scope of the Regulation is, first, to legalize the tenure, the

legality of which had been doubted; after declaring that *Putnee* tenures are valid, it provides that they shall be transferable and answerable for the debts of the *Putneedar*. It next declares, that such tenures are not voidable for arrears of rent, but that the *Zemindar's* remedy, where there is an arrear of rent, shall be a sale under the provisions of the Regulation. It further declares, that the *Zemindar* is not entitled to refuse to give effect to a transfer; and then follow certain provisions which are in favour of the *Zemindar*. The Regulation provides, that in conformity with established usage, he shall be entitled to exact a fee upon every such alienation. It fixes the maximum fee; it provides that he shall also be entitled to demand substantial security from the transferee, or purchaser, to the amount of half the *jumma* rent, or yearly rent payable to him from the tenure transferred, and that the same thing shall happen when the tenure passes in a sale made in execution of a decree or judgment of Court; that the *Zemindar* may refuse to sanction a transfer until the fee and security be tendered; that if there is a dispute as to the sufficiency of the security, it is to be determined by appeal to the Civil Court, and it gives him further powers.

In the 6th section there is this express provision, "That the rules of this, and of the preceding section, shall not be held to apply to transfers of any fractional portion of a *Putnee Talook*, nor to any alienation other than that of the entire interest; for no apportionment of the *Zemindar's* reserved rent can be allowed to stand good, unless made under his special sanction."

The 11th section shows what the consequence of one of these sales is. It gives to the purchaser—assuming, of course, that the sale has been regularly conducted—what we may call a Parliamentary title. It declares that the tenure shall be sold "free of all incumbrances that may have accrued upon it by act of the defaulting Proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder, by a stipulation to that effect in the written engagements, under which the said *Talook* may have been held. No transfer by sale, gift, or otherwise, no mortgage or other limited assignment shall be permitted to bar the indefeasible right of the *Zemindar* to hold the tenure of his creation answerable in the state in which he created it, for the rent, which is, in fact, his reserved property in the tenure, except the transfer or assignment, should have been made with a condition to that effect under express authority obtained from such *Zemindar*."

This being so, it seems extremely questionable whether, if it had been even expressly stated in the various deeds about to be considered, that shares in this *Putnee Talook* were transferred in that manner, such transfers of interest would have been binding on the *Zemindar;* whether he would not have been entitled to look to *French, Hodges* & Co. as the registered Owners of that *Talook;* and whether any of the persons who took these limited interests, some by mortgage, some absolutely, but of portions only, would have been entitled to come forward and say, "We claim to be treated as your *Putneedars*." In fact, however, the deeds do not, any of them, expressly purport to convey this *Talook;* and if the dates of the transactions are considered, there is strong ground for inferring that it was the intention of the parties to keep the two things separate, the tenure separate from the *Bansbarreah* concern, probably from a knowledge that the former could not be dealt with in the way in which it is now pretended that it was dealt with.

It has already been stated, that *Abbott* sold the *Putnee*, in 1841, to *French, Hodges* & Co. for value. The foundation of Messrs. *Cockerell's* interest in the *Bansbarreah* concern is the deed of the 9th March, 1842. That is the deed by which *Abbott* sold out-and-out to *Cockerell* & Co. three-sixteenth shares of the *Bansbarreah* concern. Now, as he had, the year before, sold the *Putnee Talook* as a whole to *French, Hodges* & Co., it is difficult to see upon what principle the general words contained in this conveyance can be construed to include and convey three-sixteenths of the *Talook*, supposing that it was competent to the *Putneedar* to sell the three-sixteenths of the *Talook* separately.

Then, on the 23rd of May, 1842, *Gilson Rowe French*, who probably was one of *French, Hodges* & Co.—though it is not shown distinctly that he was—mortgages to *Cockerell* five-sixteenths, and a fraction of another one-sixteenth of the *Bansbarreah* concern. As far as a mere mortgage went, supposing that any interest in the *Talook* passed by the general words, that clearly would not operate as against the right of the Purchaser under the sale, because the Regulation provides, that the effect of the sale shall be to sweep away any mortgage created by the defaulting *Putneedar*. Again, on the 30th of May, 1842, *Septimus Hodges* mortgages two-sixteenths, and the remaining fraction of another sixteenth, of the same indigo concern to *Cockerell* & Co.; and on the 28th of May, 1847, his Executors sell to *Cockerell* a third absolutely of the *Bansbarreah* concern, which, I take it, included that which had been already mortgaged by their Testator. Therefore, at the date of their insolvency, which, I think, preceded the sale of the *Putnee Talook*, and certainly at the date of the sale of the *Putnee Talook*, *Cockerell* & Co., or their Assignees, were Owners of three-sixteenths and one-third of the *Bansbarreah* concern absolutely, and were Mortgagees of the shares transferred by *Gilson Rowe French*, and thus, either as absolute Owners, or as absolute Mortgagees, were entitled to fourteen-sixteenths of that concern, but the remaining two-sixteenths were still outstanding, and belonged to one *Henry Gloster French*, and in respect of those two-sixteenths *Cockerell* & Co. seem at most to have been equitable Mortgagees by deposit of title-deeds.

In this state of things the sale of the *Putnee Talook* took place. An application was made by the Assignees impeaching the sale, in which they speak of *French, Hodges* & Co. as the *Benamee* Owners of the *Talook* for them; but at that time, as I have just shown, even supposing that the beneficial interest had passed under the general words of the conveyances of shares in the *Bansbarreah* concern, they were not absolute Owners even of fourteen-sixteenths of that concern, and they were only equitable Mortgagees of two-sixteenths. The two-sixteenths were not vested in them until, I think, the 14th of April, 1853, and probably the difficulty of completing the title to the whole concern was the reason of the very great delay which took place before the Appellants came into Court to impeach the sale in a regular suit.

It is unnecessary to go in detail through the subsequent deeds. The general effect of them is, that in 1853, the Assignees, the representatives of *Glyn, Halifax* and Co., who had acquired some beneficial interest in this *Bansbarreah* concern by the pledge of deeds from *Cockerell* & Co., of *London*, and a variety of parties, all concerned in getting the whole interest in the *Bansbarreah* Factories into the Assignees of *Cockerell* & Co., who at the same date transferred it to *John Compton Abbott*. All these transfers were, however, of nothing but the *Bansbarreah* concern. Neither the title to the *Talook* nor the right to impeach the sale of it could pass to *John Compton Abbott*, or from him to the Appellants, unless they were previously vested in *Cockerell* & Co. It has been shown that, in their Lordships' opinion, the general words in the several conveyances to *Cockerell* & Co. cannot be taken to have passed even an equitable interest in the *Talook;* which cannot be assumed to have been an asset of the Factories merely because it was originally taken by Mr. *John Compton Abbott* when sole proprietor of the Factories. In their Lordships' opinion the *Putneedars*, at the date of the sale, were Messrs. *French, Hodges* & Co.; a firm which, although some of its members may have had shares in the *Bansbarreah* concern, appears from the evidence to have been something distinct from that concern; and is not even proved to have been Trustees for it. In these circumstances their Lordships, without laying down any general rule as to the degree of interest which might entitle a party to impeach the sale of a *Putnee Talook* under the Regulations, are of opinion, that the Appellants have failed to show that they have acquired that interest in this *Putnee Talook* which entitles them to dispute the sale in 1849, and that the decision, therefore, of the Principal *Sudder Ameen* upon that point, was correct.

They must, therefore, humbly advise Her Majesty to dismiss this appeal with costs of both Respondents.

13th July, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the late Sudder Dewanny Adawlut at Agra.

GANESH SING,* ... *Appellant*,

versus

RAM RAJAH and others, ... *Respondents*.

Evidence—Unopposed Testimony—Suit for Compensation for Damages—Responsibility of each Person forming the Common Assembly.

In a suit to recover damages caused by the Defendants' plundering the house of the Plaintiff, the Court of first instance passed, upon the evidence of two witnesses, a decree in favor of the Plaintiff. On appeal by some of the Defendants, the Judges of the *Sudder Dewanny Adawlut* of *Agra* held that the fact of plunder was not proved, and dismissed the suit as against all the Defendants.

Held by the Privy Council that as the Defendants did not come forward to exculpate themselves by their own evidence, and as the evidence in support of the charge was unopposed, the decree of the Court of first instance could not be set aside.

Held, that in a suit for compensation for damage done to property, each and every one of the persons was equally responsible to make compensation for the loss sustained, when he happened to be a part of the common assembly and executed a common purpose, and not in proportion to his share of the plunder received or of the damage done by him. Coercion to form a member of the assembly or bear a part in the damage is no excuse from responsibility in a civil suit for compensation.

IN this case their Lordships are of opinion that the judgment appealed against cannot be supported.

In their judgment the Judges of the Court of the *Adawlut* express their opinion that the whole foundation of the claim of the complainant fails. The parties that they had before them were only a portion of the Defendants against whom the decree of the Principal *Sudder Ameen* had been made. They say in their judgment:—"We are of opinion that the Plaintiff, Respondent, so far from establishing his claim against the Defendants, Appellants, has not even proved that the acts of plunder complained of ever occurred. We are, therefore, compelled to differ from the Principal *Sudder Ameen*, and, reversing his decision, to dismiss the Respondent's claim, not only against those Defendants who have appealed, but all those Defendants who have been included in the decree of the lower Court, as it would not, in our opinion, be consistent to allow this decree to stand against these latter parties, while the entire claim preferred by the Plaintiff, Respondent, has been declared by us unfounded and unestablished."

Now that decision seem rather an indiscriminating decision, for thirteen of the Defendants had confessed to their having been present at the plundering, and some of them had partaken of the booty; twenty-seven did not appeal.

Their Lordships cannot entertain a reasonable doubt, on the whole of the evidence, that there had been a plunder of the Plaintiff's property to some extent, and that it was a joint transaction. During the time of the mutiny the chiefs of some villages collected people together with a preconcerted purpose of plundering the Plaintiff's property, and it is quite plain upon the evidence that all were acting with a common purpose of plunder, that they went to the Plaintiff's house for the purpose of plundering, and each co-operated more or less; and where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility.

Well, then, taking it as plainly established upon the evidence that there was a plunder of the property, that it took place in pursuance of a common design of all those parties who co-operated in carrying it out, the only question was to iden-

* 3 B. L. R, P. C., p. 44.

tify any of the persons who were present co-operating in that common design. In a criminal matter punishment may be apportioned, but in a matter of this description, where the Plaintiff is to be compensated for the loss he has sustained, the law does not allow men to apportion their own wrong, and does not apportion it for them. Each and every person co-operating to any extent in a plunder of this description is responsible to recoup the party plundered for the loss he has sustained.

That being the case, there was no question in reality that involved difficulty in decision, but to identify the persons who were present, and formed part of that plunder party. No doubt, in the circumstances of the country at the time, there was a great temptation to accuse, and, perhaps, considerable facility in charging particular persons suspected, or upon whom it might be desired, from any motive, to impose responsibility. But there is this fact, as was very properly observed by Mr. *Wood*, that none of those parties who now belong to the group of Respondents, tendered his own evidence to contradict the evidence of the two witnesses required by the Principal *Sudder Ameen*. His principle seems to have been, that he would not attach responsibility to any individual who had not been shown, by two witnesses at least, to have been present on the occasion. Then, when persons so accused do not think fit to avail themselves of the opportunity they have had of exculpating themselves, by their own evidence, from the charge made against them, surely that general reluctance to meet by their own evidence the evidence brought forward against them justifies the Court in relying on such unopposed testimony. Some of them in the defences which have been made seem to have imagined, that because they had not got a large share of the plunder, or because, as they allege, they were coerced to join in the transaction, that excuses them from responsibility. If the matter were to be disposed of in a criminal proceeding, where the Judge had to inflict a punishment or a fine, all that might be taken into account; but here, in a civil proceeding to obtain compensation for the loss the Plaintiff sustained, by a transaction for which all who joined in it are responsible, in the eye of the law, you have nothing to do but simply to see that, in point of fact, the parties accused were part of that common assembly which had, and executed, a common purpose of plundering this man's house, and are bound, each and all, to make him compensation for the loss that he has sustained by the demolition and abstraction of his property. It is very likely that at first, in the confusion of the whole thing, and the difficulty of proof, there was exaggeration in the claim which was made, but the claim in respect to the jewels and other things has been reduced, and the Plaintiff has certainly confined it within reasonable bounds. It certainly does appear on the evidence that he was plundered at least to the extent at which he now lays his claim, and perhaps considerably more. The judgment appealed against states that the entire claim was unfounded and unestablished, and that the decree was wrong against all the parties. But, confining it to the case of parties who had appealed, they were parties who, instead of giving their own evidence before the Principal *Sudder Ameen* to exculpate themselves and show that they did not form a part of that plundering party, instead of simply doing this and putting their own evidence against that of the two witnesses who were brought forward against them, they appeal to the superior Court, and argue upon the whole transaction, and get the Court of the *Adawlut* not to institute a discriminating inquiry into the credit of the witnesses in each case, but to come to the conclusion that there was no foundation for the claim at all. There could not have been any adequate sifting of the evidence, and it does seem to be an unreasonable conclusion on the whole of the evidence, to say or suggest that the Plaintiff had not been plundered at all.

Under these circumstances, their Lordships feel no difficulty in saying that, in their opinion, the judgment of the *Adawlut* ought to be reversed. The Principal *Sudder Ameen* had the advantage of having had the witnesses examined before him, and their evidence not having been contradicted by any of the parties themselves, his judgment may be safely adopted.

Their Lordships, therefore, will humbly recommend Her Majesty that the judgment of the Court of *Sudder Dewanny Adawlut* be reversed, and that the judgment of the Principal *Sudder Ameen* should be affirmed with costs. The Appellant is to have the costs of the appeal.

15th, 19th, 20th and 21st July, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

RAM CHUNDER DUTT,* ... *Appellant*,

versus

CHUNDER COOMAR MUNDUL and others, ... } *Respondents.*

Boundaries—Joint Hindoo family—Status—Division—Practice—Special leave to appeal from decrees of Sudder Court and Court of first instance—Order in Council on petition; leave given only from Sudder Court's decrees—Construction of Order in Council held to embrace the decrees of the Court of first instance.

In a question relating to boundaries of land, the Judicial Committee on a review of the evidence, reversed the concurrent decrees of the Court of First instance and the *Sudder* Court, but without costs.

Held, following the case of *Appovier* v. *Ram Subba Aiyan* (11 Moore's Ind. App. Cases, p. 75; *Ante*, p. 289,) that in a Hindoo family, the *status* of joint ownership is only determined by an actual partition, or an agreement by mutual consent to a division of the joint estate.

It lies on a party claiming a share of the joint estate to prove a severance of interest.

On special application for leave to appeal from two decrees of the *Sudder* Court, and also two decrees made by the Court of First instance, the Order in Council made on the leave given was confined to the *Sudder* Court decrees. *Held*, that such Order was for the purpose of the hearing of the appeal to be considered as embracing all four decrees.

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* 13, Moore's I. A., p. 181.

THESE were two appeals from decrees of the late *Sudder* Court, which was consolidated by an Order in Council, and heard as one case, made in two suits in the nature of actions of ejectment to recover possession of land and mesne profits, in which suits the Appellant was Plaintiff and the Respondents were Defendants. The question at issue respectively was one of boundaries and the alleged partition of certain estates. The facts and the points raised in the argument are so fully stated and discussed in their Lordships' judgment as to render any further statement superfluous.

The appeal was argued by

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant, and by

Mr. *Field*, Q. C., and Mr. *J. D. Bell*, for the Respondents.

13th December, 1869.

The consideration of the appeal was reserved, and judgment was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This case was heard as one consolidated appeal, pursuant to Her Majesty's Order in Council of the 27th of July, 1863. The consolidation was of two appeals which the Petitioner, the present Appellant, by a special application to Her Majesty in Council, asked leave to bring.

The application to Her Majesty was for leave to appeal, not only against two decrees of the late *Sudder Dewanny Adawlut* at *Calcutta*, made on special appeals to that Court, but also against two decrees of Mr. *La Tour*, the Judge of the Civil Court of the *Zillah* of the *24-Pergunnahs*, each of the four decrees being specified in the petition by its date.

The Order of the Judicial Committee really was, to grant leave to appeal as prayed, but inadvertently it was drawn up in words which, construed literally, would limit the appeal to the decrees of the *Sudder* Court only; but for reasons to be stated presently, it must be taken that

there was leave to appeal against the four decrees.

The original suits, Nos. 68 and 69 of 1852, were brought in the *Zillah* Court of the 24-*Pergunnahs* before *Lokenauth Bose*, the then Principal *Sudder Ameen*. They were of the nature of ordinary ejectment suits, for the recovery of the lands sued for in each, and of *wasilat*, or mesne profits.

In No. 68 the Plaintiff sought to recover 6 *cottahs* 4 *chittacks*; in No. 69, 1 *beegah* 4 *cottahs* 6 *chittacks* and 13½ *teals* of lands: the total being 1 *beegah* 10 *cottahs* 10 *chittacks* and 13½ *teals*, part of 1 *beegah* 14 *cottahs*, to which he made title as follows:—

His Son had purchased the 1 *beegah* 14 *cottahs* at a sale in execution of a decree in a civil suit for a money demand, and had subsequently conveyed it by deed of gift to the Plaintiff, his Father.

The decree-holders were *Gooroodoss Ghose* and *Bhuggobutty Dossee*, Widow and heiress of *Ramtonoo Ghose*, who had obtained their decree in a suit brought by them against *Hurramoney Dossee*, Widow and heiress of *Tarrachund Ghose*, Brother of *Gooroodoss* and *Ramtonoo*.

The Plaintiff thus accounted for the entire quantity of 1 *beegah* 14 *cottahs*. He stated in his plaint that he had possession of 3 *cottahs* 5 *chittacks* 6½ *teals*; that one *Ramlochun Seal*, the ancestor of the *Seal* Defendants, had concealed half a *cottah*; that the Plaintiff's Son had originally obtained possession of 9 *cottahs* 9 *chittacks* 6½ *teals* only, and that the residue of the whole quantity the *Munduls* had, by force and collusion with the tenants, kept in their possession. He gave this explanation as to the 3 *cottahs* 5 *chittacks* 6½ *teals*: "That out of the eastern portion of the southern parcel of land within the *bazaar* my Son had an absolute right to 10 *cottahs* of land, held by the following *Ryots*;" and after an enumeration of their names, with the quantities of their lands, and the amounts of rents respectively, the plaint proceeds thus: "But in collusion with the said *Munduls* the tenants gave *kabooleats*, in the said month of *Srabun*, of a one-third on the said land, namely, 3 *cottahs* 5 *chittacks* 6½ *teals*, at Rs. 83 15 as. 4 p."

The Plaintiff divided the lands sued for in No. 69 into two portions, one described as the southern, containing 8 *cottahs* 2 *chittacks*, and the other as the northern, containing 16 *cottahs* 4 *chittacks*. This division is not derived from anything contained either in the lot at the sale which described his Son's purchase, or in the deed of sale conveying the property to the Purchaser, but is apparently due to the fact that the two parcels of land are separated from each other by intervening land. The Plaintiff's title to all the land for which he sued in the two actions was the same, but he divided his claim into two suits, stating as the ground for doing so, that the dispossessions of which he complained took place at different times, and that the actors in both were not wholly the same persons.

In No. 68 the Defendants were, first, *Pearee Lall Mundul* (who, dying during the litigation, is represented by his two Sons, Respondents in this appeal,) and two other *Munduls* of the same famlly, the three being styled in the plaint as the "actual dispossessors;" secondly, certain persons representing *Ramlochun Seal*; and lastly, certain persons, the representatives of the decree-holders and of the judgment debtor, that is, of the *Ghose* family. In No. 69, these last parties are said to be joined *pro formâ*; the rest are called the actual dispossessors, and the same as the parties in No. 68, with the addition of four other *Munduls*, and the Widow of a fifth.

The pleadings, which are in the old form, are lengthy, extending to a rejoinder, with much repetition, and the customary imputations of fraud on both sides. Suit No. 68 was brought for a small portion of the land, on the west; suit No. 69 included the rest of the lands sued for, divided into the southern and northern portions. The boundaries in the plaints are meant by the Plaintiff to describe and demarcate a holding called No. 85, in which all the land to which he was entitled was, by his admission, situate. This admission, however, applies only to the Collectorate holding, No. 85, alluded to in the issues.

To suit No. 68, the *Munduls*, Defendants, answered that these lands were not

in No. 85, nor part of the Plaintiff's Son's purchase; that they were their own old *durpin* lands; and that neither the Plaintiff's Son, nor the Plaintiff had ever been in possession of them. The *Seals* denied, first, any connection whatever with the lands in this part; and, secondly, that they had dispossessed either the Plaintiff or his Son of any portion of them.

In suit No. 69, the Defendants, the *Munduls*, answered as to the lands in the southern part of the holding, as divided by the plaint, by admitting a title in the Plaintiff as a sharer of one-third. They pleaded that *Tarrachund* was not exclusive Owner of any part of the lands sued for in this suit, but a co-sharer only with his Brothers; that he had but one-third; that the two-thirds of the other members of the family had passed to them, the *Munduls*, by mortgage and foreclosure, and that they had obtained possession under a writ of possession issued by the late Supreme Court at *Calcutta*. They denied that the Plaintiff had any title to the lands in the more northern part lying beyond No. 78, 78-1, and 78-2. Of these they said they were the Purchasers at the auction sale, their lot consisting of a share in about 1 *beegah*, 8 *cottahs*, described as *Lakhiraj*, and as the share of *Tarrachund*. These lands they alleged not to be in No. 85, and to be beyond the sale boundaries, to the north. They alleged the Plaintiff's northern boundary to be the southern boundary of the holding, described as No. 78, 78-1, and 78-2, and that this holding severed wholly the two portions which the Plaintiff sought to include in his one lot, described in the sale proceedings on the attachment as "one parcel," and they insisted that the Plaintiff must be limited to one parcel.

The answer of the *Seals* was somewhat different; but as a decision which is not appealed from was made in their favour, it is unnecessary to state its substance.

The case will be made plainer by stating the description of the property and of the boundaries, as given in an instrument called a *Zimmanamah*, or deed of security, part of the usual proceedings in an attachment previous to sale under a decree; and also the description of the property in the deed of sale executed to the Plaintiff's Son on the completion of his purchase. The property is thus described in the *Zimmanamah*:—"One parcel within the *bazaar* of *Kaleychurn Mistree*, about 1 *beegah*, 14 *cottahs* of rent-paying land, the self-purchased lands of the Defendant (meaning the said *Tarrachund*) bearing no shares." In a separate column in the same line, the land was further described as "belonging to the Defendant exclusively:" The boundaries of the land were described as follows:—"East of the Government road, north of the *Tank* of the said *Tarufdar*, west of the *bazaar* tenants and the lands of *Rajah Sunkur Ghosal*, and south of the lands." In the Bill of sale the property is described as "mentioned in the annexed list." That list is written under the Bill of sale, and is as follows:—"List of the property, Lot 9, *Pergunnah Magoorah*, in the village of *Kidderpore*, 1 *beegah* 14 *cottahs* rent-paying purchased land." The words of the *Zimmanamah*, "one parcel" and "about," are not found in the Bill of sale. The number of the lot, and the word "purchased," in connection with rent-paying land, evidently refer to the lot under which the Plaintiff's Son purchased.

The deed of sale contains an additional statement, viz., that one named *Bhoyrubchunder* claimed the lands, and "therefore, 'that the Purchaser has in this purchased property become like the former proprietor.' Since some stress was laid on this expression in the argument for the Respondents, it is proper to state further, that in the deed of gift from the Plaintiff's Son to the Plaintiff, the property is further described as the share of *Hurramoney*, the Widow of the late *Tarrachund Ghose*."

The property remained under attachment for eight years. None of the Defendants made any objection to the description of the property pending the attachment, or previous to the sale.

After the completion of his purchase, the Plaintiff's Son tried to obtain possession of the land. He was opposed in that attempt, and, except as to a small part of the land, with success. The Plaintiff imputes this opposition to the collusion of the *Munduls* with his Tenants. With the exception of one suit, that brought by

the Plaintiff against one *Anundchunder Sircar*, in which *Pearee Lall Mundul* intervened, it will not be necessary to allude further to this earlier litigation.

The Purchaser obtained *kabooleats* from certain of the Tenants, some of whom, viz., those referred to in connection with the 10 *cottahs*, the Plaintiff states to have subsequently attorned to the title of the *Munduls*. In this state of things, his title being disputed as to a large part of his purchase, and as to the rest, *kabooleats* having been given and accepted, apparently without protest, as for a share, viz., one-third only, the Purchaser made a gift of the land to his Father, the Plaintiff, by the description before referred to, of "a share."

After this gift the Plaintiff commenced his proceedings against *Anundchunder Sircar*.

He relied on an *ikrar* and *kabooleat*, executed according to the Plaintiff's statement by that Defendant. *Pearee Lall Mundul* intervened as an objector. Both *ikrar* and *kabooleat* were denied, and declared by the Defendants to be forgeries. The Judge doubted their genuineness, but hesitated to pronounce them forgeries. He said, that if not forgeries, they were probably extorted, alluding to a complaint of several of the Tenants, including *Annundchunder*, publicly preferred to a Magistrate, but not substantiated by proof that the Plaintiff was imprisoning them, and otherwise using force to obtain from them engagements with him as Landlord. One of the issues was, whether the Plaintiff was thus irregularly seeking to obtain possession, without instituting a suit to try the proprietary right. The Judge decided the suit on the ground that the title was in dispute, and that a summary suit for rent could not be entertained. On appeal, the Judge, before whom the case next went, nonsuited the Plaintiff, on a merely technical ground.

The Plaintiff having thus failed to obtain possession by effecting arrangements with the Tenants, or by litigation with them, proceeded to take a step at last which, if well advised, he would have adopted in the first instance, viz., that of bringing a regular suit for the decision of the question of proprietary right. He preferred the suits No. 68 and No. 69, in which, dividing his claim as before stated, he brought forward his whole demand. As a complaint of this division was renewed upon the hearing of this appeal, it may be convenient to dismiss the subject at once by observing, that their Lordships attach no weight whatever to it, and do not think that the division complained of was made for any other reason than that assigned for it by the Plaintiff in his plaint.

The suits No. 68 and No. 69 were first heard before *Lokenauth Bose*, the then Principal *Sudder Ameen* of the 24-*Pergunnahs*, and were heard as one cause. Some issues not on the merits may be passed over. Those on the merits were in No. 68. "First, whether the land in dispute is included in the holding No. 85 of the Collectorate or not; second, if so, then is it comprised within 1 *beegah* 14 *cottahs*, the entire rights of the late *Tarrachund Ghose* purchased by the Plaintiff's Son?"

In suit No. 69 they were, "First, whether the land mentioned within the sale boundaries was the exclusive share of the late *Tarrachund Ghose* included in Bill No. 85; second, if it be proved to be such, whether the land in dispute was within the boundaries aforesaid."

The Principal *Sudder Ameen* in No. 68 dismissed the case against the *Seals*, a decision acquiesced in by the Appellant; but gave the Plaintiff a decree against the other Defendants for his whole demand. In No. 69 he also decreed partially in favour of the Plaintiff, excepting, however, on special grounds, a half *cottah* from the decree. His opinion was also unfavourable to the Plaintiff's contention as to the northern part of the lands which the Judge thought not to be within the Plaintiff's sale boundaries.

In the course of the proceedings an inquiry by an *Ameen* was directed. He was ordered to prepare a map of the disputed premises. This map was so prepared, and it was signed by both parties. It is No. 102 of No. 69; the inquiry directed in this stage was strictly regular and conformable to the issues. It was whether the lands notified in the Proclamation, a step in the sale proceedings, were included in Bill No.

85, and whether the lands in dispute were part of them. The *Ameen* reported in favour of the Plaintiff that the lands were included in No. 85; and that those sued for were part of them. He founded his opinion mainly on oral testimony.

The decrees of the Principal *Sudder Ameen* in the Plaintiff's favour were appealed from, and the appeals were heard by Mr. *Torrens*, the Civil Judge of the *Zillah* Court. The Plaintiff had claimed and had succeeded in obtaining decrees for the entirety and not for a share. One of the objections urged in the petition of appeal to Mr. *Torrens* was, that the quantities allotted by the *Ameen* would, on admeasurement, be found to exceed the quantity of land purchased by the Plaintiff's Son, viz., 1 *beegah* 14 *cottahs*. The Plaintiff had, in fact, in his pleading, contended that he had bought virtually the residue of the holding, putting a construction on his deed of purchase which its terms do not warrant. Mr. *Torrens* sent back both causes for further and more complete investigation.

Mr. *Torrens* also expressed some doubt, whether the Collector should not have been joined as a party. This seems to have proceeded on the ground of the land being a *khas* possession of the Government, and the Collector being, as it were, in the place of the *Zemindar* or Landlord.

The causes as remanded came before Mr. *Bell*, the Additional *Sudder Ameen;* he nonsuited the Plaintiff for the non-joinder of the Collector as a Defendant, but on appeal to Mr. *La Tour*, who had, in the meantime, succeeded Mr. *Torrens* as Judge of the Civil Court, Mr. *La Tour* reserved the decision, and sent the causes back to Mr. *Bell* to be tried on the merits.

On the 10th of November, 1858, Mr. *Bell* decided suit No. 68 in the Appellant's favour, decreeing to him possession of the land (6 *cottahs* 4 *chittacks*) claimed in that suit, with *wasilat* from the date of the plaint. On the preceding day he had postponed suit No. 69 for further local investigation, and on the 5th of January, 1859, he directed the second *Ameen* to make that investigation. The order of reference to the second *Ameen* was accompanied by copies of the plaint and answer, copy of a *chitta* dated 8th *Pous*, 1214, a petition of the Plaintiff (the Appellant) dated the 17th of December, and the original survey plan filed with the order.

The *Ameen*, under the directions in the Order, made an elaborate report, which has been much commented on by both sides on the argument of this appeal. The report was not acted on by the Judge, Mr. *Bell*.

The Appellant stated specific objections to the report, and, by petition, requested Mr. *Bell* to view the premises, which he did. It appears by the Respondent's petition of appeal to the Civil Judge that the Respondent's *Vakeels* were present at the view, which may be treated, therefore, as strictly regular and judicial. The report of the second *Ameen* was on all points opposed to that of the former *Ameen*. It reported against the Appellant, that the holding No. 85 did not include the lands in No. 68, nor those in the more northern part; that the revenue survey was inaccurate in several particulars which it mentioned; and that the lands claimed in the northern part, and in the suit, No. 68, were not within the Plaintiff's plaint boundaries. It also reported that, on the measurement made according to the principle insisted on by the Respondent, which the *Ameen* treated as the correct principle, the land contained in the southern portion of the lands claimed in suit No. 69 amounted to 1 *beegah* and 16 *cottahs*. As new terms, "plaint divisions, descriptions, and boundaries," are introduced into this confused subject, as if to confuse it more, it may be as well to observe that the second *Ameen* is not answerable for the introduction of this additional element of uncertainty into his report, since he strictly pursued in this respect the order of reference to him. The direction was the act of the Court itself, both parties, in fact, having requested that the investigation should proceed according to the *Lotbundie*, that is, the sale boundaries, in the same manner as the inquiry had been pursued on the former investigation. It is obvious that on such a purchase as the present, where a Purchaser is, as it were, in quest of his lands to identify them, the plaint itself framed, at the outset of the inquiry, on probably very imperfect information and

knowledge, is not likely to be that certain proceeding by which an inquiry should be guided which is to identify the lands.

Mr. *Bell*, the Additional *Sudder Ameen*, dissented from the opinion expressed by the second *Ameen*, declared his report to be opposed to the survey and his own conclusions from his own view, and declined to act upon it. The Respondents, in their petition of appeal to the Civil Judge, do not deny that the report is opposed to the survey, but they attack the latter document on grounds of misconduct in the Deputy Collector, which, if they had any foundation, should have been made matter of appeal and complaint to his superior the Collector. Mr. *Bell*, on the 15th of April, 1859, also decided suit No 69 in favour of the Plaintiff.

In suit No. 68 he had acted on the last-mentioned survey, and on an Award of the Deputy Collector unappealed from, which, on a dispute between the Plaintiff and the *Munduls*, whether the lands in No. 68 should be mapped as within holding 85, had included them in it. This Award, which is in suit No. 68, states, "that it is necessary to lay down the boundaries;" "but the second Petitioner, *Pearee Lall Mundul*, appears to be in possession of the lands, there being no necessity of any investigation into possession, or dispossession, or any alteration thereof from this office; should any party have any objection as to possession or dispossession, he can sue for it according to law in Court. At present, there being no necessity for cancelling the order which has been passed in laying down the boundaries of the said land along with the holding No. 85, according to the plan of the *Tussidor*, it is ordered that the boundaries of the said disputed 6 *cottahs* 8 *chittacks* 16 *teals* of land be laid down according to the foregoing directions within the holding No. 85."

In suit No. 69, the Principal *Sudder Ameen* found that the lands sued for were in the exclusive ownership of the execution debtor without sharers. He seems to have been influenced, in a great degree, in coming to that decision by the non-claim of the *Munduls* pending the attachment after the notification and before the sale. His decision implies, on this point, that the *Munduls* knew of the intended sale, and description of the lands. He concluded that they would have objected unless they had known, or supposed, the description to be true.

The *Munduls* alone appealed from these decrees. On appeal to Mr. *La Tour*, the Civil Judge, he reversed both decrees; that in No. 68, wholly; that in No. 69, in part. The decree in No. 68 he dismissed with costs; in No. 69 he decided the case on what he considered an admission by the *Munduls* of the Plaintiff's title to one-third of the lands, and limited the decree to those lands in the southern part, which the second *Ameen* had found to be within the Plaintiff's plaint boundaries, and to be 1 *beegah* 16 *cottahs*. Mr. *La Tour* declared the Plaintiff to be entitled to one-third of this quantity, 1 *beegah* 16 *cottahs*, including the 3 *cottahs* 5 *chittacks* 6½ *teals*, of which he was in possession. The quantity 1 *beegah* 16 *cottahs* 6½ *teals* is gained by adopting the second *Ameen's* report. In substance, therefore, it was decreed that *Tarrachund* was a co-sharer, and entitled to a third only. The costs were charged on the Plaintiff on the ground that he had failed on the proof of all the issues.

Mr. *La Tour*, on this last appeal, referred as evidence to a decision of the *Sudder Dewanny Adawlut* (which appears to be a reported case), in which it had been decided, on a former litigation between the two Brothers, *Gooroodoss* and *Ramtonoo* on the one side, and *Tarrachund* on the other, that the family was joint in property. Some land, 9 *beegahs* and a fraction, out of which the holding 85 was subsequently constituted, was scheduled as part of the family property. This was reduced by purchase by the Government of part—*viz.*, about 2 *beegahs* and a fraction, in the formation of the *Kidderpore* road. Subsequently to that reduction, the residue is said to have been formed into the holding No. 85. The Judge termed this decision, which he introduced and relied on as evidence, a decision *ad rem*, declared that it threw on the Plaintiff the *onus* of proving a subsequent partition, and that the Plaintiff had not sufficiently

discharged himself from that obligation. He added that, "a subsequent partition was probable enough, but that the Court must act on evidence and not on conjecture."

In suit No. 68, Mr. *La Tour* observed that certain of the Collectorate *Chittas* which the Respondents had produced in evidence, including that referred to by the *Alipore Ameen*, had been rejected by Mr. *Bell* on insufficient grounds. He did not dispute that the survey must be adopted as showing the state of Bill 85, as to boundary and contents, but thought the Award no decision on the question of title, and as evidence of no weight, especially on the northern part. He decided in both suits that the Plaintiff could recover only one parcel, and could not overleap the barrier which the holding No. 78, 78-1, and 78-2 presented, nor recover in suit 68, lands that formed a different parcel from that of which he recovered a portion on the southern part.

The decisions of the *Sudder* Court were made on special appeals from these two last decrees.

That Court could not decide in such appeals on questions of fact. It merely examined the evidence to see whether the objections urged turned on questions of law, and finding them to be, as they appear to their Lordships to have been, objections to decisions on questions of fact, it declared that it could not entertain them on special appeal. Its judgments cannot be appealed to as a confirmation of Mr. *La Tour's* decisions on the facts, since it had no jurisdiction on such appeals to decide on the facts.

Their Lordships will now consider the arguments addressed to them on the hearing of the appeal. The first objection was in the nature of a preliminary one; that the appeal allowed was from the two decrees of the *Sudder Dewanny Adawlut* only. Their Lordships observed that if this was the correct construction of the words of the Order—a view which, however, they did not entertain, it would no doubt be amended on their recommendation to Her Majesty to that effect; a recommendation which they should, in such a case, think it their duty to make. On this intimation of opinion, the learned Counsel pressed the objection no further.

It was next urged that the Appellant had not argued before the *Sudder* Court the case of No. 68, the decision in which differed materially on several points from that of No. 69. This forbearance ought not, in the opinion of their Lordships, to prejudice the Appellant here; the more especially as the two appeals involved the same material question, viz., whether the title was to a share or to the entirety of the lands.

Then there was an objection affecting the weight of evidence generally urged by the Appellant, and stated in his case, *viz.*, that the *Munduls* must be considered as mere wrong-doers, since they have not attempted to prove the title pleaded by them that they are purchasers of two-thirds of the whole of the property of the *Ghose* family. The evidence shows, in the opinion of their Lordships, a contest as to the title of the Purchaser to a large part of what he claimed, contemporaneous with his purchhase, to which contest no other description than that of a *bonâ fide* dispute could or can be given. The title of the *Munduls* to two-thirds does not rest on mere pleading. *Primâ facie* proof of their title is to be found in the receipts for revenue or rent, in the time as well of *Hurramoney's* possession as of the Purchaser's, in a petition also of the Plaintiff himself, wherein he calls *Gooroodoss* and *Bhuggobutty* the "acknowledged Vendors of the *Mundul*," and also in the *kabooleats* taken for the third of the rents. The *Zimmanamah* which is put in by both parties favours the same conclusion, for the decree-holders, who would otherwise have had the title to the two-thirds, are connected with that instrument, and pointed out the property by their Agent to the *Nazir*. Many of the lots describe the *Munduls* as Owners of the two-thirds, which had been the property of the *Ghose* family.

The next matters for consideration are the evidence and findings in suit No. 69, and the reasons given by Mr. *La Tour* for his decision. The judgment, the reception of which in evidence has been objected to, was one to the reception of which, had it

been tendered in evidence at the right stage of the proceedings, no legal objection could have been made. The objection as to the judgment being used at all was one dependent only on the time and manner of its introduction; this more limited objection was not included in the grounds of special appeal, and as it does not affect the merits, cannot be entertained now. It is true that the *status* of the family as a joint Hindoo family was not continuing. The alienation of the shares of two members of that family to the *Munduls* determined that *status*, and substituted the *status* co-sharers or joint owners, whose rights, as is shown by Lord *Westbury* in the case of *Appovier* v. *Rama Subba Aiyan* (11 Moore's Ind. App. Cases, p. 75; *Ante*, p. 218), are in many important respects distinguishable from those of a joint and undivided family. This joint-ownership *status* would, however, only be determined by an actual partition, or an agreement by mutual consent to divide; and such a severance of interest it lay upon the Appellant to prove. Their Lordships have not been insensible to the presumptions in favour of an actual severance of *Tarrachund's* share which the learned Counsel for the Appellant has drawn from the terms of the *Zimmanamah* and the conduct of the *Munduls* with reference to that document. But looking at the whole of the evidence before Mr. *La Tour*, and in particular to the receipts for revenue, and to the acceptance of at least one *kabooleat* for a share by the Appellant's Son, who is not produced to explain his act, and is not shown to be dead or incapable of giving evidence; their Lordships, while they dissent from much of Mr. *La Tour's* reasoning, are nevertheless of opinion, that he has come to a right conclusion in finding that the Appellant has failed to show that *Tarrachund* was entitled to more than a one-third undivided share in the property which was the subject of the lot purchased.

The next question to be considered is, whether the Appellant has proved that any part of the lands of which his Son purchased *Tarrachund's* share, is situated in the northern portion of the lands claimed in Suit No. 69. The Appellant relies on the revenue survey and the Award already referred to, as conclusive upon this question, the Award not having been questioned in a regular suit within three years of its date. This Award, however, as has already been stated, did not purport to determine the right of possession; it stated as a fact that *Pearee Lall Mundul* was in possession of the lands; but in itself it was a mere order relative to the mapping of the holding and defining its boundaries. It would be unjust to give the Order indirectly an effect on possession, which directly it disclaims; nevertheless, it must be held to fix the boundaries.

In this more northern part of the holding, the question that arose between the Plaintiff and the *Munduls* was one of proprietary right, not of mere boundary; the Respondents relied on their title as purchasers of a share belonging to *Tarrachund*. They said this land never was in No. 85, or if it be so adjudged, it is our purchase. In the former case, the Plaintiff, by his own admission, would have no title to it; in the latter case the question between them would be whether the Respondents' purchase was proved.

They survey in this case is not questioned by the issues; it must, therefore, be viewed as evidence of the boundaries and of what holding No. 85 includes, but it furnishes no evidence of proprietary right in the Plaintiff in his contest with the *Munduls* directly nor indirectly. The Award, for the reasons already given, is evidence only to the same extent as the survey.

The Respondents claim under a purchase of a share of *Tarrachund* in the more northern part. It is the case, therefore, of both parties that some property of his extended thus far. The Plaintiff's Son did not purchase all *Tarrachund's* share in holding No. 85, but only a certain quantity in that holding, the situation of which was not clearly defined. The survey, therefore, does not much advance his case. The origin of his title is a sale under the decree of the Court directing a sale in execution. The whole holding was sold: there was no unsold residue. The justice of the case requires that the Plaintiff, whose Son paid for 1 *beegah* 14 *cot-*

tahs should obtain that entire quantity, if so much exists in the holding unsold to others, and if so much does not exist, then all that is capable of being so applied. His claim, however, can extend no further than the sale boundaries.

This being so, their Lordships proceed to deal with the subject of the sale boundaries. These begin with the north bank of the Tank, and are, therefore, not those of the whole holding. The description of the boundaries north is, the lands of the *Rajah Kalesunkur Ghosal*. That description tallies with the plaint, and favours the Plaintiff's construction. It means strictly sole, not *Ijmallee* lands. As an imperfect description, it may be applied to *Ijmallee* lands also, if the evidence shows that it was meant to describe them. The holding No. 85 is found to extend beyond the *Ijmallee* lands to the sole owned lands; and as the whole surplus is inadequate to supply the whole quantity, no ground exists for narrowing the construction, since, in a doubtful case, that interpretation should prevail which may best effect a satisfaction of a claim which cannot be otherwise fully satisfied.

Their Lordships are merely considering so far how the case would stand in a contest on the construction of the words as to boundaries, supposing a clear surplus to exists in the more northern part. The language, therefore, of the *Zimmanamah* as to the boundaries presents, in the opinion of their Lordships, no bar to the Plaintiff prosecuting his claims on the more northern part. It lies, however, on him to show that there are lands in that part of the holding capable of being applied to the satisfaction of his demand. Here, however, he is met by the Respondents claiming as auction Purchasers under a distinct lot; and alleging themselves to be in possession under that title.

Therefore, the contest in this suit on this part must be considered to be narrowed to this, whether the Respondents' purchase *de facto* is in this northern part. The issue lies on them to prove their purchase, as the Plaintiff, by the survey, has established a *primâ facie* case to land in this northern parcel.

The Respondents prove their title-deed. It is a Bill of sale of a moiety of 1 *beegah* 8 *cottahs*. The lot is No. 3. The land is described as alleged to be *Lakhiraj*. The Bill of sale contains no statement of boundaries. On referring in the *Zimmanamah*, to the lot which is the one immediately beneath that of the Plaintiff's Son's purchase, a further description of the land is found. The lands are described as rent free, within the House of *Kalee Churn Mistree*, about 1 *beegah* and 8 *cottahs*, inclusive of the dilapidated Buildings, after deducting two shares belonging to *Oodoy Narain Mundul*, the remaining one share being 9 *cottahs*. The boundaries are thus described: "North and west of the lands of *Rajah Kalesunkur Ghosal*" (a part is left out as worm-eaten) "and south of the lands of the said *Ghosal*." So far, therefore, as this description is decipherable, it describes lands surrounded by those of the *Rajah Kalesunkur Ghosal*. If it appeared that the *Rajah* had no lands in the neighbourhood, except those delineated or referred to, it would appear that the holding No. 78, 78-1, and 78-2, was meant to be described, though erroneously, by a description of the lands of the *Rajah* exclusively; and the same inference might be drawn from the description of the place, if the meaning of the words "within *Kalechurn Mistree's* House and dilapidated Buildings" was clearly ascertained. Both descriptions, however, are the subjects of dispute. It would be wrong to conclude anything against the Respondents in a case where the Court is dealing with inaccurate documents, by reason of mere variances between the deed of sale and the *Zimmanamah*.

The Judge, Mr. *Bell*, found the dilapidated Buildings to be in No. 78, 78-1, and 78-2. The Plaintiff's second witness places the *pucka* house of *Kaleechurn Mistree* in that holding. The Plaintiff also, in his pleadings, supposes the Respondents' purchase to be there in that holding, but he does not show how any concealment could be effected.

The Judge, Mr. *Bell*, finds as a fact that the Respondents had fraudulently attributed portions of the holding 78, 78-1, and 78-2, to the lands claimed by the Plaintiff in the northern part, which he says were less than 1 *beegah* 8 *cottahs*, and had so increased their quantity frau-

dulently, and were aided by the *Rajah* in this scandalous attempt to defeat justice. Yet this is a matter to which a mere view would not afford discovery; and Mr. *Bell* assigns no reasons for his conclusion, which implicates the *Rajah* in a fraud.

The Appellant has not attempted to show, by evidence, the real original extent of this holding 78, 78-1, and 78-2. He had to prove the fraud which he alleged. The Collectorate must reasonably be supposed capabe of furnishing some evidence as to this holding, as to its former quantity and boundaries, if rent paying, as to its rent. If a quantity had been abstracted, proof of its former state would detect the fraud. Without any evidence, and without the disclosure of any reason, to justify a suspicion of collusion in a fraud to defeat a purchaser under a judicial decree, the *Rajah* must, in support of this hypothesis, be supposed guilty of conniving at a concealment and deception on the Court. Their Lordships, therefore, cannot adopt Mr. *Bell's* conclusion, that the Respondent's possession is so augmented as he concludes it to have been, and without it, this land, which the *Munduls* certainly purchased somewhere, becomes, unless it be where the Respondents place it, an untraceable possession, scarcely a probable conclusion. Upon the whole, therefore, their Lordships are of opinion, that the Appellant has failed to establish a title to any land, or to any share in any land in the northern plot, which he claims in suit No. 69, and that the judgment of Mr. *La Tour*, which it is to be observed is consistent with the original judgment of *Lokenauth Bose* on this point, must be established.

As to suit No. 68, the Respondents urge that the Appellant cannot have believed that his Son's purchase included the land claimed in this particular suit, since he offered to take it from the Government on a separate settlement of revenue, whereas had he believed it to be already included in holding No. 85, he would have stood upon that title and settlement. Whatever might have been the weight of this objection, had the offer been unqualified, it loses its effect, when the language of the Plaintiff's petition is carefully weighed. In that document the Plaintiff still insists on his claim under his Son's purchase, and on the existing settlement, and asks merely to be preferred on a fresh settlement, if on measurement the lands are found to be beyond the holding, No. 85. This proposal, thus made and guarded, cannot be construed to amount to any admission that he could not rely on the settlement, or to imply any consciousness that the land was really beyond the limits of the holding, No. 85.

The survey which includes the lands sued for in No. 68, within the holding, No. 85, makes out a *primâ facie* case, at least, in favour of the Plaintiff. Whatever older title, if any, the *Munduls* may have had, they did not stand upon. They settled for the land with Government. It was a *khas* possession of the Government. The settlement with the *Munduls* proceeded on a measurement. The Plaintiff said the land was wrongly measured, and wrongly settled, because already included in No. 85. He denied that there was any excess of land over the measured quantity properly belonging to No. 85, and appealed to the *Sudder* Board of Revenue, which set aside the measurement complained of by the Appellant, and directed a new one, on which the existing survey was made. The survey showed the disputed land to be included in the settled estate, No. 85. The Respondents deny that this restoration proceeded on the Plaintiff's appeal; but the reason which they give, *viz.*, that the Government at that time resumed the whole of the *durpin* lands, is unsatisfactory, for it is opposed to the plain language of the Proclamation, declaring the annulment of the settlement; and it supposes further, a power in the Board of Revenue which it is not shown ever to have exercised, and which is not authorized by the Regulations, *viz.*, the power of resuming lands by a general notice, applying to several distinct holdings. Such a proceeding as that supposed would be virtually a resumption proceeding, and must be pursued according to the Regulations applying to resumption proceedings. The question, then, was reduced to this, whether the old holding No. 85 settled with *Tarrachund* included these lands; that is, it became a question of the boundary and contents of an existing settle-

ment, and was properly to be ascertained by a measurement by the revenue authorities. Mr. *La Tour's* reasoning proceeds entirely on a preference of the report of the second *Ameen* to the revenue survey, and on the assumption that the measurements which were made by that Officer at the instigation of the Respondents' *Vakeels*, are correct, the report of this *Ameen* was deliberately discredited and rejected after a view of the lands by Mr. *Bell*, who necessarily had much better means of forming a correct judgment on the point in question than their Lordships can have.

It is not at all probable that the survey with which the *Ameen's* report is inconsistent should be inaccurate.

Their Lordships have, therefore, come to the conclusion, that Mr. *La Tour's* judgment in suit No. 68 cannot be supported, and that the Appellant has established his title to one-third share in the land claimed by him in that suit.

Under all the circumstances, therefore, their Lordships will humbly advise Her Majesty that the appeal against the decrees of the *Sudder Dewanny Adawlut* be dismissed, and that the decrees of Mr. *La Tour* in suits Nos. 68 and 69 be discharged, and that in lieu thereof one decree be made in both suits on this consolidated appeal in the following terms, *viz.* :—

Declare that the Plaintiff's Son purchased, and that the Plaintiff, as Donee of his Son, is entitled to the right, title, and interest of *Turrachund* in 1 *beegah* 14 *cottahs* of land within the holding No. 85, as the same holding was constituted, and as the same is delineated and shown by the survey in the pleadings mentioned, and referred to in the issues framed in the two suits Nos. 68 & 69 respectively; and declare further, that the Plaintiff has failed to show that *Turrachund* had more than a one-third share in that holing; and that the same share must be taken as one-third only: and declare that the Plaintiff's quantity of land so described as 1 *beegah* 14 *cottahs* can be made up only out of the said share, and so far only as such share will extend to satisfy the same: and declare further, that the Plaintiff has proved a right to have, so far as the quantities permit, that quantity made out of the said share of the land sued for in suit No. 68, and out of the said share of the land sued for in No. 69, except as to the land in the more northern part, described and stated on his plaint to consist of 16¼ *cottahs*, as to which the said Plaintiff has not established his title: and further declare that as to the lands in that northern part so described in his plaint, and as to which his suit has been dismissed, that the same do stand and remains dismissed: and declare that the Plaintiff is entitled to *wasilat* in respect of the said one-third as from the date of his plaints respectively, but that in ascertaining the amount thereof, regard is to be had to the fact of his having been in exclusive possession of 9 *cottahs* and 9 *chittacks* and 6⅓ *teals* in the southern portion: and declare that the costs awarded in the suits No. 68 and No. 69 to the Respondents should be reduced by one-third; and that the rights and interests of the Appellant and Respondents, and the sums due from or to the Appellant and Respondents ought to be settled and adjusted in accordance with the foregoing declaration, and remit the suits to the High Court to the end that such settlement and adjustment may be made accordingly; and their Lordships think that each party should pay his own costs of this appeal.

21st and 22nd July, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William, Bengal.

RAJ LUKHEE DABEA,* ... *Appellant*,

versus

GOKOOL CHUNDER CHOWDHRY, ... } *Respondent.*

Alienation by Hindu widow of her deceased Husband's property—Evidence of the necessity for such alienation—Deed of Sale.

A recital in a deed of sale by a Hindu widow of her deceased husband's property, setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity; nor does the attestation of a relative import his concurrence. Such a transaction may become valid by the consent of the husband's kindred, but kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there ought to be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindu law.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The question raised by this appeal is, whether the sale by two Hindoo Widows of part of the estate of their late Husband, one *Gooroo Pershaud Surmah*, to the Respondent, can be upheld as valid.

The suit was brought to impeach this transaction by the Appellant as the adoptive Mother and Guardian of one *Mookundo Chunder*. The fact of that adoption is not now in dispute, nor is it disputed that *Mookundo Chunder* was by virtue of it, at the time of the institution of the suit, the next heir to *Gooroo Pershaud Surmah*, or to the Sons of *Gooroo Pershaud Surmah*, failing his Widows or the survivor of them. *Mookundo Chunder* was still living at the date of the final decree, which is the subject of the present appeal; but he afterwards died childless, and the appeal is brought by his adoptive Mother, who, as such Mother, is his heiress. There is a suggestion in the Appellant's case that she has, under the authority given to her by her Husband, made a second adoption, but inasmuch as the validity of that adoption is incapable of being discussed in this suit, their Lordships cannot take that into their consideration.

The validity of this transaction is sought to be upheld upon two grounds, first, upon the construction of the *Hibbahnamah*, or Deed of gift, which, it is contended, gave to the Widows an absolute interest, subject to be divested in the event of their Sons or either of their Sons coming of age. If that construction were correct, there would, of course, be an end of the case, because the Deed of sale by the Widows would be good against all the world. Their Lordships will, therefore, first dispose of that question.

Upon the best consideration which their Lordships have been able to give to this *Hibbahnamah*, they are of opinion, that it provides only a species of trust for management, and that it does not interfere with the devolution of the estate, according to the ordinary law of succession, under the Hindoo Law. The Deed was executed by *Gooroo Pershaud Surmah* in the year 1823, at a time when he states himself to have been not only suffering from corporeal illness, but to have a purpose of going to reside at *Benares*, and, therefore, from his then circumstances there is ground for the argument of Sir *Roundell Palmer*, that he meant to provide for the management of the estate, not only after his death, but during his life, and that seems to their Lordships to be the true construction of the instrument. The learned Counsel for the Respondent have laid some stress upon the direction, "you shall perform the cere-

* 13, Moore's I. A., p. 209; 3 B. L. R., P. C., p. 57.

monies of *Shradh*, &c., according to my means," and have contended that that implies a charge to the person to perform the funeral ceremonies of the Doner, and, therefore, must be taken to imply a change in the course of succession to his estate.

Their Lordships, however, are of opinion, that the words "*Shradh*, &c.," are somewhat wide and ambiguous, and that if the *Hibbahnamah* be taken, as they think it ought to be taken, to be an arrangement providing for the management of everything from the date of it, during the life of the Donor himself, it may be taken to refer to, certainly to include, those family religious ceremonies which *Gooroo Pershaud Surmah* himself would, from time to time, if he remained in his home, and in possession of his strength and faculties, be bound to perform.

They, therefore, cannot give to those words the force which, it has been contended, ought to be given to them.

That being their Lordships' view of the construction of the *Hibbahnamah*, it may be convenient here to consider what has been the course of the succession to the property. If the succession was not altered by the Deed, then of course, upon the Donor's death, his two Sons became entitled to his estate. Those Sons are shown to have survived him. Each is also shown to have died in the life-time of his Mother, and to have died childless and under age. The consequence of that is, that on the death of each, his interest would have passed to his Mother, and that *Mookundo Chunder*, who was the adopted Son of the Testator's Nephew, became, on his adoption, the collateral heir of each Son, subject to the interest of his Mother. The result, of course, is, that upon the death of the Widow, *Gouree Dabea*, *Mookundo Chunder* became entitled to a present interest in the property, which is the subject of this contention, unless it can be shown that that property has been validly passed by the act of alienation, which is the subject of the suit.

Their Lordships have next to consider, whether treating the Deed of sale as one executed by women having only the limited interest of Hindoo females in property which they take either from their Husband or their Sons, the transaction can be supported upon any of the grounds on which such a transaction is recognized as valid by the Hindoo Law. The law upon the point is well ascertained, and has been established by many cases. Some question has been made at the Bar as to the right of a person who is a presumptive heir in reversion to question such a transaction; but their Lordships, if it were necessary to decide the point, would find it extremely difficult to overrule the many cases in which that right has been more or less recognized. But in the view which they have now taken of the *Hibbahnamah* and of the present right of *Mookundo Chunder*, upon the death of *Gouree Dabea*, to enter into possession of two *annas* of this property, it really is not necessary, in order to support the suit, to express any more decided opinion upon that question.

Then, upon what grounds are we to treat this transaction as valid? The statement upon the face of the Deed of sale is, that the property was sold in order to liquidate the Husband's debts. It recites, "Now, our Husband's debts not being paid, the liabilities are being gradually increased by loss in interest. The debts of the Creditors cannot be liquidated at once, by the profits of the above *zemindaries*, particularly the debts of the time of our Husband for which we had made an Instalment Bond in Court in our own names with the Creditors, *Narain Chunder Doss* and others. Now, that money not being paid, the above Creditors are about to have all our *zemindaries* sold by auction by putting in force the said Instalment Bond in Court." Therefore, there is a clear allegation that the transaction was entered into for the purpose of defraying the debts of the Husband, including a particular debt, secured by an Instalment Bond, and an agreement made in Court, and under the threat of an immediate execution against the *zemindaries*; though the Deed goes on to say, that it was executed for the further purpose of performing the *Shradh*, &c., of their Husband at *Gya*.

It is not easy to see why, if the case so stated was true, there should have been any difficulty in giving far more satisfactory evidence of it than has been given in

this suit. There is the reference to an agreement in Court, there is also the reference to a threat of execution and to the Instalment Bond which constituted the debt at least of *Narain Chunder Doss*. These things, if they had any real existence, were presumably capable of being proved.

But what has been the course of the litigation? The burden of proof was unquestionably on the party seeking to support the transaction, that is, the present Respondent. But it is an admitted fact, that in the Court of First Instance he gave no evidence in support of the transaction except the Deed of sale itself. In that state of things the Principal *Sudder Ameen* very properly decided the issue against him.

The case, then, went to the High Court by appeal. When the appeal was heard in the first instance, the High Court, with some variation in the form of the Order, confirmed the decision of the Principal *Sudder Ameen*. There was then an application for a review, and a suggestion made upon that application, that the Respondent had been shut out by the Principal *Sudder Ameen* from giving the evidence which he was ready to give in the suit. The judgment of the Principal *Sudder Ameen* contains a distinct statement that no such application was made. He says, "It was indispensable, however, that he should prove that the sale was made to pay the Husband's debts, and the debts contracted for his funeral obsequies, but he has filed no decree of Court, nor any other voucher proving these points. He has not applied for a summons in the name of any Witness whatever. He has not even named a single Witness, nor adduced any description of evidence whatever." Certainly it appears somewhat singular that, if the learned Judges of the High Court had no other contradiction of that solemn and direct statement upon the face of the judgment of the Lower Court that no evidence had been tendered, they should have acted upon the very wild story told by the Witness, *Gooroochurn Odheekary*, and the copy of a petition said to have been made from an original petition lost in the extraordinary manner in which that Witness states it to have been lost. It may be that the learned Judges did ascertain by reference to the Principal *Sudder Ameen* or to the proceedings, that evidence had been offered and had not been taken, but certainly there is no *constat* of anything of the kind upon this record; they seem to have acted solely upon the singular evidence to which I have just adverted.

Their Lordships, however, think that, whether it were right or wrong in the appellate Court, in those circumstances, to admit the additional evidence taken before it, it would not be right for their Lordships to exclude that evidence from their consideration; and they will, therefore, consider it as if there were no objection whatever to its admission.

The material portion of the evidence taken on review is the deposition of *Khadem Ally*, who describes himself as the *Jemmadar* of *Gokool Chunder Chowdhry*, the Respondent. He gives a very detailed account of the execution of the Deed of sale and of the payment of the money, which he professed to have seen made at the time of the execution of the Deed,—he states in particular, that he was a witness to the payment of Rs. 9,500, part of the consideration-money, to *Sree Narain Doss, Mahajun*, upon account of the Instalment Bond. Although he had not mentioned *Sree Narain Doss*, in the first instance, as among the parties present, yet he does distinctly state that he was present. "*Sree Narain Doss*, who had taken Rs. 9,500, was present there. *Seetul, Talookdar*, had given him the said Rs. 9,500. On the said *Sree Narain Doss* returning the Instalment Bond, *Seetul* gave it to the *Thakooranies*. On my Employer asking for it they did not give it."

Here, then, is very specific evidence of a transaction which took place many years ago; but the singular thing is, that when it is contrasted with the statements of the Respondent himself, it does not tally in any degree with his recollection of what passed on the occasion. His statement is, that the price of the property was paid in order to pay off the debts of *Mahajuns*, but he does not recollect the debts of what *Mahajuns* were paid, and he says, "I gave

Gouree Dabea and *Surbo Mungola Dabea* the money myself." The learned Judges of the High Court seem to have thought that in that conflict of evidence, it was impossible to give the credit to *Khadem Ally* which they otherwise would be disposed to give. Their Lordships think, that when in a case in which the party himself having an imperfect recollection of the transaction, and having stated that he paid the money to the Vendors personally, a Servant—a *Jemmadar*—comes forward, after the decision of the case by the Court of First Instance and the Court of appeal, to make out this elaborate proof of payment of debts to *Sree Narain Doss*—the least that can be said of evidence so given, is that it is wholly untrustworthy. Nor does the deposition of the other Witness, also a Servant, deserve more credit. The learned Judges, however, finally decided the case, partly upon the mere fact that *Juggut Ram* was an attesting Witness, and must, therefore, be taken to have been a concurring party to the transaction, and partly upon the corroboration which they seem to think that fact afforded to the evidence of *Khadem Ally*. Their Lordships cannot see how the one can be any corroboration of the other. The fact that *Juggut Ram* attested the Deed is perfectly consistent with the fact that *Khadem Ally* is a tutored Witness brought forward at the last moment to depose to having seen what he never saw. Again, with respect to the effect of the attestation of the Deed by *Juggut Ram*, it seems to their Lordships that the learned Judges have attached to that circumstance a weight which it really does not possess. Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the Husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindoo Law. That it can be, as Mr. *Field* seemed to put it, a presumption of law in the sense of *præsumptio juris et de jure*," their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction. And one of the difficulties of allowing the present decree to stand is, that this point, which was raised at the last moment, was decided upon the mere proof, by the production of the Deed of sale, that *Juggut Ram* was an attesting Witness to it. The point had never been raised before. The opposite party has had no opportunity of examining *Juggut Ram* as to the circumstances under which he became an attesting Witness, or what his understanding of the transaction really was. The utmost that the Judges ought to have done in that state of things, was to remand the case to be re-tried, for the full consideration of that question.

Their Lordships cannot affirm the proposition, that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting Witness, he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. But considering who *Juggut Ram* was, and what the circumstances of this family were, their Lordships are further of opinion, that his concurrence would not, in this case, be sufficient to set up the Deed. In the first place, it is not proved, though on the other hand it certainly is not disproved, that at the date of the execution of this Deed, which was executed before the adoption took place, *Juggut Ram* was the next heir in reversion. He was unquestionably a very distant relation, and although he appears to have taken a considerable part in the management of this family, and even in the adoption of the Plaintiff, he is not proved to have been the next heir. On the other hand, the very fact of his connection with the family leads to the presumption that he knew that the present Appellant had the power given to her by her Husband to adopt a child, and that, therefore, his interest, even if it existed, as next reversioner, was, in all probability, likely to be defeated. Therefore, if his concurrence were

proved, it would not amount to such a concurrence by the Husband's kindred as, in the opinion of their Lordships, would have defeated the Plaintiff's claim. Their Lordships have already said, that if anything could have been made of that point, it would have been rather a reason for a remand of the cause, to be tried upon such an issue, than for the immediate decision of the case against the Plaintiff; but in their Lordships' opinion, there was no ground, in the circumstances, for such a remand, because such an issue had never been raised upon the pleadings, or in the earlier stages of the cause. The case of the party who sought to support the validity of this transaction was, that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of *Juggut Ram* either as supplying the want of proof of the existence of the debts and the necessity of the sale, or as a consent equivalent to such proof.

Their Lordships are, therefore, of opinion, that the decree which is under appeal must be reversed; and the only question is, what should be the form of the Order to be made? They have been furnished by Sir *Roundell Palmer* with the minutes of the Order which he thought he was entitled to claim; and to some extent their Lordships adopt those minutes. They think that the minutes should stand thus:—"Declare that the Deed of the 16th of November, 1845, was and is invalid as against *Mohesh Chunder* and the Appellant as his heir, and declare that *Mohesh Chunder* became, on the death of the Widow, *Gouree Dabia*, and that the Appellant, as such heir, is now entitled in possession to one moiety of the four *annas*, and order that the Respondent do deliver up to the Appellant such moiety, and do pay to her the profits thereof received since the death of *Gouree Dabia*."

Their Lordships will, therefore, humbly advise Her Majesty to allow the present appeal, to reverse the decree of the High Court, and to direct that, in lieu thereof, a decree be made to the effect above stated, and further directing that the Respondent do pay to the Appellant the costs incurred by the Plaintiff in both the Courts below. The Appellant must also have the costs of this appeal.

30th November, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William in Bengal.

MOULVIE SAYYUD UZHUR ALI,* ... ... } *Appellant,*

versus

MUSSUMAT BEBEE ULTAF FATIMA, and others, ... } *Respondents.*

Benami Purchase—Hindu and Mahomedan Law—Question of fact.

In cases where the question is whether property bought and held in the name of another than the party claiming as the real purchaser is the property of that other or merely bought and held in his name (*Benamee*) for the claimant, the criterion is from what source the purchase money came; the presumption is that a purchase made with the money of *A* in the name of *B* is for the benefit of *A*; and where the purchase is by a father whether Hindu or Mahomedan, in the name of his son, there is no presumption of an advancement in favour of that son.

Upon the facts, the decision of the Court below reversed.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

In coming to the conclusion which their Lordships have come to in this case, they feel that they are not departing from the wholesome rule—that, unless they are clearly satisfied that the finding of two concurrent Courts in *India* upon a question of fact was wrong, such finding will not be

* 13, Moore's I. A., p. 232; 4 B. L. R., P. C., p. 1.

disturbed here. For if the judgments in the Respondents' favour are carefully examined, it will appear, either that there has been no finding at all of the facts which it was necessary to find, or that those facts have been found in favour of the Appellant. Their Lordships may dismiss the judgment of the High Court with the respect due to that Tribunal, by saying that the learned Judges who then sat, appear to have conceived, rightly or wrongly, that the question in dispute between the parties was one of fact, and that they, under the rules which regulate the hearing of special appeals, had no jurisdiction to disturb the finding of the Court below.

Then, with respect to the first judgment —the judgment of the Court of First Instance—it appears to their Lordships, that the Judge never dealt with the real question at issue between the parties, namely, the question, whether this property was held *Benamee* by the Son and Wife of the Appellant, or whether it was held by those persons beneficially, and for their own interest, and in their respective shares.

There were two issues before the Court, one of which seems to be not very accurately framed. It is in terms, whether the *Ikrarnamah* was genuine or not? which apparently is meant to raise the question whether it was a forgery or not.

The real question between the parties and that which appears to have been decided by the Judge was, however, whether the parties who executed, or purported to have executed that document were, at the time when they so executed it, infants or of full age. The Principal *Sudder Ameen* has found that fact against the Appellant; and the learned Counsel at the Bar have not called upon us to interfere with that finding. But what was the inference which the Principal *Sudder Ameen* drew from the fact so found? It was that this document, which was a mere declaration of trust, and a document intended only to facilitate the mutation of names, *i. e.* the transfer of the property, into the name of the Appellant, being executed in a manner which was not binding on the parties who purported to have executed it, was a fact fatal to the Appellant's title; and that from the fact so found it necessarily followed that the whole of the Respondents' case was established against the Appellant, and that the property was really held by those who were the ostensible Owners of it, in their own right, and not *Benamee* for the Appellant. That sweeping inference will not stand a moment's examination.

The case then goes by appeal to the *Zillah* Judge, who, so far as he finds any facts, appears to have found the material fact in favour of the Appellant; for he begins his judgment by stating, that the proceedings before the Court proved that the Appellant, during his Son's life-time, had purchased property in his name, and always acted as if the Son were the real proprietor of the estate. He goes on to state the Appellant's case:—"It is urged by *Uzhur Ali* that all property purchased by him was purchased in his Son's name, but with his own funds, which is probably the case." And, therefore, he has either done what the Principal *Sudder Ameen* did, namely, omitted to come to any finding at all on the material issue in the case, or he has found that issue in favour of the Plaintiff.

That being the effect of the judgments, it appears to their Lordships that there has been really no decision against the Appellant in the Courts below, which is capable of being supported on the grounds upon which it professes to rest. The result is, that it lies upon their Lordships to decide the case upon the evidence in the record, putting those decisions entirely out of consideration.

The case is simply this. The Respondents bring their suit in the nature of an ejectment suit, to recover, we will take it, that share of the property which would have belonged to their Father, supposing that the purchases originally taken in the joint names of their Father and the Wife of the Appellant, had been taken for them beneficially. The Defendant alleges that of that property, of which he seems to be the now ostensible Owner, he was all along the beneficial Owner; that it was purchased by him from his own funds, *Benamee*, in the names of his Wife and Son, and that every act of ostensible ownership which was done was consistent with that state of

the title. It is not a novel thing in *India* that that state of things should exist. It has been repeatedly brought before this Committee; and the law relating to it was reviewed in the case of *Gopeekrist Gosain* v. *Gungapersaud Gosain* (6 Moore's Ind. App. Cases, p. 53, 1 P. C. J., p. 493.) Of course we cannot apply to the decision of this case, which is one between Mahomedans, any of the reasons which in the judgment delivered at this Board in that case, are drawn exclusively from Hindoo law. It is, however, perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in *India* as much among Mahomedans as among Hindoos, and the judgment in *Gopeekrist Gosain* v. *Gungapersaud Gosain* and the cases therein referred to are, at all events, authority for the propositions that the criterion of these cases in *India* is to consider from what source the purchase-money comes; that the presumption is, that purchase made with the money of A, in the name of B, is for the benefit of A; and that, from the purchase by a Father, whether Mahomedan or Hindoo, in the name of his Son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that Son. Again, the mere fact that this property was purchased, not in the sole name of the Son, but in the name of the Wife as well as of the Son, affords a strong argument in favour of the hypothesis that it was a *Benamee* purchase, for there was no such community of interest between the Wife and the Son as would render it probable that they had been made joint Owners of the property; and the reason for putting two names rather than one into a trust applies almost as strongly in *India* as it would in this Country.

Again, when we come to the evidence which has been given in the suit, it appears to their Lordships to be all on one side. As we have said before, the evidence of acts of ostensible ownership prove nothing; but we have proof, so far as there is any proof in the suit, of the source from which the money proceeded, that the money was the Father's.

We have, moreover, the admission of the Son, which though it directly applies only to one portion of the property, throws a light upon, or at least tends to corroborate, the direct evidence which has been given as to the nature of the other transaction. So that, without going through that evidence in detail, it is sufficient to say that, in their Lordships' opinion, there was but one conclusion to which, if the case were fairly tried out, the Judges of the two Courts which dealt with the question of fact, ought to have come.

On these grounds their Lordships will humbly advise Her Majesty that the decisions of all the three Courts below be reversed, and that the suit of the Plaintiffs be dismissed, with costs. They must also pay the costs of this appeal.

1st and 3rd December, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William, Bengal.

BAMASOONDERY DASSYAH and others,* ... } *Appellants,*

versus

RADHIKA CHOWDHRAIN, ... *Respondent.*

Enhancement of Rent—Reg. VIII. of 1793, ss. 48, 51—Registration—Onus Probandi.

In a suit for enhancement of rent, *Held*, that in order to bring a *Talook* within the scope of sec. 51, Reg. VIII. of 1793, it was sufficient to show that the tenure existed, and was capable of being registered at the time of the decennial settlement, the fact of actual registration not being an essential element in the formation of a *Talook*.

Held, further, that the effect of proof of the existence of such a *Talook* at the time of the decennial settlement is sufficient to throw the *onus* on the Plaintiff to prove that it was held at a variable rent.

Decision of the Court below reversed.

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* 13, Moore's I. A., p. 218; 4 B. L. R., P. C., p. 8.

13th December, 1869.

THEIR Lordships' judgment was reserved, and pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The only question upon this appeal is, whether the Respondent is entitled to enhance the rents of certain lands held by the Appellants within the *zemindary* of which the Respondent is the Owner of a six-anna share. In the Courts below some questions were raised touching the Respondent's title to her share; the sufficiency of the notice, which is the statutory commencement of such a suit, and the justice of the particular assessment, supposing that the rents were liable to enhancement at all; but these are no longer in dispute.

A suit to enhance rent proceeds on the presumption that a *Zemindar* holding under the Perpetual Settlement has the right, from time to time, to raise the rents of all the rent-paying lands within his *zemindary*, according to the *Pergunnah* or current rates, unless either he is precluded from the exercise of that right by a contract binding on him, or the lands in question can be brought within one of the exemptions recognized by *Ben.* Reg. VIII. of 1793; and it also assumes, that the Defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit. Before the recent modification of the law (which, as Act, No. X. of 1859 had not come into operation when this suit was commenced, does not affect the case,) the effect of this presumption in favour of the *Zemindar* was undoubtedly to relieve the Plaintiff in a suit for enhancement from much of the burden of proof, which would have laid upon him in an ordinary suit, and to shift it upon the Defendant. Regulation VIII. of 1793, however, does not apply an uniform rule to all tenures and rights of occupancy. It may be broadly said, that it divides them into two great classes, viz., *Talooks* within the meaning of its 51st section; and *Ryotty* and other under-tenures for which provision is made by the 49th section. If it be conceded that the law casts upon those who claim the benefit of the latter section the whole burden of proving that their land has been held at a fixed rent for a period commencing at least twelve years before the date of the Decennial Settlement, it is clear that the 51st section is more favourable to the holders of *Talooks* within its meaning, by imposing upon the *Zemindar* the burden of showing that he is entitled to raise the rent either by special custom, or by contract, or by reason of certain specified conduct on the part of the *Talookdar*. It follows, that in every suit for enhancement of rent, the nature of the tenure is a material question, irrespective of the question, whether the rent is fixed or variable, since upon the former question depends the extent and nature of the proof which the Plaintiff is bound to give.

In the present suit the Respondent has come into Court treating the Defendants to the suit as *Ryots*, having a right of occupancy in certain lands at a variable rent. The case set up by the Appellants was that they were *Shikmy Talookdars*; that they and their ancestors had become so many years before the Decennial Settlement; and that they held the *Talook* at a fixed rent. In this state of things, it is obvious that the issue settled by the Principal *Sudder Ameen*, viz., "whether the *Mehal* in dispute is liable to enhancement or not," is not sufficiently pointed, because in order to determine not only that issue, but also the mode of trying it, it is necessary to determine the preliminary question, whether the tenure of the Appellants was or was not a *Talook* within the meaning of the 51st section of *Ben.* Reg. VIII. of 1793.

To the consideration of this question their Lordships will first address themselves, and they will assume that as the law stood before Act, No. X. of 1859, came into operation, the burden of establishing the affirmative of it lay upon the Appellants.

The Appellants produced in the Courts below two *Kabalas* and a Settlement paper, all dated long before the Decennial Settlement, in order to prove and explain the creation of their tenure; and a number of *Dakhilas*, or receipts for rent, to show the payment of rent at an uniform and fixed

rate. The Courts in *India* have rejected these documents as spurious, or at least untrustworthy; and their Lordships accept that finding, and propose to act upon it, by leaving them out of consideration.

The fact, however, remains, that the Appellants derive title from *Roopram Ghose* and *Joykristo Ghose*, who are admitted in the replication to have held the lands in question under one *Ramchunder Bose*, from whom the *zemindary* passed to *Kissen Singh* and *Gunganarain* (through whom the Respondent derives her title), some time before the Decennial Settlement. The fact is, therefore, admitted, that the tenure of the Appellants, whatever it be, existed before and at the time of the Decennial Settlement. The proceedings before the Collector at least prove, that as early as the year 1797 the then holders of that tenure asserted that it was a *Talook*, capable of being separated under *Ben.* Reg. VIII. of 1793, from the *zemindary*, and entered in the Collector's Books as a *Talook*, paying revenue directly to Government.

It appears from these proceedings that the *Zemindar*, although he dig not at first appear, ultimately came in and resisted the demand, but that no final decision was come to. It does not appear what were the grounds of his defence, and it is quite consistent with the evidence, that he admitted the existence of a *Talook*, but contended either that it was held at a variable rent, or that, by reason of some beneficial interest reserved to the *Zemindar*, it ought not to be separated from the *zemindary*, but to continue a dependent *Talook*. Again, by comparatively modern *Dakhilas*, produced and proved in the suit, it appears not only that rent at the uniform rate of C. Rs. 168-4 being the equivalent of S. Rs. 158-4-15-1 has been paid and received for this holding from 1245 to 1264 B. S. or from 1838 to 1857; but that in those *Dakhilas* the holding was described as "*Talook, Roopram Ghose* and *Joykristo Ghose*." The notice, which was the commencement of this litigation, was served in the year 1264 B. S. The *Jumma-wassil-bakee* is, so far as it goes, corroborative evidence of the Appellants' case; inasmuch as it shows that by a document which, from its nature, would seem to have proceeded from the *Cutcherry* of the *Zemindar*, and was filed in the Collectorate in the year 1810, the lands in question are described as "*Talook, Roopram Ghose* and *Joykristo Ghose*," and as held in 1804 at a rent of S. Rs. 158-4-15-1. Their Lordships, however, do not lay much stress on this document, inasmuch as the Respondent disputes its binding force on her, and the evidence concernind it is scanty, and not very satisfactory.

The evidence, however, above stated, seems to their Lordships sufficient to establish at least a *primâ facie* case, that the holding of *Roopram Ghose* and *Joykristo Ghose*, which existed before and at the date of the Decennial Settlement, was a *Talook*, and is identical with the present holding of the Appellants. Such a case called for an answer from the Respondent, and no answer, in the way of evidence, has been given by her to it.

It may be added, that the judgment of the High Court seems to treat the tenure as being in terms a *Talook*, and even a *Talook* in existence at the time of the Decennial Settlement, though afterwards it speaks of it as a *Talook* created at some unknown period, but having a fluctuating rent. The judgment, too, of the Principal *Sudder Ameen*, which also allows the deduction of 10 *per cent.* for the expenses of collection, seems to treat the tenure as an intermediate tenure, *i. e.*, something higher than a mere *Ryot's* hereditary right of occupancy.

It is said, however, that the tenure, if a *Talook*, is not a *Talook* within the meaning of the 51st section of Reg. VIII. of 1793, unless it is shown to have been registered under the 48th section of that Regulation.

This proposition is undoubtedly supported by the cases, *Maharajah Kishen Kishwur Manik* v. *Ram Guttee Burdun* and *Kali Dass Neogee*, decided on the 30th of June and 10th of August, 1847, reported at pp. 292 and 413 of the *Bengal Sudder Dewanny Adawlut* Decisions for that year; by *Ramkoomar Moostofee v. Roopnarain Purdham*, decided on the 29th of August, 1850, and reported at p. 451 of the Decisions for that year; and

by *Nubokishen Mookerjee* v. *Kaleepersad Roy*, decided on the 31st of May, 1859, and reported at p. 607 of the Decisions for that year. But it is not consistent with the case of *Rajkishen Roy* v. *Bydonath Nundee*, decided on the 30th of April, 1858, and reported at p. 902 of the volume of Reports for 1858, in which two of the Judges, who afterwards decided the case of 1859, extended the benefit of the 51st section to the tenure of a *Kudeemee Ryot*—a tenure which their Lordships apprehend was not subject to be registered under the 48th section, and was certainly not shown to have been so registered in fact. And this doctrine of the necessity of registration has been questioned and overruled by the cases decided in the High Court on the 28th of February, 1863, *Doyamoyee Chowdrain* v. *Nundocoomar Dey*, and the 23rd of January, 1867, of which the first is reported at Vol. 2, p. 220 of *Hay's* Reports of the Decisions of the High Court for 1863, and the other case, *Mussamut Mohamoya Dossee* v. *Mussamut Doya Chowdhrain*, is reported at p. 63 of the 7th volume of the "Weekly Reporter."

The effect of the authorities in *India* seems to their Lordships to be, that although for several years it was held by the late *Sudder Dewanny Adawlut*, that in order to bring a *Talook* within the scope of the 51st section, it must be shown to have been "registered," "recorded," or "recognized" (for all three terms are used in the cases) at the time of the Decennial Settlement, that construction is no longer recognized as law by the High Court; and that it is, at all events, sufficient to show that the tenure existed, and was capable of being registered at the date of the Decennial Settlement. It follows, that their Lordships are not compelled by a long course of uniform decisions to put upon the clause in question a construction narrower than that which, in their judgment, its words warrant. And applying this view of the law to the evidence, which, though scanty, is uncontradicted, they must find, as a fact, that the tenure of the Appellants is a dependent *Talook*, within the meaning of the 51st section of Reg. VIII. of 1793.

Whether such a finding ought not of itself to be an answer to the present suit, is a question which is certainly open to argument; for it may well be said, that a Plaintiff who brings a suit founded on her rights against a *Ryot* in occupation of land, ought not to be allowed to convert that suit into one founded on a different right, and governed by a different rule. Their Lordships, however, without pressing that point, think it sufficient to say, that the effect of such a finding is to cast upon the Respondent the burden of showing that the rent is variable, and that if there is no evidence of that fact in the suit, her suit must fail.

It may be said, however, and that seems to have been the opinion of the High Court, that the evidence given by the Appellants itself affords proof that the lands were held at a variable rent. But that opinion seems to their Lordships to be founded on a misconception of the effect of the proceedings before the Collector between the years 1797 and 1801. The proceeding of the 2nd of September, 1800, shows that whatever inaccuracy there may have been in the petition (and the document appears on the face of it to be worm-eaten and imperfect,) the case really put forward at that date by the Appellants' ancestors was, that they were the holders of a *Talook* at a rent of S. Rs. 158-4-15-1. Their Lordships are, therefore, of opinion, that upon the evidence in the suit the Respondent must be taken to have failed to show that the *Talook* was held at a fluctuating rent; or that she is entitled to enhance the rent, which is proved to have been paid at a uniform rate for so many years.

Their Lordships have further to observe, that if the Respondent's case were a true one, she would have had little difficulty in proving it. She does not come into Court as the Purchaser at a sale for arrears of revenue, who rests upon a statutory title, with no documents to support it. She derives title from the *Zemindar* with whom the Decennial Settlement was effected; and she has presumably a right of access to all the records of the *zemindary*. Her determination in such circumstances to rest upon the supposed defects in the Appel-

lants' proof, and to abstain from giving evidence of the truth of her own case, affords strong grounds for supposing that she had, in fact, no such evidence to give. If such evidence were forthcoming, and she has neglected to give it, she must take the consequences of her own miscarriage.

Their Lordships will humbly advise Her Majesty that the three decrees under appeal ought to be reversed, and that in lieu thereof a decree should be made, dismissing the Respondent's suit with costs; and the costs of this appeal must follow its result.

15th and 16th December, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the Court of Admiralty), and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William in Bengal.

MAHARANEE SHIBESSOUREE DEBIA, Trustee and Guardian of her minor Son, KOOMAR GOBINDNATH ROY,* ... *Appellant*,

versus

MOTHOORANATH ACHARJO, *Respondent*.

Sebait—Alienation—Creation of derivative tenures and estates—Presumption—Rent, fixity of—Mere naming a sum certain does not of itself impart fixity to that sum as rent.

The *Sebait* of a *talook* dedicated to the religious services of an idol, has not the legal property, but only the title of manager of a religious endowment. In the exercise of that office she cannot alienate the property, though she may create proper derivative tenures, and estates conformable to usage.

To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in *Sebait*, and is not, therefore, presumable.

Where variableness of *jumma* is the normal condition, the mere naming a sum certain in connection with the grant of a descendible tenure, does not impart of itself fixity to that sum in the absence of positive words, or of other evidence to show that such was the original design.

18th December, 1869.

THEIR Lordships's judgment was reserved, and now pronounced by

THE RIGHT HON. LORD CHELMSFORD:

This appeal was heard before their Lordships *ex parte*.

The suit out of which it arose was brought in the Civil Court of *Jessore*, by *Mothooranath Acharjo*, the sole Plaintiff, against *Maharanee Kestomonee Debia*, described as *Sebait* of a *Talook*, dedicated to the service of the Deity, and against certain other persons named in the plaint. It was brought to establish a title to certain *jummas*, and to recover possession of certain lands connected with them, which the Plaintiff claimed by purchase from four of the Defendants, Mahomedan Ladies, who descended from one *Gourmohun Biswas*, a Hindoo, on whom, as the Plaintiff avers, the right to the *jummas* transferred to him was originally conferred.

The present Appellant represents the interests as Guardian of her infant, which, at the commencement of the litigation, were represented by the *Maharanee Kestomonee Debia*, since deceased, his Grandmother, appointed his Guardian under the direction of his deceased Father. The tenure, whatever its strict character, whether *ryotwary* or of a higher degree, is one held under the infant's title, as superior Owner of the lands.

The *jummas* were claimed by the Plaintiff as *mouroosee* (hereditary), and also as held at a fixed invariable rent.

The Appellant, the *Sebait*, denies the hereditary character of the tenure, the invariable quality of the rent, and the purchase itself. She stated, that the Tenants of the *jummas*, from whom the Plaintiff asserted that he had purchased, had not any hereditary tenure, and that they had surrendered such interest as they possessed to the Appellant, before the time of the alleged sale to the Plaintiff.

* 13, Moore's I. A., p. 270.

Of the four Defendants, the alleged Vendors, three denied the sale, and affirmed the surrender; whilst the fourth affirmed the sale and denied the surrender, agreeing, three of them with the Appellant, and one with the Plaintiff. They all, however, insisted on the hereditary character of their tenure.

The *Talook*, itself, with which these *jummas* were connected by tenure, was dedicated to the religious services of the Idol. The rents constituted, therefore, in legal contemplation, its property. The *Sebait* had not the legal property, but only the title of Manager of a religious endowment.

In the exercise of that office, she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage.

The sale under which the Plaintiff claimed was established by the decree of Mr. *Seton-Karr*, the Judge of the Civil Court of *Jessore*, who tried the cause.

On appeal from his decision, it was affirmed by the High Court.

Two Courts, therefore, have established the sale to the Plaintiff, and have decided against the validity of the alleged surrender.

Into the sufficiency of the evidence to support those several findings, their Lordships do not propose to inquire; their judgment on this appeal will be confined to the question, whether a tenure held at a fixed invariable rent has been established by the evidence.

The Appellant insisted on the authority of *Baboo Prosonoo Coomar Tagore's* case (11th January, 1855), which she quoted in her answer, and which was relied on in argument at the Bar, that a transfer of such a tenure as that set up in his case, which she termed a *Ryotwary* tenure, could not be effected without the consent of the *Zemindar*, or *Talookdar*, as the case might be, the immediate successor in estate. The Judges in both Courts decided that this tenure was one at a fixed rent; and that the case in question did not apply. On the question of its vendible character without the condition of the superior's consent, they pronounced no opinion. A question of this latter character is likely to be one so much affected by modern and local usage, that it would be unsafe for an ultimate Court of appeal to express an opinion upon it as a mere dry, legal question turning on the incidents of hereditary tenure. Their Lordships would be most reluctant to decide on an *ex parte* appeal any question of general consequence, not absolutely necessary to the decision of the particular case.

If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata* binding on the parties and those claiming under them.

Their Lordships think that there is no satisfactory proof in the cause that these *jummas* were ever held at a fixed invariable rent. One important element in this inquiry has been wholly lost sight of, viz., the nature of the *Sebait* title, and its legal inability to be the source of such a derivative title. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent, from time to time, would be a breach of duty in a *Sebait*, and is not, therefore, presumable. Where variableness of *jumma* is the normal condition, the mere naming a sum certain in connexion with the grant of a descendible tenure does not impart of itself fixity to that sum, in the absence of positive words, or of other evidence to show that such was the original design. In this case we start with a double presumption against the rent having been fixed, viz., that founded on the ordinary character of rents, and that derivable from the special character of the tenure. Another presumption arises in this case, that the rent was variable, from the circumstance that the only instrument which asserts positively that the *jummas* were to be at a fixed rent, is one of the three documents on which the signature of Mr. *Skinner*, the Magistrate, was fabricated. This fraud, in tampering with evidence, throws additional doubt upon this part of the case.

The terms of the surrender relied on by the High Court do not state that the rent is fixed and invariable; that document, on

which the High Court laid great stress, appears to their Lordships to afford but a slight presumption that the *Sebait* adopted and admitted that description of the tenure on which the Surrenderer relied, though by accepting the surrender she acquiesced in the use of that description by them; and as the instrument does not say that the rent was fixed as well as the tenure hereditary, the implied recognition of the right can be raised no higher than the actual language warrants. The tenure, therefore, at a fixed rent is, in the opinion of their Lordships, not proved. The acts of the Plaintiff cannot be ascribed to a valid title to possession under the circumstances of this dispute, since the only title insisted on, in the contest between him and the superior, viz., the right to hold at a fixed rent, is not established, and the general right of the *Zemindar* or *Talookdar* to receive the collections, subject to account, till a valid claim to an intermediate tenure be established, must prevail, *ad interim*, at least, until the Plaintiff, if he think it for his interest to rely on the *mouroosee* title at a variable rent, and to establish it by a suit founded on that title, in which suit the true nature of the tenure, and its freedom from the conditions of the superior's assent to the transfer of the tenure, may be ascertained. Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed, and the decision appealed against reversed, and in lieu thereof the Respondent's suit be dismissed with costs, and their Lordships think that the Appellant should have the costs of the appeal.

18th December, 1869.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SRIMATI SUKHIMANI DASI and others,* ... } *Plaintiffs*,

versus

MAHENDRANATH DUTT & others, ... } *Defendants*.

Execution of Deed of Partition—Intention—Obligation imposed on Parties by their Public Acts.

Whatever may be the real intention amongst themselves of some of the members of a Hindu joint family in executing a deed of partition, purchasers from them have an undoubted right to bind them, by the execution of the deed and their public acts attending it, to the fulfilment of those obligations which such public acts cast upon them.

THEIR Lordships' judgment was as follows:—

This appeal is brought to reverse a decision of the High Court at *Calcutta*, which reversed a decree of the Judge of *Beerbhoom*, in favor of the Plaintiffs, the Appellants.

The suit was instituted by the Plaintiffs, who are the heirs and representatives of four out of five brothers, who formed at one time a Hindu family, joint in food, worship, and estate. The Defendant *Harinath* was the son and heir of the remaining brother. *Harinath*, during the progress of this litigation, died, and is represented by his eldest son, the first-named Respondent, and his younger brothers, who appear by their guardian.

The object of the suit is to establish a trust, of a religious nature, against the several Respondents, as affecting the lands in their several occupations. The suit origi-

* 4 B. L. R., P. C., p. 16.

nally included two claims, which could not properly be joined, *viz.* a claim in the character of *sebaits* to establish the religious trust, and one founded on the ordinary right of co-heirs in ordinary joint property. On the objection of misjoinder being raised by the answers of the Defendants, the Plaintiffs yielded to it, and their plaint has in that respect been reformed, so that the suit must now be regarded as confined to one in the character of *sebaits*, to establish their claim to lands alleged to be *dewatar*.

A further objection was advanced by the answers, that the Plaintiffs attributed a partible character to an indivisible property, by suing for four-fifths only. The Judge of *Beerbhoom*, admitting the correctness of this view of the nature of such property on which the objection was grounded, appears to have considered the plaint as one that might be supported by attributing to the Plaintiffs the character of managers. Whether this view of the subject removed the objection may well be doubted, since such a manager has no partible, and indeed no estate in the lands; and a trust of this character should follow the general rule, and be asserted and established by a suit so framed as to decide finally and entirely the matter of the claim. Their Lordships, however, regarding the point as one which does not affect the merits of the suit, will proceed to the consideration of the case on the merits.

The Plaintiffs state their case thus:—By a deed of partition executed by the then members of the family, in the year 1245 of the *Bengal* era, answering to the *Christian* year 1838, the trust was established; the family was then a continuing joint family, and, as such, they dedicated a portion of their joint property to the service of their gods at *Brindaban* and their family mansion respectively. The alleged foundation, therefore, of the trust was the common consent so to appropriate their common property; and if this foundation failed, the trust would necessarily fall with it.

The Plaintiffs state in their plaint that at an earlier period, *viz.* the *Bengal* year 1229, answering to our *Christian* year 1822, a deed of partition had been executed by the five brothers, who were then all living; but they sought to remove this impediment, and *primâ facie* bar to their subsequent endowment, by alleging that the partition was not acted on, nor designed to be so, being, in truth, a mere device of the family to protect its property from the creditors of one of its members, *Gupinath*, who had become insolvent.

The answers of the Defendant *Harinath*, and those claiming under his title, *viz.*, *Ishan Chundra*, the Defendant *Bose*, and the Coal Company, on the contrary, assert (amongst other matters) the validity of this prior deed; that it was acted upon; that it was repeatedly established by decrees of several Courts of Justice; that property has been distributed, and titles derived and enjoyed under it; and they add that it was publicly registered.

Against the deed of 1838 they allege that it was not registered; that it was not stamped; that it had no original character of publicity; that *Gupinath*, an insolvent, is treated under it as equally entitled with the other sharers; that it makes no allusion to the previous deed; that it secularizes some property already devoted to the gods and incapable of such change or transfer; that without any assigned reason it constitutes the insolvent the *sebait*, and sets up a divided and separate administration of trust for one common object; and for these and some other grounds, they declare this latter deed to be false and fabricated.

The contest, in the opinion of their Lordships, may be decided by declaring to which of these deeds effect should be given, for clearly they cannot both stand together.

The objections raised by the several answers to the case made by the Plaintiffs, are compendiously and correctly stated in the record, in the form of a statement of issues. The first, third, and fourth are those on which their Lordships will proceed to declare their opinion. A decision on these will render it unnecessary to consider the other issues.

The first, second, and third issues are:

Whether the case is affected by the Law of Limitation?

Whether the partition took effect in 1229 (1822) or 1245 (1838)?

Whether the disputed villages were given in *dewatar* or not?

The first issue was found by the *Beerbhoom* Court in favor of the Plaintiffs, and by the High Court in favor of the Respondents, the Defendants. As the plaint was originally framed, this issue was correctly introduced. When the plaint was reformed and limited to a suit in the character of *sebaits* against trustees, limitation of time afforded no bar; the decisions, therefore, of both Courts on this issue are formally defective; but, as in both Courts its decision involved one on the validity of the trust itself, the substantial question was, in truth, considered and decided on the merits.

The third issue involves the second, not necessarily, indeed, but as the facts are pleaded and presented in this case. The Plaintiffs do not say that a partition once took place, but that the family re-united, and then made a fresh and operative partition of its then joint property, and dedicated a portion of that joint property by common consent to the service of the gods, constituting the land *dewatar*. The case of re-union and subsequent partition is not made by the pleadings, and is unsupported by the evidence.

The Plaintiffs' case assumes, and assumes rightly, that a valid partition acted on would render the second deed inoperative. A Hindu family, consisting of persons in this near connection, may re-unite; part also may re-unite; and such re-united members may impress on their united property by common family consent such trusts as their law will support; but neither of these cases is that before their Lordships.

The burden of proof is on the Plaintiffs. The deed of 1229 (1822) has the ordinary legal presumption in its favor that it is honest, and is, what it purports to be, a deed of partition. It is also prior in time. It is *primâ facie* a good and operative deed. It cannot be got rid of, except by the establishment of a case by the Plaintiffs, as part of their proof, which involves all the family at that time, including those under whom they derive title, in the perpetration of a gross fraud. The deed of partition is declared by their pleadings to have been designed for the express purpose and object of defeating creditors. It is, however, said in the pleadings not to have been acted on. It is not clear in what sense this phrase is used, unless it be that all outward acts of the family in acting upon it disguised an inward design at variance with that which their actions declared. There is the most abundant, and indeed uncontradicted proof, that this deed was, by *Harinath* and his vendees, produced, established, and made the subject of various decrees. It is unnecessary to state the instances of this which were brought to the notice of their Lordships by Sir *Roundell Palmer* in his exhaustive argument. Mr. *Field*, in reply, did not deny that such was the case in numerous instances, but he answered that these acts were all the natural and premeditated results of the original device; that as it was a deed to defraud creditors, it would, of course, be use as such, and that such proof did not exclude the supposition that it might be considered *inter se* by the members of the family, as a mere writing, working no change of property amongst them. Without expressing any opinion upon the question, whether a Plaintiff, supporting his case against those in possession whom he seeks to evict, can be admitted to allege the inoperative character of an instrument by which his recovery would otherwise be barred, on the ground of a fraud in its concoction, to which all from whom he derives title are parties, their Lordships, treating the question as one unaffected by such estoppel, and one simply of evidence arising on the facts, have to observe that, as all these public acts would equally attend the enforcement of an honest and valid deed of partition, when the estates derived under it are assailed, or rights derived under it have to be enforced, they furnish of themselves no evidence of *mala fides*, and should be rather ascribed to the character given to the deed by the Defendants, than to that imputed to it by the Plaintiffs.

Their Lordships, therefore, are of opinion, that the issue whether the partition took place under the deed of 1229 (1822) or that of 1245 (1838) should have been found in favor of the Respondents, which finding should, in their Lordships' opinion,

have been followed by a corresponding finding on the third, whether the villages were given in *dewatar*, or that they were not so given.

Their Lordships desire to add that their conclusion, on the effect of the whole evidence as to the subsequent deed, does not materially differ from that of the Judges of the High Court, so far as that Court regarded it as insufficient to establish a trust of this character. The altered state of the family property, their increasing expenses and diminishing means, render it improbable that the family really deliberately resolved and effected that resolution to place out of their control, by a legal dedication, so large a proportion of their remaining property. When it is considered that in this case the Plaintiffs have advanced, as a part of their case, that a solemn deed, registered and purporting to effect a valid partition of their property, was designed to have no such effect, but was merely a blind for a covert purpose, their Lordships must ask, what confidence can a Court of Justice repose in their statement, that one less solemn and public, and accompanied by many most suspicious circumstances, was designed to be a real and effective instrument of endowment, assented to by whole family? Whatever may have been the real intention of some of the members of the family amongst themselves, a fact almost impossible to discover amongst the windings of guile and fraud, purchasers at least have an undoubted right to bind them, by these their public acts, to the fulfilment of those obligations which such public acts cast upon them. Courts ought not to credit readily assertions of hidden and fraudulent intentions, which, made to-day for one purpose, may be abandoned or denied to-morrow for the assertion of another and inconsistent one.

Their Lordships do not mean to apply the above observations to any mere *benami* transaction, or in any way to shake the authority of the numerous decisions which have established between the apparent and the real, though concealed, title, that a *benami* transaction, devoid of fraudulent design, may be made the foundation of a decree in a Court of Justice.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed with costs.

Agent for Appellant: Mr. *Lattey*.

Agents for Respondents: Messrs. *Bailey, Shaw, Smith*, and *Bailey*.

26th January, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Solicitor, duty of.

It is the duty of a Solicitor, who has once undertaken a cause, to carry it to a conclusion.

Observations addressed by Lord Westbury, on behalf of the Lords of the Judicial Committee of the Privy Council, to a Solicitor of the Court.

THEIR Lordships' attention has been directed to the fact, that in an Indian Appeal an order on a recommendation to Her Majesty was given by their Lordships on the 13th of July 1869, that the decree should be reversed, with costs to be paid by the Respondent to the Appellant, of which Appellant you were the Solicitor. Their Lordships are also informed that Her Majesty's order, which was in conformity with their recommendation, cannot be issued by reason of your delay in bringing in your bill of costs for the Appellant, that bill of costs requiring to be lodged for taxation. Their Lordships feel it to be their duty to take care that Her Majesty's gracious order should not be delayed, and the party, Appellant, deprived of the benefit of it by any unreasonable delay. A communication having been made to you, you sent an answer to it in a letter which their Lordships have read, and being disposed to give full credit to the statements

* 4 B. L. R., P. C., p. 29.

contained in that letter, they abstain from doing more at present than express their earnest hope that you will most promptly take measures by which Her Majesty's order may be issued, because the position of the Appellant is very unfortunate. He has not yet got the order to which he is entitled. If he got the order he would be entitled, in the Court in *India*, to recover the costs decreed to be paid to him by the Respondents, but that he is deprived of also in consequence of this delay. Their Lordships, therefore, hope that you will take prompt measures for completing the order, because it is the duty of a Solicitor, who has once undertaken to conduct a cause, to carry it to a conclusion, and he cannot refuse to do that duty by reason of the client not having complied with any application that may have been made to him. Their Lordships hope this will not be painful to you, but they have felt it their duty to take care that there shall be no delay in the completion of an order which has been once made by Her Majesty.

THE following correspondence should be read in explanation of the Observations addressed by Lord *Westbury*, on behalf of the Judicial Committee of the Privy Council, to a Solicitor of the Court.

INCORPORATED LAW SOCIETY, U. K.,
CHANCERY LANE, W. C.,
1*st March*, 1870.

SIR,—I am requested, by the Council of the Incorporated Law Society, to address you on the subject of some observations which were made by Lord *Westbury*, on behalf of the Lords of the Judicial Committee of the Privy Council, on the 26th ultimo, to *William Baker Smith*, in reference to an appeal from Bengal of *Gunesh Singh* v. *Ram Rajah and others*.

The Council do not for a moment presume to make the slightest observation upon the merits of the particular matter which seems to have called forth these observations from their Lordships, but they contain a remark which is calculated in the opinion of the Council to have a most prejudicial effect upon the numerous Solicitors who practise as agents before the Judicial Committee.

The passage to which the Council desire that I should call your attention is the following. After expressing a hope, that Mr. *Baker Smith* would take proper measures for completing the order in the case referred to, his Lordship stated, "it is the duty of a Solicitor who has once undertaken to conduct a cause, to carry it to a conclusion, and he cannot refuse to do that duty by reason of the client not having complied with any application that may have been made to him."

With the greatest respect for their Lordships, and for the learned and noble Lord from whom these observations fell, the Council venture to think that the above proposition was stated thus broadly, and without qualification, through inadvertence, and not with the intention, that it should be promulgated as a formal judgment; for as it appears to the Council, there is no rule better established than that an Attorney is not bound to proceed in a cause, unless he receives adequate advances from time to time for necessary disbursements upon reasonable notice to his client. *Wadsworth* v. *Marshall* (1), *Vansanden* v. *Browne* (2), *Lawrence* v. *Potts* (3).

The Council are induced to address you on this subject, because they believe that, if the observations in question are circulated in *India* and the Colonies, they are calculated to place Solicitors practising before the Judicial Committee in a position of embarrassment, and to lead to disappointment on the part of the suitors; in fact, it has come to the knowledge of the Council that a Solicitor now conducting an appeal has felt himself in a position of difficulty in consequence of his attention being directed by one of the gentlemen in the Privy Council office to the observations in question.

I would desire to add that it is only on account of this anticipated result, and because the Council do not understand that the observations to which they refer were intended in any sense as a formal decision, that they venture thus to trouble you, because I need hardly say that the Council would not consider it consistent with the respect due to the Lords of the Judicial Committee to comment on any judgment delivered by their Lordships.

I am, &c.,
(Sd.) EDWARD LAWRENCE,
President.

HENRY REEVE, ESQ.,
Registrar of the Privy Council.

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(1) 2 Cr. & J., 665. (2) 2 Moo. & Sc., 543.
(3) 8 C. & P., 428.

PRIVY COUNCIL OFFICE,
5th March, 1870.

SIR,—I have the honour to acknowledge the receipt of your letter of the 1st instant, on behalf of the Council of the Incorporated Law Society, with reference to some observations made by Lord *Westbury*, to Mr. *Baker Smith*, on the 26th January.

I have submitted your communication to Lord *Westbury* and the other Lords who were present, and they have authorized me to state that the observations in question have no judicial authority whatever, nor were they made with the intention that they should be promulgated as a formal judgment of the Privy Council, nor have they been so promulgated. The remarks did not enter into the determination of any judicial matter, but were merely a personal admonition addressed to Mr. *Baker Smith*, and they had reference to the peculiar circumstances of his case, in which, after having obtained a final order in the appeal, he had abstained from carrying that order to its proper termination.

I have, &c.,
HENRY REEVE,
Registrar, P. C.

EDWARD LAWRENCE, ESQ.

25th, 26th, 27th & 28th January, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William, in Bengal.

KHAJAH ASSANOOLLAH,* *Appellant*,

versus

OBHOY CHUNDER ROY, and others ... } *Respondents.*

Act X. of 1859, sec. 23, cl. 6, suit between under-tenants and Zemindar for determination of a right to possession of lands tenable under—Auction Purchaser under Beng. Reg. XI. of 1822—Cancellation of Tenure, effects of omission of.

An auction purchaser under *Bengal* Regulation No. XI. of 1822, had the option of cancelling and avoiding a *Talookdary* tenure, a power which he might or might not exercise; and, in a case in which the Government was the purchaser it was *Held*, that, it was incumbent on the Government to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure. That, if the Government had not effectually annulled the tenure before 1842, it had lost its Statutory right to do so, since Regulation XI. of 1822, upon which that right depended, was repealed by Act No. XII. of 1841. That in the case under appeal, the Government, whatever might have been its powers, did not, in fact, cancel or destroy the tenure, but left the *Talookdars* in the position in which they would have been, as of right, under the old law, reducing their tenure from a *Talook* at a fixed, to one at a variable rent; and that a purchaser of the rights of the Government had a right to bring a suit properly framed for the further enhancement of the rent, but was not entitled to disturb the possession of the *Talookdars*, or to let the land over their heads to the highest bidder.

A suit between Under-tenants claiming a right to the possession of lands of which they have been dispossessed, and their *Zemindar* who disputes their right of possession, may be brought under the 6th clause of the 23rd Section of Act X. of 1859.

22nd February, 1870.

THEIR Lordships reserved judgment, which was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant is the present Owner of the *zemindary* right in that portion of an extensive estate situate in *Zillah Tipperah*, and called *Buldakhal*, which includes the lands and villages that form, or once formed, a *Talook* known as *Talook, Poorba Auttee*. This *Talook* was created subsequently to the Perpetual Settlement, and in the year 1830, by *Mirza Hosein Ali*, the then *Zemindar* of that portion of the estate, in favour of *Bishonath Roy*, the Father or ancestor of the Respondents.

It was an hereditary transferable *Talook*, to be held at a fixed perpetual rent of Rs. 1,550. 4½ as. The estate of *Buldakhal*, at the date of the revenue sales, afterwards mentioned, seems to have comprehended many other *Talooks*, of which some had existed at the date of the Decennial Settlement; but the greater part had been created subsequently to the Permanent Settlement of the *Mehals* in which they were situated.

In January, 1835, an 8-*anna* share, and in May, 1836, a 2-*anna* share, of the

* 13, Moore's I. A., p. 317.

Buldakhal estate (the latter being the portion which included the *Talook* in question), were sold for arrears of Government revenue; and in both instances the Government itself became the Purchaser, and thus acquired all those rights which the sale Law then in force gave to a Purchaser of a *zemindary* sold for arrears of revenue.

In the exercise of those rights it proceeded to make a re-settlement of the estate, and proceedings, extending over a considerable period of time, were had against the *Talookdars*, including *Bishonath Roy* or his representatives. These will, hereafter, be more particularly considered. At present it is sufficient to state, that several settlements were ultimately made with the Respondent, *Obhoy Chunder Roy*, on behalf of himself and the other Respondents, in respect of the lands comprised in *Talook*, *Poorba Auttee*, viz., a settlement for one year in August, 1841; a settlement for twenty years in August, 1842; and a second settlement for one year in April, 1862. On the expiration of this third settlement the Government Collector gave notice to the *Ryots* and cultivators of the lands comprised in the *Talook* not to pay their rents to any person except the Government; and on the 23rd of November, 1863, the *zemindary* rights of the Government in the lands were put up for sale, subject to the rights (if any) of the *Talookdars*, and were purchased by the Appellant.

In March, 1864, the Respondents commenced the suit, out of which this appeal arises, against the Appellant. It was founded on their alleged dispossession from their *Talookdary* rights in the lands, and was brought under the 6th clause of the 23rd section of the Act, No. X. of 1859, before the Collector. That Officer, by his decree, dated the 7th of June, 1864, dismissed the suit; but his decision was reversed by the High Court on the 23rd of March, 1865, and the appeal is against the latter decree, and a subsequent order rejecting an application for a review of judgment.

The contention between the parties is shortly this. The Respondents assert, that their *Talook* is still a subsisting tenure, and that, although it is now, as they admit, subject to enhancement of rent by means of proceedings properly taken by the *Zemindar* for that purpose, it gives them a right of possession or occupancy which he is not entitled to disturb. The Appellant, on the other hand, insists that the Government, after the sale for arrears of revenue, and in the exercise of its powers as Purchaser, effectually cancelled and destroyed the tenure created in favour of *Bishonath Roy;* that the Settlements which it afterwards made with *Obhoy Chunder* were in the nature of mere temporary *Ijarahs*, or farming leases; and that the last of these having expired, it was open to the Government, and is now open to him, the Appellant, to resume the possession of the lands, and either to make the collections from the *Ryots* and actual cultivators himself, or to make a new lease or settlement with the highest bidder. He further contends, that if the proceedings of Government have given to the Respondents any equity for a re-settlement, that equity is one which cannot be enforced in a suit brought under the special statutory jurisdiction given by Act, No. X. of 1859, to Collectors in cases of dispossession. It is admitted that the Appellant, as Purchaser, can claim no higher rights than those possessed by the Government at the date of the sale to him; and that, if Government had then waived or lost the right which it may have had originally to cancel the tenure, he cannot now assert such a right.

The questions argued at their Lordships' bar were:—

First, whether the Government, upon the true construction of Regulation XI. of 1822 (the sale Law under which it purchased), ever had the right to cancel or destroy this tenure.

Secondly, whether, assuming that right to have existed, it was ever in fact exercised, whilst it was capable of being exercised; and,

Lastly, whether the suit, whatever be the rights of the Respondents, has been properly brought under the 6th clause of the 23rd section of the Act, No. X. of 1859.

Their Lordships will consider these questions in the order in which they have just been stated.

The general policy of the Revenue sale Laws that have been passed since the Perpetual Settlement, has been to protect the public revenue by placing the Purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They, therefore, gave, or sought to give, to the Purchaser, the power of abrogating all engagements made by the defaulting *Zemindar* or his predecessors since the settlement, whereby the *zemindary* rents and profits, which were the security to Government for the due payment of its revenue, were diminished. The Indian Legislature, however, has not uniformly tried to effect this general object by precisely the same means. The various Regulations and Acts which it has from time to time passed for the purpose differ in the language of their provisions, and in the stringency of the powers conferred by them. Those enactments, at least those that were passed before 1840, are reviewed in the very able paper signed by Mr. *Colvin*. It was called forth by a difference of opinion between the Board of Revenue, of which he was then the Secretary, and Mr. *Dampier*, the Commissioner of the division in which this estate was situate; Mr. *Dampier* taking the view now contended for by the Respondents, viz., that the *Talookdars*, whether their tenures were created before or after the Decennial Settlement, were entitled to retain possession of their lands, subject, save in certain exceptional cases, to the liability of enhancement of rent according to the *Pergunnah* rates. And this was the view of the Law expressed by the Board of Revenue itself in May, 1833. Mr. *Colvin's* Letter was written in 1836 on behalf of the Board of Revenue to combat and overrule this construction of the Law.

To some of Mr. *Colvin's* conclusions their Lordships give an unqualified assent. They concur with him in holding that, under the sale Law, as it existed before 1822, a *Talookdar* could not be dispossessed of his lands at the will of the Purchaser at the sale; that he was at most, liable to pay the full *Pergunnah* or district rate for them; and could only be ejected from them if he finally declined to hold them at the enhanced rent. They are also of opinion, that Mr. *Colvin* is right in holding that, under Regulation XI. of 1822, the Law respecting dependent *Talooks* created subsequently to the Settlement was, "that such *Talooks* were liable to be wholly avoided and annulled at the option of the Purchaser at a sale for arrears of revenue," unless they fell within the class contemplated by the 32nd section of that Regulation. The language of the 31st section is very distinguishable from that used in the earlier Regulations. It provides that "all tenures which may have originated with the defaulter or his predecessors, shall be liable to be avoided and annulled." On the other hand, the 5th section of Regulation XLIV. of 1793, provides only that the engagements which the defaulting proprietor may have contracted with dependent *Talookdars*, as also all leases to under-farmers, shall stand cancelled; and that the Purchaser shall collect from the *Talookdars* rent according to the full *Pergunnah* rates. The effect, therefore, of the earlier Regulation was to cancel a farming lease, but to keep alive the *Talookdar's* tenure, though at a rent liable to enhancement.

Hence the question between the Commissioners and the Board of Revenue in 1836 was, as the question between the parties on this part of the case now is, whether *Talookdars* of the class of *Bishonath Roy* were within the protection of the 32nd section. Mr. *Colvin* contends that "the *Mofussil Talookdars*" spoken of in that section, being described as persons having an hereditary transferable property in the lands or in the rents thereof, must be taken to be such *Talookdars* as are described by section 5 of Regulation VIII. of 1793, who, at the time of the Decennial Settlement, might have engaged directly with Government for the payment of the public revenue assessed on their lands; and even after the Settlement, and until that right was taken away by Regulation I. of 1801, might have claimed to be separated from the estate of the *Zemindar*. He argues that the term does not include dependent *Talookdars* whose tenures have been created since the Settlement, they

being *Talookdars*, who, under the 7th section of Regulation VIII. of 1793, are declared not to have the property in the soil, but to be mere leaseholders.

Their Lordships are of opinion, that there is considerable weight in the reasoning of Mr. *Colvin*, which receives some corroboration from that portion of the 14th section of Regulation I. of 1801, which declares that the rules regarding separable *Talooks*, contained in Regulation VIII. of 1793, were never meant to apply to any new *Talooks* constituted since the Decennial Settlement. Considering, however, that they have been referred to no case in which the clause now under consideration has received a judicial construction; that the question was not raised or considered in the Courts below; and that its determination is not absolutely essential to the disposal of this appeal, they abstain from expressing any further or more decided opinion concerning it.

They will assume that an auction Purchaser under Regulation XI. of 1822, had the option of cancelling and avoiding such a *Talookdary* tenure as that of *Bishonath Roy* which Mr. *Colvin* claims for him. But granting this, they are of opinion, that the power was one which he might or might not exercise; and that, in conformity with the principle of the decision in the case of *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (10 Moore's I. A. Cases, 123; *Ante*, p. 60), it was incumbent on the Government in this particular case to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure.

Their Lordships will, therefore, proceed to consider the second question raised on this appeal; viz., whether the Government has, in fact, exercised its power of cancellation whilst it was capable of so doing.

Mr. *Colvin's* Letter being the expression of the views of the Board of Revenue, is not merely an able exposition of the law; it is also the best evidence we can have of what the Government, in February 1836, intended to do in respect of the dependent *Talooks* forming part of this estate. Nor is it possible to read the last paragraphs of that letter, beginning with the 52nd, without coming to the conclusion that it was then the intention of Government, whatever might be their extreme rights, to make settlements with the *Talookdars* of all classes, putting them, or at least all who were not especially protected against enhancement of rent, in the position which they would have held of right before 1822, viz., that of under-tenants entitled to retain possession of their lands during the subsistence of their tenure, subject to the condition of having their rents enhanced, according to the *Pergunnah* rates. The Letter, no doubt, contemplated the exercise of the extreme rights of Government if the *Talookdars* should not, within a certain time, enter into the new settlement. But the primary object of Government was to settle with the *Talookdars*; and if the settlement were made, the tenures would continue to exist, though as *Talooks* held at variable instead of fixed rents. Nor is it improbable that, considering the power and influence which the hereditary possession of land seldom fails to give in *India*, especially in a remote District like that in which this estate is situate, the revenue Officers felt that such an arrangement would be beneficial to Government, as well as to the *Talookdars*.

Do, then, the subsequent proceedings show that Government departed from this its original intention?

In considering these proceedings, it should be borne in mind that the position of Government, in one respect, differed from that of an ordinary Purchaser at a sale for arrears of Government Revenue; inasmuch as the 36th section of Regulation XI. of 1822 expressly declares, that an estate purchased by Government shall be subject to the rules applicable to the management of ordinary *Malguzary Mehals* held *Khas*. By virtue of this enactment the revenue Officers had over this estate in 1833 all the powers conferred upon them by Regulation IX. of 1825, and by the provisions of Regulation VII. of 1822, which by the second section of the former Regulation are extended to and made applicable to estates held *Khas*, and the other lands there mentioned. It follows that Government, though its rights either in respect of cancelling the under-tenures or of enhancing the rent, were not higher than

those of an ordinary auction Purchaser, may have been at liberty to assert those rights by a procedure not open to a private individual.

Their first proceeding was, however, one which every *Zemindar* is bound to make, the foundation of a suit for enhancement of rent. It was the issue on the 7th of June, 1836, of a notice under the 9th section of Regulation V. of 1812, claiming a rent raised at discretion to the sum of Rs. 5,000. This led to the proceeding of Mr. *Allen*, the Deputy Collector of the *Zillah Tipperah*, of the 19th of June, 1837.

Great stress has in the argument for the Appellant been laid upon this proceeding. Their Lordships, however, feel that in considering its effect they should look to its nature, and not to expressions loosely used in it, such as "it be ordered that the *Talook* be set aside," or the like. And, if this be done, it will be found that it is nothing but an ordinary proceeding for the enhancement of rent, against a person admitted to be in occupation of the lands. On such a proceeding it is open to the Defendant to contest either the right to enhance at all, or the reasonableness of the rent claimed, or both; without, however, admitting the reasonableness of the rent claimed if he expressly contests only the right to enhance. The *Talookdar* in this case adopted the former course by asserting that his *Talook* was one at a fixed rent, incapable of enhancement even by an auction Purchaser. And the proceeding determined this point against him. It is in fact such a proceeding as Mr. *Colvin* in the 56th paragraph of his Letter assumes to have been already taken.

Again, it appears that in July, 1836, and, therefore, between the date of the notice and that of Mr. *Allen's* proceeding, the Government had given orders for the measurement and survey of the lands. This shows that the rent of Rs. 5,000 was a mere arbitrary claim made in order to try the right to enhance; and that the proceeding of 1837 determined neither the rent to be fixed, nor the person with whom the settlement was to be made.

The measurement and survey were not completed until the *Bengal* year 1245; and on the 3rd of September, 1839, the Commissioner wrote to the Collector that notice was to be issued to the *Talookdars* to appear within fifteen days, and make settlements for twenty years at the *Pergunnah* rates, and that if they did not appear *Ijarah* settlements would be made after annulling their rights. These directions clearly imply that up to that time the intention of Government was still not to destroy the *Talookdars'* tenures, unless the *Talookdars* should finally refuse to engage at the *Pergunnah* rate.

Accordingly, notice was issued to the heirs of *Bishonath* on the 5th of December, 1839. It invited them to come in and make a *Talookdary* settlement within fifteen days, in default of which they were to be held not to have any rights as *Putnee Talookdars* of the late *Zemindar*, or of possession.

From Mr. *Money's* proceeding it appears that the Respondent, *Obhoy Chunder*, did not come in under this notice to accept the settlement; that he still struggled either for a settlement at the old rate, or for delay; and that Mr. *Money* accordingly, as Collector, granted an *Ijarah* for twenty years to a Stranger, *Sheikh Aeenoodeen*. This arrangement, however, was subject to confirmation by higher authority, and we learn that on the 24th of November, 1840, the Commissioner refused to confirm it *in integro*, and reduced the lease for twenty years to one for a single year. And we have a further notice to the heirs of *Bishonath*, dated the 23rd of February, 1841, calling upon them once more, in anticipation of the expiration of the one year's lease to *Aeenoodeen*, to enter into a *Talookdary* settlement at the *Pergunnah* rate, under pain, in case of default, of losing all right to the *Talook*.

The Appellant relies much on the interruption, or assumed interruption, of the Respondent's possession by the grant of this lease to *Aeenoodeen*. And if the original lease for twenty years had been confirmed, and possession had followed thereon, the inference that the old *Talookdary* tenure had been cancelled would have been strong.

The Commissioner's Letter of the 24th of November, 1840, was not, however, produced *in extenso*; and it is to be presum-

ed that the Appellant, who derives title from the Government, would have found means to produce it, had it supported his case. Its effect, as stated on the record, coupled with the fact of the subsequent notice to the heirs of *Bishonath*, which treats their *Talookdary* tenure as still subsisting, leads their Lordships to the conclusion that the lease for a year to *Aeenoodeen* was nothing but one of those temporary arrangements pending negotiations for a final settlement of the Revenue which the Revenue authorities were, under Regulation IX. of 1825, competent to make. Certain it is, that the result of this second notice was that, in 1841, the Respondent, *Obhoy Chunder*, entered into the first engagement for one year; and in 1842 made the engagement for twenty years; and the *Kaboolyats* and other documents executed on both occasions support the conclusion that those settlements were *Talookdary*, and were made with him as representing the persons entitled to hereditary possession of the lands under the old *Talook* granted to *Bishonath*, although their continuing tenure may not be described with strict accuracy as a *Putnee Talook*.

It is further to be observed that, if the Government had not effectually annulled the tenure before 1842, it had then lost its statutory right to do so; since Regulation XI. of 1822, upon which the right depended, was repealed by Act, No. XII. of 1841; and that it is, therefore, unnecessary to consider the subsequent proceedings. The conclusion, then, to which their Lordships have come upon this part of the case, is that the Government, whatever may have been its powers, did not, in fact, cancel or destroy the tenure, but left the *Talookdars* in the position in which they would have been, as of right, under the old law: reducing their tenure from a *Talook* at a fixed to one at a variable rent. And it follows from this that the Appellant, though he has the right to bring a suit properly framed for the further enchancement of the rent, is not entitled to disturb the possession of the *Talookdars*, or to let the land over their heads to the highest bidder.

Upon the last question their Lordships think it sufficient to say, that the suit being one between under-tenants claiming a right to the possession of lands of which they have been dispossessed, and their *Zemindar* who disputes their right of possession, has, in their Lordships' judgment, been properly brought under the 6th clause of the 23rd section of Act X. of 1859.

Their Lordships, therefore, being of opinion, that no ground for disturbing the decree under appeal has been established, will humbly advise Her Majesty to dismiss the appeal with costs.

28th and 29th January, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of the Punjab, Lahore.

MUSSUMAT FANNY BARLOW,* ... ... } *Appellant,*

versus

SOPHIA EVELINE ORDE and others, ... } *Respondents.*

Will—Domicile—Rules for Interpretation—"Children"—Accretions to Property from Rents.

Where a testator has an ascertained domicile, the construction of his Will must depend on the law of that domicile; but if no particular law is applicable, the Will is to be interpreted by principles of natural justice.

In such cases, in applying the rules of Hindu, Mahomedan, or English law to the Wills of Hindus, Mahomedans, or East Indian Christians, respectively, their particular habits and modes of life may be looked to as a guide to the interpretation.

From the context of the Will and surrounding circumstances, "children" may be interpreted as illegitimate children.

Where by Will the income of estates was left to devisees for life, with a gift over of the *corpus* on their death, and a portion of the income instead of being divided among the tenants-for-life was ap-

* 13, Moore's I. A., p. 277; 5 B. L. R., P. C., p. 1.

plied to the purchase of other estates, *held*, these estates did not pass to the remaindermen, but formed the absolute property of the tenants-for life, and passed to their devisees.

THE important clauses in the Will which the question raised by the suit affected, were as follows :—

"I will and bequeath the rest of my property, of whatever nature, I may die possessed of, or may be coming to me by gift, Will, or as heir-at-law, or in any other manner, to my Sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, or the surviving heirs of them, in equal shares or dividends," and then, after giving certain specific legacies, proceeded in these terms :—"I leave and bequeath the income of my *Altumgah*, *zemindary*, and *Theka* villages, gardens and houses, to my five Sons herein named, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed property of the *Altumgah* or *zemindary*. One of my Sons, whichever is most fit, or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get 10 per cent. from the whole income, and he is bound to show a faithful account current yearly to his Brothers.

"Should they like to live together, they may live at *Belaspoor*, and build Houses with mutual consent in the *Altumgah* or *zemindary*.

"Should my personal property not pay off all my debts, they may sell my House at *Delhi*, and my garden at *Trevellian Gunge;* but should the personal property pay the debts, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five Sons.

"In the event of the death of any of my boys previously to attaining the age of twenty-one years, without issue, his or their portion or portions of the *Altumgah*, *zemindary*, and *Theka* villages shall revert to the surviving Brothers for the benefit of the survivors and their heirs, and his or their portion or portions of other property willed by me shall be equally divided amongst all my surviving male children.

"I will and declare that it is my intention and meaning, that in the event of all or any of my afore-mentioned Sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, dying and leaving issue, or children, that the share of the Fathers shall devolve on the issue, or children, to be by them divided in equal shares.

"I will and declare that in the event of the death of all my reputed children, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, and without issue, that my *Altumgah* rights, *zemindary*, *Theka* villages, and all and every of the sums bequeathed, and eventually bequeathed to them, shall devolve to my Daughters, *Louisa* and *Elizabeth*, and to my Granddaughter *Sophy*, or their lawful issues, to my late Brother, Major *Robert Skinner's* children, and their issues, in equal shares and dividends."

Colonel *Skinner* died in December, 1841, leaving his five Sons mentioned in his Will surviving, who thereupon took possession of the estate left by their Father.

On the 25th of October, 1855, the eldest Son, *Joseph Skinner*, died, and *George Skinner*, claiming to be his Son, applied for a certificate to his Father's estate. This was assented to by his Uncles *Thomas Alexander* (one of the Respondents) and *James*, but opposed by *Hercules* on the ground of *George* being illegitimate: this objection was overruled, and a certificate allowing him to collect the debts of the deceased *Joseph* was granted. It appeared that *George* remained in possession of his Father's share for several years, and was killed at *Delhi* in May, 1857, leaving a Wife and Daughter, the Respondents, *Helen* and *Victoria Skinner*.

The second Son, Major *James Skinner*, was during his Father's life-time married to *Sophia Barlow*, by which marriage he had one Daughter only, the Respondent, *Orde*. He also cohabited with his Wife's eldest Sister, *Charlotte*, by whom he had a Son, *Stewart*, and also with the Appellant, his Wife's other Sister, by whom he had a Son, *James*, the infant in the suit.

On the 10th of November, 1859, Major *Skinner* made his Will, the only material parts whereof were as follows :—

"I give, devise, and bequeath my share

of the landed interests devised to me by the last Will and Testament of my late Father, Colonel *James Skinner*, dated *Hausie*, 10th May, 1841, consisting of *Altumgah*, *zemindary*, *Theka* villages, Indigo Factories, Houses, and other lands specified therein, also all and every sum and sums of money which may be due to me at the time of my decease, and also all other debts, or money, or Bonds, or other securities, to be equally divided between my Daughter, Mrs. *Sophia Eveline Orde* and my Son *James*, and to their descendants in perpetuity, and a salary of Rs. 100 per month to their respective Mothers, Mrs. *Sophia Elizabeth Skinner* and *Fanny Barlow*, alias *Villaetee Begum*, which on their demise is to revert respectively to their children above named, viz., Mrs. *Skinner's*, to my Daughter, Mrs. *Orde*, and *Fanny Barlow's* (alias *Villaetee Begum*), to my Son *James*, and likewise, in case of the decease of the children without issue or descendants, their share is to revert respectively to their Mothers, as above-mentioned. And I request my Executors will adopt measures to carry these my last wishes into effect, as also to pay for my Son *James's* schooling and maintenance as long as he is a minor, and to invest the surplus of his share in the best Government loan that may then be open, and to be made over to him on his attaining the age of maturity, or twenty-one years. As my Son, *James*, is not educated, or otherwise provided for, I leave and bequeath to him and to his Mother, *Fanny Barlow*, alias *Villaetee Begum*, the whole of the villages, landed property, &c., &c., &c., which have been purchased for the estate since the late Colonel *Skinner's* demise, and in which I have a fifth share, as also my House, out-offices, and other lands at *Hausie*, and on their demise the share of one to devolve on the other, if my Son, *James*, may die without issue or descendants. Should I happen to die in debt, I ardently hope and beseech my Executors to effect such arrangement and compromise with my Creditors as will not prevent the above legacies from being carried into effect, otherwise to make a proportionate deduction from the share or income of each legatee."

284-85 & 307-8

9th March, 1870.

At the conclusion of the arguments the case stood over for consideration; their Lordships' judgment was pronounced by

THE RIGHT HON. LORD WESTBURY:

The question in this appeal depends on the construction and legal effect of the Will of Colonel *James Skinner*, who was an Officer in the service of the East India Company.

Colonel *Skinner* died in the month of December, 1841, and at the time of his death he was resident and domiciled in the *Delhi* territory, which then formed part of the North-Western Provinces of *India*, but which, after the mutiny, was placed under the administration of the *Punjaub* Government.

The construction and effect of the Will, therefore, must depend on the law of the domicile, if that can be ascertained. At the time of the Colonel's death there was no *lex loci* of the Province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion.

Thus the succession of a Hindu would, as a general rule, fall to be regulated by Hindu law, and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged.

If no specific rule could be ascertained to be applicable to the case, then the Judges administering justice in the Province were to act "according to justice, equity, and good conscience."

Such is the substance of the Regulations, as explained in the case of *Abraham* v. *Abraham* (1) which were made by the East India Company for defining the jurisdiction of the Courts of the Province in which Colonel *Skinner* was domiciled, and which were in force at the time of his decease.

(1) 9 Moore's Ind. App. Cases, p. 195; *Ante*, p. 10.

There is little evidence from which the personal *status* of Colonel *Skinner* may be ascertained, beyond that which is afforded by the Will.

It is stated, and there is proof, that he was illegitimate, being probably the child of a native woman by an European Father. As a Commander of a corps of irregular light Horse he acquired great distinction in the Military service of the East India Company, and, in consideration of his services, he obtained grants of large landed estates, situate partly in the North-Western Provinces, and partly in the Territory of *Delhi*.

The form of a renewed grant of some of these estates made to Colonel *Shinner* by the Marquis of *Hastings* when Governor-General, may be material to be noticed. The grant was made to the Colonel in "*Altumgah*" to take effect from the beginning of the year 1226, *Fusly* era, and contained this special form of limitation, viz.: —"To Colonel *Skinner* and his heirs after him, or to such persons as he may devise by his last Will and testament, or by any other valid instrument, with their heirs, in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share shall conform himself to the dispositions of the said Will." Had the grant been simply to the Colonel and his heirs in "*Altumgah*," the grant would have come to an end on the death of the Colonel without leaving lawful issue, and the superadded special power of testamentary disposition, therefore, is regarded as an indication that the Grantee was conscious that he was not likely to leave lawful issue, and, therefore, obtained the grant of a power of disposition. This argument, however, is not of much weight. Colonel *Skinner* does not appear to have been ever married, but he seems to have kept several native women as part of his family, with whom he cohabited and by whom he had several children.

There is nothing to indicate the religious belief or profession of the Colonel or of his family, or what were their habits or usages.

His origin is unknown: being illegitimate, he belonged to no family, and all that can be collected is, that he was probably a Soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the service of the East India Company.

It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the Colonel's Will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice.

In English law there is a technical rule of construction, that under a testamentary gift, to children as a class, illegitimate children, although recognized by a Testator in his life-time, cannot be permitted to share jointly with natural lawful children; and the Respondents contend, that this rule is applicable to the construction of the Will of Colonel *Skinner*; but, for the reasons we have already given, we are of opinion, that Colonel *Skinner's* succession is not to be administered according to English law, and that there is no room, therefore, for the application of this English rule of construction. The word "children" where it occurs in Colonel *Skinner's* Will, must be taken in that sense, and receive that signification, in which it is plain from the language of the Will, and the dispositions it contains, that it was used by the Testator, that is to say, its extent of meaning in the vocabulary and mind of the Testator must be determined in the Will itself.

The Testator had at the times of making his Will and of his death, five Sons and two Daughters, all of whom were illegitimate, for it seems to be certain that no rite or ceremony of marriage had ever taken place between the Colonel, and any one of the Mothers of these children.

All of these Sons and Daughters, however, appear to have been acknowledged by the Testator during his life as his children, and they are expressly called by him in his Will his "Sons and Daughters."

Thus the Will begins with a general gift "to my Sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas*," and, after giving various pensions to servants and others for life, the Testator directs that they shall revert to my "Sons."

The Sons are again in a subsequent

part of the Will referred to under the term "male children," and afterwards they are called "my reputed children."

It appears that the Testator had a Brother, Major *Robert Skinner*, who, like himself, had never been married, but at the date of the Colonel's Will was dead, leaving several illegitimate children, who had been treated and acknowledged by their Father during his life-time as his children.

It appears also from the Will of the Colonel, that he had been appointed Trustee or Guardian of these children, and must be taken to have been well acquainted with their real *status*, or condition of illegitimacy. It is important, therefore, that we find in the Will a devise in certain events "to my late Brother Major *Robert Skinner's* children and their issues in equal shares."

Here the illegitimate offspring of Major *Robert* are called his children, and are associated as tenants in common with the Testator's Daughters and Grand-daughter and their lawful issues.

The correctness of the interpretation which we put on the word "children" in this Will, as denoting the offspring of Sons, is much confirmed by the fact that there is a marked change of expression in the Will, when the Colonel speaks of the issue of his Daughters.

It is natural to suppose that he would shrink from the thought of his Daughters forming any other connections than those of lawful marriage, or of their having any but lawful issue. Accordingly, when he provides for the event of the death of all his reputed children (meaning his five Sons) without issue or children, and directs that the property given to them shall devolve to his Daughters, *Louisa* and *Elizabeth*, and his Grand-daughter, *Sophy* (who was born in wedlock), or their lawful issues, we find a remarkable change of expression which is not to be found in any of the gifts to the children or issue of his Sons.

It appears also from the evidence, that the Colonel's eldest Son, *Joseph* (who died in the year 1855), had no lawful issue, but had one illegitimate Son, named *George*, who was born some years before the death of the Colonel, and was always recognized and treated by the Testator as his Grandson; and it is also proved that on the death of his Father, *Joseph*, *George*—this reputed Son—was permitted to succeed his Father, and has, in fact, taken the share devised to *Joseph* by the Will.

The limited signification which in our law is put upon the word "children," when used as the designation of a class, and not as *descriptio personarum*, is probably the result of the Christian law of marriage.

According to natural law, the children of a man mean the issue begotten by him, and the *criterea* of this condition are; the being born of a wedded Wife or Wives, or, if born of other women, the being recognized and acknowledged as children by the Father.

With regard to his Sons, the Colonel probably felt the same indifference as to their being married or not, which he had shewn in his own case.

The conclusion, therefore, at which their Lordships have arrived is, that the word "children" in the Will of Colonel *Skinner* denotes and includes as well illegitimate as legitimate children, whenever such illegitimate children are acknowledged or treated as his children by their putative Father.

We proceed to apply this conclusion to the case which is before us, and which arises on the following clause in the Testator's Will: "I will and declare that it is my intention and meaning, that in the event of all or any of my afore-mentioned Sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, dying and leaving issue or children, that the share of the Fathers shall devolve on the issue or children, to be by them divided in equal shares." As has been already stated, the first Son, *Joseph*, died intestate in the year 1855, without lawful issue, but leaving an illegitimate Son, *George*, who, with the assent of the majority of his Uncles, succeeded to his Father's share under the devise.

James, the second Son, died in the year 1861, leaving one legitimate Daughter, *Sophia Orde*, and an illegitimate Son, *James Skinner*; and the question is, whether the share of *James*, the Father, in the property devised to his five Sons by the

Will of Colonel *Skinner* vests, as to the share of *James*, in his Daughter *Sophia* exclusively, or in the said Daughter and the Son *James*, as tenants in common. For the reasons we have already given, we are of opinion, that the share of the Son *James* belongs to *Sophia Orde* and *James* the Son equally as tenants in common. *James* is named and described as his Son in the Will of his Father *James*, and, therefore, there is a natural equality of *status* between him and his Sister, Mrs. *Orde*, and both take equally under the aforesaid gift made by the Will of their natural Grandfather.

The next and subordinate question in this appeal relates to the Will and succession of *James*, the second Son of the Testator.

By his Will, dated the 10th of November, 1859, after devising all his share of the landed interests devised to him by the Will of his late Father, and which he particularly mentions, and after also bequeathing all sums of money due to himself at the time of his decease, and also all other debts, money Bonds, or other securities, unto his Daughter, Mrs. *Sophia Evelina Orde*, and his Son, *James*, to be equally divided, the Will contains the following passage:—"As my Son *James* is not educated or otherwise provided for, I leave and bequeath to him and to his Mother, *Fanny Barlow*, alias *Villaetee Begum*, the whole of the villages, landed property, &c., &c., &c., which have been purchased for the estate since the late Colonel *Skinner's* demise, and in which I have a fifth share, as also my House, out-offices, and other lands at *Hausie*."

The question between the Appellant and Respondents is, what property passed under this last devise?

The facts, although they are not very clearly stated, appear to be, that whilst the estates devised by the Colonel to his Sons were under the management of the Executors or Managers appointed by the Colonel's Will, considerable sums, being surplus rents of the devised estates, but not drawn by the Devisees, the Sons, were laid out in the purchase of additional landed property; and it is contended by the Respondents, that these new acquisitions must be regarded in law as accretions to the original devised estates, and as passing with them under the gifts made by the Will.

If this were so, the share of *James*, the Son, in the purchased estates would be divisible, like his share in the original estates, between his Daughter, Mrs. *Orde*, and his Son, *James*, under the Colonel's Will, and would not pass under the devise contained in his own Will.

But their Lordships find no ground for this conclusion, and they are of opinion, that the purchased estates follow the ownership of the purchase-money, which was the absolute property of the five Sons in equal shares; and they are of opinion, therefore, that the Testator *James's* fifth share in these purchased estates passed under the aforesaid devise in his Will.

But another question was raised at the Bar by the Respondents' Counsel, who stated that some leases granted to Colonel *Skinner* by the Government of certain villages and lands expired at the death of the Colonel, and that renewals were made by the Government to the Colonel's Devisees, which renewed leases were, it was contended, obtained by virtue of the original ownership of the devised estates, and must, therefore, in equity, be subject to the gifts made by the Will of the devised estates.

It was incumbent on the Respondents to have stated and proved the facts on which this claim is founded, so as to have enabled their Lordships to decide the question; but this has not been done, and it does not appear to have been considered and determined by the Courts below.

If, however, Mrs. *Sophia Orde* requests, and is content to take at her own risk, an inquiry on this subject, their Lordships will recommend that such inquiry shall form part of the Order to be made. Their Lordships will humbly recommend Her Majesty to reverse the decree appealed from, and to declare that Mrs. *Sophia Orde* and *James*, the Son and Daughter of Major *James Skinner*, are entitled in equal shares, by virtue of the Will of Colonel *Skinner*, to one equal fifth part of all the estates and property thereby devised and bequeathed to the Testator's five Sons in equal shares, and also to declare that one equal fifth part of all the estates and pro-

perty purchsed or acquired after the death of the Colonel by means of the rents, profits, or income arising from the estates and property devised and bequeathed to the said five Sons of the Testator, belonged absolutely to his second Son *James Skinner*, and passed, under the Will of the last-named *James*, to Mrs. *Fanny Barlow* and his Son *James* absolutely in equal shares; and at the request and risk of Mrs. *Sophia Orde*, let an inquiry be made, by or under the direction of the Court from whose decree this appeal is brought, whether any renewals or leases of lands that had been held by the Colonel during his life-time were made or granted by the Government or any other persons to the Executors or Managers of the Colonel's Will, and under what circumstances, and for what consideration, the same were made.

There remains the subject of costs.

On the first hearing of the cause no costs were given to either party. From the decision of this first Court on the matters in question Mrs. *Orde* appealed, and obtained a judgment with costs, from which the present appeal is brought. In the opinion of their Lordships, Mrs. *Orde* was wrong on both points; and further in contending that the fifth share of her Father belongs to herself exclusively, she is claiming inconsistently with what was done by the family in the case of *George*, the illegitimate Son of *Joseph*. Their Lordships see no reason, therefore, why the ordinary rule should not prevail. The difficulty has arisen, not from any uncertainty in the language of the Colonel's Will, but from the contention of Mrs. *Orde* that it ought to be interpreted by English law, which has no application. Their Lordships, therefore, condemn Mrs. *Orde* to pay the Appellant's costs in the Court below, the judgment of which is hereby reversed, and also to pay the Appellant's costs of this appeal. No Order is made as to the costs of the Respondent, *Alexander Skinner*.

316-17 & 336

2nd February, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Madras.

STREE RAJAH YANUMULA VENKAYAMAH,* ... } *Appellant,*

versus

STREE RAJAH YANUMULA BOOCHIA VANKONDORA, } *Respondent.*

Impartibility—Succession—Self-acquired Property—The Shivagunga case commented on.

If the acquirer of separate property leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property, and the separate property will not descend to different persons, they will descend in a different way, and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property; and his self-acquired property, free from those rights. The course of succession will not be the same, for the family and the separate estate, and it is clear, therefore, that according to Hindoo Law there need not be unity of heirship.—*Katama Natchiar* v. *The Rajah of Shivagunga*. 9 Moore's Ind. App. Cases, p. 539.

The decision in the *Shivagunga* case (Vol. 9, p. 539) will be found to proceed solely and expressly, on the finding of the Court, that the *zemindary* in question was proved to be the self-acquired and separate property of *Gowery Vallabha Taver*. It assumes that, if this had not been so, the decision would have been the other way.

The mere impartibility of an estate is not sufficient to make the succession to it follow the course of succession of separate estate.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The question on which the parties in the suit out of which this appeal arises joined

* 13, Moore's I. A., p. 333.

issue and went to trial, was, whether the family, of which the Plaintiff and the Appellant's Husband were members, was an undivided or a divided Hindoo family.

Both the Courts below, giving effect to the presumption of Hindoo Law which the evidence failed to rebut, have decided, and in their Lordships' judgment have properly decided, that issue in favour of the Plaintiff. The general *status*, therefore, of the family, as an undivided family, has been ascertained.

Accordingly, the strength of the argument of the learned Counsel for the Appellant has been directed to show that this case should be governed by *Katama Natchiar* v. *The Rajah of Shivagunga*, in the 9th Vol. of Moore's Indian Appeal Cases, p. 539; *ante*, p. 25, which is generally known as the "*Shivagunga* case." They have gone so far as to argue that the estate in question in this case, being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the "*Shivagunga* case," the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided.

The authority invoked, however, affords no ground for this argument. The decision in the "*Shivagunga* case" will be found to proceed solely and expressly on the finding of the Court, that the *zemindary* in question was proved to be the self-acquired and separate property of *Gowery Vallabha Taver*. It assumes that if this had not been so, the decision would have been the other way. At page 589; 9 Moore's Ind. App. Cases, their Lordships say:—

"Hence, if the *Zemindar*, at the time of his death, and his Nephews were members of an undivided Hindoo family, and the *zemindary*, though impartible, was part of the common family property, one of the Nephews was entitled to succeed to it on the death of his Uncle. If, on the other hand, the *Zemindar*, at the time of his death, was separate in estate from his Brother's family, the *zemindary* ought to have passed to one of his Widows, and, failing his Widows, to a Daughter, or descendant of a Daughter, preferably to Nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but *Gowery Vallabha Taver's* Widows and Daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late *Zemindar* continued to be generally undivided in estate with his Brother's family, this *zemindary* was his self-acquired and separate property, and as such was descendible, like separate estate, to his Widows and Daughters and their issue preferably to his Nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact, would be, whether the *zemindary* was to be treated as self-acquired separate property, or as part of the common family stock." Again, at page 605, it is said:—"The substantial contest between the Appellant and the Respondent is, as it was between *Anga Mootoo* and the Respondent's predecessors, whether the *zemindary* ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:—First, were *Gowery Vallabha Taver* and his Brother undivided in estate, or had a partition taken place between them? Second, if they were undivided, was the *zemindary* the self-acquired and separate property of *Gowery Vallabha Taver?* And if so,—Third, what is the course of succession according to the Hindoo law of the South of *India* of such an acquisition, where the family is in other respects an undivided family?" And again at page 606, their Lordships, dealing with the second of these questions, say:—"The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the *zemindary* as the self-acquired property of *Gowery Vallabha Taver*. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the Grantee

selected by Government was a remote kinsman of the *Zemindars* of the former line, does not, their Lordships apprehend, bring this case within the rule cited from *Strange's* Hindoo Law."

It is, therefore, clear, that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend, that if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of *India*.

Has it then been shown that, though the family was undivided, this estate was in fact the separate property of the Appellant's Husband?

The evidence concerning the original grant of it, and the terms on which it was held, is extremely scanty. The most material document is the Exhibit A, in the record; which, as the statement of the then *Zemindar*, made on an official requisition at a time when he had no interest in giving, nor apparent motive for giving any but a true account of the history of the estate and of the custom of his family, seems to be in every way worthy of credit. Looking at that document, their Lordships are of opinion, that the estate was in its inception part of the common family property, though impartible, and, therefore, with certain qualifications enjoyable by only one member of the family at the time. It appears to have been substantially granted to the common ancestor of the family, *Bapam Dhora;* though with his consent and for some undisclosed reason, it was put into the name of his third Son, *Joggappa Dhora*. This grant states:—

"As the issues which the said *Saraba Raghavaraz* had, had failed, and as he had no near relatives and heirs, he made up his mind to give up the said *Totapatti Talook* attached to *Raghavaraz Sima* to my said ancestor, *Bapam Dhora*, and the *Joddangi Talook* to *Boggula Gannamreddi Dhora*, and at the time of his death he executed *Pottahs* in the names of *Joggappa Dhora*, the third of the four Sons of *Bapam Dhora*, according to his consent, and of *Boggula Gannamreddi Dhora* transferring to them respectively the *Talooks* of *Totapatti* and *Joddangi*, and authorizing them and their posterity to enjoy them as *Jaghires* as he has done."

That the grant was to the family of *Bapam Dhora* is made more apparent by what follows:—"From that time *Joggappa Dhora* enjoyed the *Talook* (of *Totapatti*) for forty-nine years. In his time he had managed the affairs of the *Talook* and lived at *Totapatti*, and provided *vasatis* (landed gifts) to his three Brothers, caused *Pedda Mallu Dhora* to live in the village of *Vajrokutam*, *Rajani Dhora* in *Kottange*, and *Chinna Mallu Dhora* in *Nellipudi*, and thus maintained them."

These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a *Raj*, or impartible estate, in favour of the junior members of the family; who, but for the impartibility of the estate, would be co-parceners with him.

It is argued, however, that whatever may have been the original nature of the property, the effect of what took place when *Bapam Dhora* supplanted and excluded *Mallappa Dhora* was to make it a new and fresh acquisition of *Bapam Dhora;* just as in the "*Shivagunga* case," the new grant of the escheated *zemindary* to *Gowery Vallabha Taver*, was held to constitute a new and separate acquisition by him, though a member of the family of the former *Zemindar*. Their Lordships are, however, of opinion, that there is a clear distinction between the two cases. In the "*Shivagunga* case" the *zemindary* had escheated to Government, which was free to deal with it as it chose. By a new *Sunnud* it granted it to the *Taver*, conferring a legal title which none could dispute. What was done in this case? The document A. states:—"On his death, *Jaggappa Dhora's* Son, *Mallappa Dhora*, after joining the people called '*Desastula*,' fell out with *Sri Maharaz*, and enjoyed the *Talook* as *Mokhasa* without his interference, by causing much disturbances; consequently, my senior paternal Uncle, *Bapam Dhora*, went to *Peddapuram*, visited *Sri Maharaz*, represented to him, that in the event of your affording me assistance, I will turn out the said *Mallappa Dhora*, enjoy *Totapatti Talook*, paying the *Jumma-bundi* amount formerly fixed by *Rajam*

Dhora, and thus obtain the assistance of *Sibbandis* (Warriors,) came and drove out *Mallappa Dhora*, entered *Totapatti*, and took possession of it, and paid 2,700 *karuku pagodas* for one year in full."

This account shows no legal forfeiture; no fresh grant by any person competent to grant a legal title. It only shows that on a dispute between *Mallappa Dhora* and the superior, another member of the family came in, and, with the strong hand, and in concert with the superior, succeeded in ousting *Mallappa Dhora*, and in assuming the position and rights of the *Zemindar*. And the document itself shows that the adopted Son and successor of *Bapam Dhora* himself considered this as no substantial change in the nature or tenure of the property: that he still traced his title to *Bapam Dhora* by virtue of the original grant; and spoke of the *Talook* as having been enjoyed by six generations of his family during the period of one hundred and seventy-nine years.

Nor is it immaterial to observe what he states as regards the practice of succession observed in the family. He says:—"As regards the practice of succession observed in our family, I have to state, that if the holder of the *Talook* has two or three Sons, the eldest of them enjoys the estate, while the rest, being provided with *vasatis*, conduct themselves according to his will, but it has never been the practice of dividing the *Talook* among Brothers. If the Owner of the land has no issue, a competent person out of his nearest Cousins is selected, and the *Talook* put in his possession."

Their Lordships are, therefore, of opinion that, even if the case made for the Appellant at their Bar had been made in the Courts below (which apparently it was not) it must have failed: and that no ground has been shown for disturbing the decrees under appeal. They must, therefore, humbly advise Her Majesty to dismiss this appeal, with the costs of the Respondent, on whose behalf an appearance has been entered here.

21st February, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On petition from an Order of the High Court of Judicature at Calcutta.

IN THE MATTER OF SREE MOHUN GHUTUCK.

Moonsiff, office of—Patent Office, 22, Geo. 3, Cap. 75—Special leave to appeal—Jurisdiction.

Special leave to appeal from an Order of the High Court of *Calcutta* dismissing the petitioner from his office of *Moonsiff*, refused, same not being a Patent Office within the meaning of the Statute, 22nd *Geo.* 3, Cap. 75; and the Court having no jurisdiction to entertain the application.

THE Petitioner, in this case, applied *ex parte* for special leave to appeal from an Order made by the High Court at *Calcutta*, under *Ben.* Reg. V. of 1831, section 26, dismissing him from his office of *Moonsiff*, or Judge, of *Chowkey Shahazadpore* in *Bengal*, for corruption in the exercise of his judicial functions as *Moonsiff*.

The petition set forth, that the Petitioner was appointed a *Moonsiff* in the year 1859, and discharged the duties of that office from the year 1865 down to the period of his dismissal from that appointment in 1867; that he was dismissed from his office of *Moonsiff* by Orders of the High Court at *Calcutta*, dated respectively the 3rd October, 1866, and the 12th of June, 1867; that such Orders were made upon separate reports made by the Judge and Commissioners of *Rajshahye*, dated the 21st of August, 1866, and the 25th of September, 1866, in relation to certain charges of corruption brought against him in the exercise of his judicial functions as *Moonsiff*, under the provisions of *Ben.*

* 13, Moore's I. A., p. 343.

Reg. V. of 1831, section 26, cl. 2. That although the provisions of Act, No. XXXVII. of 1850, which prescribe the course of procedure to be followed in investigating charges against Judicial Officers whose cases fall under cl. 1, of section 26 of *Ben.* Reg. V. of 1831, do not expressly refer to the investigations of charges against *Moonsiffs* by the *Sudder* Court, whose powers were now vested in the High Court, yet, the Petitioner submitted, that the principle was the same in both cases, and that there had been grave departures from principle and justice in disposing of his case. That the Judge on whose report, together with the evidence taken by him and upon which the High Court entirely proceeded, entered on the discharge of duties, which should have been conducted in a judicial spirit, with the strongest avowed prejudice against the Petitioner, and regarded himself as a private Prosecutor. That the Judge admitted hearsay evidence when it was in his power to have called for the original account-books, in which it was alleged, the entries of the moneys paid by Witnesses to the Petitioner as bribes were entered; that he allowed alleged copies to be put in, which, without proof, he held to be true copies; and submitted, that if such evidence were excluded, there would remain no proof of the charge against the Petitioner; that the Judge did not give him sufficient opportunity of putting in his defence or calling Witnesses. That one of the Judges of the High Court before whom the report of the Judge came, acting thereon, and without hearing the Petitioner, on the 3rd of October, 1866, made an Order for the dismissal of the Petitioner; that afterwards, in consequence of the Petitioner complaining of not being heard, the case came on again for hearing on the 12th of June, 1867, before another Judge of the High Court, who after hearing the arguments for the Petitioner affirmed the Order of dismissal; and the petition further alleged, that if full opportunity had been given to the Petitioner of making his defence, he could have successfully rebutted the false and malicious charges brought against him, and have escaped the ruin and disgrace which his dismissal from the Bench, and exclusion from practice at the Native Bar, had brought upon him; and that as there was no right of appeal under the Letters Patent creating the High Court, he prayed that special leave might be granted him to appeal against the judgments of the High Court of the 3rd October, 1866, and the 12th of June, 1867, and that such decisions might be reversed, and the Petitioner reinstated in his Office, or that the High Court might be ordered to direct a fresh inquiry to be instituted, with regard to the charges brought against the Petitioner.

Mr. *Doyne*, in support of the Petitioner.

As no right of appeal is given from Orders of dismissal of *Moonsiffs* by section 39, of the Letters Patent of the 14th of May, 1862, creating the High Court at *Calcutta*, which Court exercises the same power as the late *Sudder* Court did under cl. 2, sec. 26 of *Ben.* Reg. V. of 1831, in dismissing *Moonsiffs*, the only remedy the Petitioner has is under the Statute, 3rd & 4th *Will.* IV., c. 41, sec. 4, to seek for special leave to appeal. In re *Minchin* (*a*), this Court allowed an appeal from an Order of the Supreme Court at *Madras*, dismissing the Master of that Court, which Order was not by the *Madras* charter an appealable grievance.

THE RIGHT HON. SIR J. W. COLVILE:

The Office of *Moonsiff* is not a Patent Office within the meaning of the Statute, 22nd *Geo.* III., c. 75. *Exp. Robertson* (11 Moore's P. C. Cases. 288), is an express authority that we have no jurisdiction to entertain this application.

(*a*) 4 Moore's I. A. Cases, 220; 1 P. C. J., p. 337.

21st and 22nd February, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

BUNARSEE DASS, Executor of ROY RAMPERSHAD, and Guardian of DAMODUR DASS, a Minor,* — *Appellant*,

versus

GHOLAM HOSSEIN, MUDDUN MOHUN, T. G. A. PALMER, and LALLA BHOLANATH, ... — *Respondents*.

Partnership—Liability upon a Bill drawn by a Partner in the recognised trading name of the firm—Holder's knowledge of the Bill as a private transaction, effect of.

Every one of the partners in a Mercantile firm of ordinary trading partnership is liable upon a Bill drawn by a partner in the recognized trading name of the firm, for a transaction incident to the business of the firm, although his name does not appear upon the face of the instrument, and although he be a sleeping and secret partner.

In order to take a case out of these principles of the general law, it must be shown that the holder of the Bill knew at the time he received it that the transaction was the private affair of a single partner.

THE facts of this case and the points raised by the appeal are fully stated in the judgment.

The appeal was argued by

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant, and

Mr. *Mackeson*, Q. C., and Mr, *J. Edwards*, for the Respondent, *Lalla Bholanath*.

At the conclusion of the arguments, their Lordships' judgment was pronounced by

THE RIGHT HON. SIR ROBERT PHILLIMORE:

This was an appeal from a decree of the late *Sudder Dewanny Adawlut* at *Agra*, which confirmed the decree of the Principal *Sudder Ameen* of the City of *Cawnpore*. The decree was in favour of *Gholam Hossein* and *Muddun Mohun*, who were Plaintiffs in the Court below; *Palmer* and *Roy Rampershad* were Defendants. *Lalla Bholanath* has since purchased the interest of *Gholam Hossein* and *Muddun Mohun*, and is in fact the only Respondent. The representative of *Roy Rampershad*, is the only Appellant.

Roy Rampershad entered into partnership with *Palmer* on the 8th of June, 1861. *Palmer*, at that time, carried on business at *Allahabad*, *Cawnpore*, and other places; and on the 6th of October, 1860, had entered into a contract with a Railway Company to supply them with a certain number of Sleepers, and, in order to fulfil his obligation, entered into a subsidiary contract with the Respondents, *Gholam Hossein* and *Muddun Mohun*, for the purchase of a certain number of Sleepers. This contract was, in fact, only an oral one. The delivery of the Sleepers began on the 15th of *January*, 1861, and continued till the 14th of July in that year. A considerable number of Sleepers were delivered after the 8th of June, which was the date of the partnership between *Palmer* and *Roy Rampershad*.

In December, 1861, *Gholam Hossein* and *Muddun Mohun* applied to *Palmer* for payment of their account. *Palmer* thereupon gave them five *Hoondees*, or drafts, one for Rs. 10,000, and four for Rs. 2,500 each—Rs. 20,000 in the whole, in part payment of their account. The drafts were dated, "*Cawnpore*, the 31st of December, 1861," and drawn by "*Palmer* & Co." upon "*Palmer* & Co., at *Calcutta*." These Bills were all dishonoured and protested; but, subsequently, it appears

* 13, Moore's I. A., p. 358.

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that the Respondents received Rs. 10,000, on account. There was a further sum of Rs. 24,000 due to the Respondents, the value of articles purchased from them by *Palmer*, while in partnership with *Roy Rampershad*, in the course of business.

The total amount of the debt, therefore, from *Palmer* & Co. to *Gholam Hossein* and *Muddun Mohun*, was Rs. 34,000 4 as. 3 p. For this amount they brought their suit, on the *Hoondees* and on a general statement of account, against both *Palmer* and *Roy Rampershad*, and also against *Ram Putt* and *Kalloo Mull* (to whom, after the Bills had been dishonoured, the Respondents had been referred for payment), in the Court of the Principal *Sudder Ameen* of *Cawnpore*, and obtained a decree in their favour, from which an appeal was presented by *Roy Rampershad* alone to the *Sudder Dewanny Adawlut* at *Agra*, which Court confirmed the decree of the Principal *Sudder Ameen*.

From these decrees the representative of *Roy Rampershad* and Guardian of his Minor Son have appealed to this Tribunal. The principal grounds upon which this appeal is founded are derived from the terms of the agreement between *Palmer* and *Roy Rampershad;* that agreement was as follows:—

"Deed of agreement executed by Mr. *Palmer*, dated 8th June, 1861.

"We, *Thomas George Adam Palmer*, residing in the House situated in *Mouzah Nubee Bagh*, *Pergunnah Chayal*, and *Roy Rampershad*, Banker, Guardian of *Damodur Dass*, Minor, his Son, resident of *Daragunj*, one of the quarters of the City of *Allahabad*, *Pergunnah Chayal*, *Zillah Allahabad*, having agreed between ourselves to enter into equal partnership, for the purpose of carrying on a certain trade, we do accordingly record the conditions of that engagement, and testify to its truth and veracity. 1st. This business shall proceed under the style and title of *Palmer* & Company. 2nd. A sum, not exceeding one *lakh* of Rs., shall be embarked on behalf of *Damodur Dass*, Minor, *Roy Rampershad's* Son, in this business, and *Damodur Dass* shall remain Owner of this money with its interest, at the rate of 12 *per cent. per annum* out of the profits, interest at the above rate due to the Minor aforesaid being carried to account of the business aforesaid, shall be paid to *Damodur Dass* at broken rates. The interest on the money embarked by Mr. *Palmer* in this business shall also be paid to him at broken rates, and of the remainder of the profits, *Damodur Dass* and I, Mr. *Palmer*, shall be Owners in equal shares. 3rd. I, Mr. *Palmer*, shall draw the sum of Rs. 1,000 out of the profits monthly, as remuneration for my services, and after payment of this and other expenses, we shall have equal shares in the profits. 4th. I, Mr. *Palmer*, shall not undertake any contracts, &c., for any amount in this business without the consent and signature of *Roy Rampershad*, and all sums paid as expenses for the management of this business, shall be paid with the consent of *Roy Rampershad*. If any matter should be undertaken without such consent, it shall be considered distinct from this business. 5th. All the money in this business, and the accounts, shall be kept by the Treasurer, selected and recommended by *Roy Rampershad*, and *Roy Rampershad* shall be responsible for his honesty. 6th. This business shall be carried on for the space of two years and a half, and if, at the end of this period, I, *Roy Rampershad*, should for any special reason desire to close the business, six months' previous notice of closing the business shall be given to Mr. *Palmer*. At the time of closing, *Damodur Dass*, Minor, shall realize the whole amount that may be due to him, with interest at one *per cent.* from the goods and property then pertaining to the business. And if, after payment of the amount aforesaid, with interest, there is any balance left, or profits, we, the parties to this agreement, shall, without objection, divide equally between us. If any deficiency should be found to exist, the loss shall be borne by use in equal proportions. 7th. Whatever profits in this business may be realized on my, Mr. *Palmer's*, share from year to year, shall be yearly carried to account of a separate debt jointly due to *Roy Rampershad* and *Ram Rikh* by me, Mr. *Palmer*. 8th. Whatever Servants I, Mr. *Palmer*, may employ for the management of business, and whatever necessary ex-

penditure I may incur, I shall employ and incur after consulting *Roy Rampershad*, the salaries and expenditures shall be discharged from the profits of this business. Accordingly this Deed of agreement is drawn up that it may be used when occasion requires.

"Given this day, the 8th June, 1861.

"(Signed) *Palmer & Co.*"

It has been contended that the particular terms of this agreement show that it was of a limited nature, that it had reference only to future contracts and transactions which were authorized by the express consent and signature of *Roy Rampershad*, and, therefore, had no reference to the previous contract of *Palmer* with the Respondents for the purchase of the Sleepers, and that there was no privity of contract between the Respondents and *Roy Rampershad* with respect to purchase of the Sleepers.

The proposition of law applicable to these facts it well known and indisputable. Every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a Bill drawn by a Partner in the recognized trading name of the Firm, for a transaction incident to the business of the Firm, although his name do not appear upon the face of the instrument, and although he be a sleeping and secret Partner.

In order to take a case out of these principles of the general law, it must be shown that the holder of the Bill knew at the time he received it that the transaction was the private affair of a single Partner.

Their Lordships are unable to see that the facts of the present case are such as to bring it within this exception. The evidence does not establish that the Respondents were cognizant of the limitations in the partnership agreement between *Roy Rampershad* and *Palmer;* the contract for the delivery of the Sleepers is not shown to have been one contract, but it appeared that, from day to day, separate consignments of Sleepers were passed to the Firm of *Palmer* & Co. The consignments continued to be delivered, in the same form after the date of the partnership, a condition of which was that the business should proceed under the style and title of "*Palmer* & Co." The money advanced by *Roy Rampershad*, more than Rs. 92,000, went, with *Roy Rampershad's* knowledge, into this very transaction, and was consequently brought within the scope of the agreement.

What the "certain trade" was, which is mentioned in the Deed of agreement, does not appear, but *Roy Rampershad* has himself been examined as a Witness, and he has not explained what the "certain trade" was, but has advanced his money for the purpose of this business, has made no complaint of misappropriation of the funds, and has not endeavoured to satisfy the Court that it had been diverted to any purpose not contemplated by him. The *Hoondees* were drawn in the ordinary name of the Firm. Moreover, the Courts below gave credit to the Witnesses who deposed to the fact that the *Gomashtah* for *Roy Rampershad* was present at *Mooradabad*, and that the Sleepers were purchased and despatched in his presence and under his instructions; and their Lordships see no reason to dissent from this view, though it is not necessary for their Lordships' judgment to place reliance on this evidence.

Their Lordships will humbly advise Her Majesty to dismiss this appeal, with costs.

22nd February, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the late Sudder Dewanny Adawlut at Agra.

SHEIKH ZAHURUDDIN and others,* ... ... } *Plaintiffs*,

versus

THE COLLECTOR OF GORUCKPORE, on behalf of Government, ... } *Defendants*.

Sanad, Construction of—Acts of Government Officers, Binding Effect of—Reg. VII. of 1822, s. 6, cl. 3.

Where by a *sanad* a grant was made of certain *mauzas* specified as containing an estimated number of *bigas*, a recognition by the Revenue Authorities and Civil Courts of the grantee being entitled to forest land as part of that grant, although much exceeding the estimated area, was held to be binding on Government, and not to be an error within the meaning of Reg. VII. of 1822, section 6, clause 3.

ON the 11th December 1818, *Mati Khanam* conveyed the property, by the following deed, to Government:—

"I *Mussamat Mati Khanam*, the proprietress, by auction-purchase, of *Talooka Ganespore, Pergunnah Aurungabad Nugur*, in the district of *Goruckpore*, do hereby make a good, valid, and legal declaraton, that *Talooka Ganespore*, consisting of the twenty-seven villages detailed below, is, in virtue of auction-purchase, my exclusive property and in my possession, and I have all along enjoyed the preprietary right thereto; and that now, while in a sound state of body and mind, I have, without force or compulsion, sold absolutely to Government, through the Collector of *Goruckpore*, for a consideration of rupees 8,343 of the current coin and of full weight, whereof a moiety is rupees 4,171-8-0, my ownership of the said villages, together with all the rights and interests, original and attached, having distinct boundaries, inclusive of all the land, both arable and not arable, forests, wells, ponds, tanks, and pools, right of forests and fisheries, fruits, gardens, trees, both fruitful and barren, saline land, and the houses of tenants, and having received, through the Officiating Collector of *Goruckpore*, the amount of sale money in a lump, have taken possession thereof and brought it to my own use, and put the vendee in possession of all the villages, together with the revenue and proprietary dues receivable from the said *Talooka*, and heretofore received by me, and now I and my representatives have no longer any claim or right to the ownership of the said villages. Therefore, I have executed this deed of sale that it may be of service when needed. Rs. 8,343. Twenty-seven *mauzas*.

(Sd.) MATI KHANAM."

In 1818, the following *sanad* was granted to *Kadir Buksh*:—

"Be it known to the *Matsuddis* of the present and the future times, and to the *Chowdhris* and the *Quanoongoes* of the *Pergunnah Aurungabad Nugur*, attached to the district and *Sircar* of *Goruckpore*, which is an adjunct of the province of *Akhtar Nugur Oudh*, that whereas the villages comprised in the *Talooka Ganespore*, of the aforesaid *Pergunnah*, whether principal villages or dependencies, according to the subjoined details purchased by the Government, including all lands cultivated and waste, with fish and forest rights, have, from the beginning of the autumnal season of 1226 *Fasli*, been granted by the Government as a rent-free *jagire* to *Kadir Buksh*, in lieu of *Sicca* rupees 4,000 allowed him as a maintenance, under the orders of the Most Noble the Governor-General, dated 10th April 1818; and whereas, after *Kadir Buksh*, the abovementioned property is to be retained as a hereditary *zemindari* estate by his heirs and successors, provided they pay the revenue which may be due to the Government. Therefore, they (the aforesaid *Matsuddis*, &c.,) recognising the said *Kadir Buksh* as the permanent and inflexible rent-free

4, B. L. R., P. C., p. 36.

holder of the above estate, shall leave its revenue and proprietary rights in his possession and enjoyment. They shall in no way interfere with or molest him by realizing from him the regular or miscellaneous revenue, &c., and they shall not demand from him a fresh *sanad* every year. And considering the above orders strict, they shall act in accordance with them."

Then followed a list of the villages, giving the names and the area of each, concluding—

"Total, twenty-seven villages; area, 3,933 *bigas*."

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

There is little, if any, dispute concerning the facts of this case. It is admitted that, on the 14th of January 1819, Lord *Hastings*, the then Governor-General, executed in favour of the *Pindara* Chief, *Kadir Buksh*, the *sanad*, of which the construction has been so keenly contested; that the grant, whatever it comprised, was made in lieu of a money allowance of 300 *sicca* rupees per mensem, which the Government had previously undertaken to pay to the *Pindara* for his support; that the lands granted by way of *jagire* were to be held by him rent-free during his life, but were to be subject to the payment of Government revenue in the hands of his heirs and successors; and that, in January 1822, Lord *Hastings*' Government, on the application of *Kadir Buksh*, determined that the lands comprised in the *jagire* should, on his decease, be continued to his heirs, to be held by them at an *istemrari jumma* of 1,877 rupees 8 annas.

The principal question in the cause is what passed by the *sanad*. The Appellants contend that the subject of the grant was the whole of *Talooka Ganespore* which had been purchased by Government from one *Mati Khanam*, with a view to its being granted to *Kadir Buksh*. The Respondents assert that it was only 3,933 *bigas*, part and parcel of that *talook*.

Talooka Ganespore, as purchased by *Mati Khanam* at an auction sale, and as conveyed by her to Government, consisted of twenty-seven principal *mauzas* or villages; and to one or other of these villages were attached five *towfir* villages, of which the names do not appear either in the conveyance of *Mati Khanam* to the Government, or in the *sanad*. Each principal village, as the *Talooka* originally stood, consisted of some cleared and cultivated land, and of a considerable amount of forest; and thus the twenty-seven villages amongst them included the whole of the forest land now in dispute. The cleared or cultivated lands were comprised in the 3,933 *bigas* to which the Respondents say the grant was confined, and these were scattered about the surrounding forest in the manner shown by the first of the maps in evidence, which is admitted to be a correct map of the whole *Talooka* sold by *Mati Khanam* to Government.

Kadir Buksh was put into possession of his *jagire* by a Government officer, Captain *Stoneham*, described as Superintendent of the *Pindara* Chiefs. He, by a letter dated the 25th of January 1819, brought to the notice of the Collector the five *towfir* villages, and stated that they had been represented to him to form part of the *Ganespore* estate. It is difficult to read his letter without coming to the conclusion that it assumes the whole of that estate to have been granted to *Kadir Buksh*. The Collector also, on the 9th of February 1819, announced to the Board of Commissioners (then the highest authority under the Supreme Government in the Ceded Provinces), that *Kadir Buksh* had been put in possession of the *Talooka Ganespore*; and that the establishment entertained for collecting the revenues of the estate, whilst it belonged to Government, had been discharged. In 1821, there was a dispute between the *Rajah* of *Nugur* and *Kadir Buksh*, in respect of the boundary lands and *jungle* attached to the *jagire*, which was decided in favour of the latter. This was followed in 1826, in 1834, and in 1835, by other suits, in which the boundaries of *Talooka Ganespore* and the right to forest lands on those boundaries were in dispute; and in each of these *Kadir Buksh* was suc-

cessful, and was recognized as the proprietor of *Talooka Ganespore*, including all that had passed under that description by the auction sale to *Mati Khanam* and from her to the Government. The most important of these suits is that of 1826, because to it the Collector was a party; and the direct issue raised was whether the *towfir* villages were part and parcel of *Talooka Ganespore*. In the presence of the Collector they were decided to be so, and were treated as belonging to *Kadir Buksh*. Again, it appears that the title of *Kadir Buksh* to the whole *Talooka* was recognized in the years 1836 and 1837, in various proceedings taken by the original proprietors under Regulation I. of 1821, and Act III. of 1835, to set aside or modify the auction sales. In these proceedings *Kadir Buksh* intervened as the actual proprietor of the whole of what had been sold at the auction sales, which were impeached. And, on the other hand, the Government did not intervene to claim or defend a title to any part of what had been so sold. The fact has been questioned by Mr. *Pontifex*, if not also by Mr. *Forsyth*, but on this evidence their Lordships have no difficulty in finding that from 1819 up to the time of his death, *Kadir Buksh* was, with the knowledge of the Government and its Revenue Officers, in possession of the whole *Talooka*, and was recognized as its owner in various judicial proceedings. Nor is there the slightest evidence, that during that period the Government asserted a title to, or exercised any right of ownership in, the forests comprised in the *talook*.

Kadir Buksh died in 1837, and his death was the occasion of proceedings wherein the then Government recognized still more unequivocally his title under the *sanad* to the whole *Talooka*, including the lands in dispute. Upon his death it became necessary to apportion the fixed revenue or *jumma* of 1,877 rupees 8 annas amongst the different villages. This was done by a Mr. *Chester*, acting as Assistant Collector and Settlement Officer. It is admitted that the measurements of the different villages on which he proceeded included all the forest and other land in dispute; and that his settlement, in fact, treated the heirs of *Kadir Buksh* as the proprietors of the whole *Talooka*, subject to a fixed revenue then to be apportioned among the twenty-seven *mauzas*, or villages, into which the total area of the *Talooka* (being 10,592 acres) was taken to be divided.

Nor can this settlement be treated as the act of a subordinate officer liable to error and acting in ignorance or forgetfulness of the history of the *Talooka*. The smallness of the revenue attracted the attention of the Commissioner. He demanded an explanation on the 5th of July, which was given by Mr. *Chester* on the 9th of July 1838. The settlement went in due course to the Board of Revenue, was pronounced by it to be "fair, moderate, worthy of approval, and creditable to Mr. *Chester*," and as such was, on the 14th of January 1840, reported to the Governor-General, and so confirmed. It is hardly conceivable that if the former Government had, by its *sanad*, granted only a portion of the *Talooka*, retaining its rights in large and valuable forests, there should have been no record of such retention in one or other of the various offices and departments through which this settlement passed with approval. Yet the present claim of Government rests on the assumption that the settlement proceeded on a gross and palpable error.

It is further remarkable that the alleged error was brought to the attention of the Revenue Officers by the zeal of the ex-proprietors of the *Ganespore* estate in proceedings extending over a period beginning in September 1843 and ending in February 1845. By petitions they brought almost the very case now made, first before the Collector, then before the Commissioner, and finally before the Board of Revenue. Yet each of these authorities refused to recognize the error, and dismissed the petitions.

So things remained until 1862, when the point thus disposed of was again revived by Mr. *White*, a Deputy Collector on settlement duty in that of *Goruckpore* wherein this estate lies. It would appear by Act VIII. of 1846, section 1, that the previous settlement of *Goruckpore* expired in July 1859, and it is to be presumed that Mr. *White* was employed in making the new settlement which then became necessary. It

is to be observed, however, that the 3rd section of the Act expressly declares that persons holding lands on special grants shall continue to hold them according to the terms of their grants. If, therefore, the whole of *Talooka Ganespore* was held by the Respondents under the *sanad* at the fixed *jumma* imposed by the Letter of Government of January 1822, it was wholly out of the scope of the new settlement, which was then in progress. Mr. *White*, however, on the 9th of April 1862, in a paper more remarkable for zeal than for sound reasoning, communicated to the Collector his reasons for holding that the major part of the *Talooka* was liable to resumption and full assessment as *khiraji* lands.

Assuming that the intention of Government in 1818 was to give *Kadir Buksh* nothing but a strict equivalent for the allowance of 4,000 rupees per annum, and proceeding also upon his own construction of the *sanad* and other documents, he held that nothing was effectually granted beyond the 3,933 *bigas;* that the fixed *jumma* was referable only to that portion of the *Talooka ;* and that the rest remained liable to a fresh assessment of revenue, if indeed the Respondents were entitled to be treated as in rightful possession of it, or as the parties entitled to engage for the revenue so to be assessed upon it. He charged *Kadir Buksh* and his representatives with having "dishonestly" enlarged the borders of the *jagire* "by imposition and artifice," favored by "a rare combination of chances," in which last phrase their Lordships conceive is included the remarkable *consensus* in favor of the Appellants' title of all the Government Officers, whether revenue or judicial, to whose notice the subject had been drawn during a period of more than forty years. The acts of those officers are accounted for by suggestions of error, mistake, or the omission to make due inquiry.

Mr. *Bird*, the Collector, to whom this communication was made, took the contrary view of the Appellants' rights, and seems to have held that the former settlement could not be disturbed. He was, however, overruled by the Commissioner, whose decision was confirmed by the Board of Revenue, and the result was that, by the Revenue Authorities the *Talooka, ultra* the 3,933 *bigas*, was held to be subject to resumption and assessment of revenue at the current rates. The Respondents thereupon brought their regular suit to contest these revenue awards, and to establish their proprietary right in the whole *Talooka* under the *sanad* at the fixed rent. But their suit was dismissed by the Judge of first instance, and his decree has been affirmed by the *Sudder* Court, both Courts holding that the claim of Government was well founded.

On the argument of this appeal the absurd and groundless imputations of fraud, which were cast by Mr. *White's* report upon *Kadir Buksh*, have been very properly withdrawn. It was still suggested that the possession by the family in 1837 of a great part of the lands then settled, is to be accounted for by the hypothesis of accretion by means of gradual encroachment. Their Lordships can find in this record no proof that the family then possessed a rood of land other than that into the possession whereof *Kadir Buksh* had been put by Captain *Stoneham*, the Government officer, under whose superintendence he was placed. Of lands beyond the boundaries of the *Talooka*, as it passed from *Mati Khanam* to Government, there can in this suit be no question. The existence of such, and their liability to assessment, must be determined in some other proceeding. The fact that the more recent measurements assign a larger area to the *Talooka* than is shown by the earlier documents, is to be accounted for by the more accurate survey that preceded the thirty years' settlement of the North-Western Provinces. The only questions for their Lordships' determination are, 1st, Did the grant by the *sanad* pass the whole *Talooka* as it was purchased by Government, or only the 3,933 *bigas ;* 2ndly, Was the perpetual *jumma* of 1,877 rupees 8 annas fixed by Government in 1822 upon the 3,933 *bigas*; leaving the rest of the *jagire* (if any) subject to future assessment; and 3rdly, Was either act (supposing the two former questions to be determined in favor of the Appellants) the result of a mistake on the part of Government, which is capable of rectification in this suit?

The construction of the *sanad* must, of course, be determined by the terms of the instrument. It is, however, not too much to say that where general descriptive terms such as "villages" or the like have been used in a grant, and both the parties have by their acts put a particular construction upon them, and rights depending on that construction have been enjoyed for many years, it lies upon those who impugn that construction to show that it is erroneous. How is this attempted in the present case?

The *sanad* is in form a notification "that the villages comprised in the *Talooka Ganespore*, whether principal villages or dependencies, according to the subjoined details purchased by the Government, including all lands cultivated and waste, with fish and forest rights, have, from the beginning of the autumnal season of 1226 *Fasli*, been granted by the Government as a rent-free *jagire* to *Kadir Buksh* in lieu of 4,000 rupees allowed him as a maintenance under the orders of the Most Noble the Governor-General, dated April 10, 1818." And the subjoined details consist of an enumeration of the twenty-seven villages, showing, under the head of "estimated area," areas aggregating 3,933 *bigas*, and giving no specification of boundaries. The learned Counsel for the Respondent contrast this with the language of the conveyance from *Mati Khanam* to Government (1), which, after declaring that *Talooka Ganespore*, consisting of the twenty-seven villages detailed below, was, by auction-purchase the property of the lady, conveyed "her ownership of the said villages, together with all the rights and interests, original and attached, having distinct boundaries, inclusive of all the lands, arable and not arable, forests, wells, ponds, tanks, and pools, rights of forests and fisheries, fruits, gardens, trees, both fruitful and barren, saline land, and the houses of tenants." And they rely much on the larger general words here used, and particularly on the word "forests," which was not to be found in the *sanad*. They meet the argument founded on the other side upon the words "fish and forest rights" ("*jalkar*" and "*bankar*,") by saying that the term "*bankar*" does not necessarily imply title to the soil of the forest in which it is exercised, since it may import rights to be exercised over the forests of another; and that even, if taken in the former sense, it may be understood to be the *bankar* derivable from that portion of the 3,933 *bigas* which, by the statement of the 22nd of August 1818 (1), is shown to have been either barren or still uncultivated, though fit for cultivation. They further rely strongly on the words "according to the subjoined details," coupled with the schedule specifying only as the areas of the villages, such as made up the 3,933 *bigas*.

It appears to their Lordships that these arguments, though more or less plausible, afford no ground for cutting down the grant of Government to the 3,933 *bigas*. The subject of the grant, like the subject of the conveyance, consisted of the twenty-seven villages described in each case by the same names. It is shown beyond a doubt by the conveyance, and by the earlier *Rakbabandi* in the record; and it has even been admitted in argument, that these villages, as conveyed by *Mati Khanam*, make up the whole *Talooka*, as delineated by the first of the maps, and comprise amongst them all the lands in dispute. An Indian village or *mauza* is not a mere village in the sense of an aggregation of houses or huts, with the land actually cultivated by its inhabitants. It is a division of a *Pergunnah*, and may, as in the present instance, consist of dwellings, of lands cultivated, and of a large extent of forest in which the rights of a *Zemindar* may co-exist with rights belonging to the villagers. If, then, there be nothing else in the *sanad* to show that the villages granted by it and by the former conveyance, under the same names, are in the one case the villages defined by their known and ascertained boundaries; and, in the other case, the same villages *minus* their appendant forest, the mere fact that the general words are somewhat larger in the one instrument than they are in the other

(1) *Supra*, p. 554.

(1) This was the statement of the Collector set out, 4 B. L. R., P. C., p. 38.

goes for very little. Is it then a legitimate inference from the words "according to the subjoined details," coupled with the list of the villages, that the *sanad* granted only a portion of each village, and that a portion defined by no boundaries; and further that the whole subject of the grant was a congeries of unconnected plots of cultivated land scattered about the *Talooka* of which they formed part, and separated by forest land retained by Government. Their Lordships can find in the passages relied upon nothing which warrants so violent and improbable a construction of the whole instrument. The words "according to the subjoined details" are followed by the words "purchased by Government," which support the hypothesis that what was granted was that which had been acquired by Government; and since these latter words make the subjoined details equally applicable to the estate purchased by Government, and to the estate granted by it, it follows that the schedule must be treated as an imperfect description.

The learned Counsel for the Respondent have also dwelt much on the improbability that the Government of 1819 would have granted property of such extent or value in commutation of an allowance of 300 rupees per mensem, and called in aid of their construction the official correspondence which preceded the grant. It was pointed out by one of their Lordships that this correspondence could not be legitimately admitted as a key to the construction of the *sanad*. They may go further, and say that it does not to their minds establish the antecedent improbability that such a grant should have been made. The estate had been purchased for a small sum; the frequency of the prior auction sales suggests a doubt whether, in its then state, it was equal to the payment of the revenue assessed upon it; it was granted rent-free only for the life of *Kadir Buksh*; there was at that time no stipulation that his heirs should hold it at a fixed rent; and the Indian Government, which was then, and for many years afterwards, notoriously careless about the forests, may at the time of the grant have contemplated that, as the forests were reclaimed, the estate in the hands of *Kadir Buksh's* successors would become subject to a progressive revenue. Be that as it may, their Lordships have no difficulty in coming to the conclusion that, upon the true construction of the *sanad*, the whole of *Talooka Ganespore*, as purchased by Government, passed under it.

If this be so, it is necessary to consider whether there is any ground for holding that by the Government letter of the 18th of January 1822, the *istemrari jumma* of 1,877 rupees 8 annas was fixed upon that part only of the *jagire* which had before the grant been assessed to revenue, leaving the rest subject to the liability to future assessment. Many ingenious arguments founded on the principles upon which the land revenue is, from time to time, assessed in the Upper Provinces, under the Regulations, were addressed to their Lordships. But they are of opinion that these are beside the present question. The act of Government in fixing a permanent revenue on any lands comprised in the *jagire* was, *ex concessis*, an exceptional act of favour, and a departure from the general revenue law applicable to that part of *India*. The effect of the letter is to be determinded by its language, and that seems to their Lordships to be conclusive. It expresses the determination of the Governor-General in Council that the lands comprised in the *jagire* should, on the death of *Kadir Buksh*, be continued to his heirs, to be held by them at the *istemrari jumma*. The *jumma* was to cover whatever was included in the *jagire*. The grant may have been improvident; but if made by the Government of 1822, it is binding on the existing Government: and was properly so treated on the occasion of the settlement of 1837.

Upon the last point little need be said. If, as their Lordships think, the whole *Talooka* was granted and afterwards made tenable at the permanent *jumma*, it is clear that neither act of Government can be rectified in such a suit as this, upon a suggestion of mistake. But it is difficult to see how such a case could be successfully raised in any suit. How is it possible, at this distance of time, to enter, as it were, into the Council Chamber of Lord *Has-*

tings, to measure the motives which prompted an act of grace in favour of a particular family, or to determine that his bounty proceeded upon mistake and not upon an appreciation of the facts, of which all might, and but for the assumed carelessness of his advisers must, have been before him.

A good deal was said on both sides touching the conduct of Government in taking the proceedings which have led to this suit. Their Lordships fully concede that it is the right, nay, the duty, of a Government to protect the public revenue against unfounded claims to particular exemption from burthens to which the community is subject. But in the present case, their Lordships cannot but think that the rash views of Mr. *White* were too readily adopted by his official superiors, and that the Government was thus committed to dispute on insufficient grounds the effect of former grants, of which the more liberal construction was supported by an undisputed possession of forty years, and had been formally sanctioned by the settlement of 1837.

Their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the decree of the late *Sudder* Court at *Agra*, and to order that, in lieu thereof, a decree be made granting to the Appellants the relief sought by their plaint with the costs of the proceedings in both the Courts below. The Appellants must also have the costs of this appeal.

22nd and 24th February, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty,) and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

BHOWAN DOSS and PURSOTUM DOSS,* ... } *Appellants*,

versus

SHEIKH MAHOMED HOSSEIN and MUSSUMAT BUNNOO BIBEE, Widow of SHEIKH MAHOMED HUSSUN, and MUSSUMAT HOSSAINEE BEGUM, ... } *Respondents*.

Mortgage in the name of a deceased Mahomedan's concubine—Benamee Transaction.

Mortgage executed in the name of the concubine of a deceased Mahomedan considered to be a *Benamee* transaction.

25th March, 1870.

THE consideration of their Lordships' judgment was reserved. Judgment was now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The only question on this appeal is, whether the interest of the Mortgagee under a Deed of conditional sale, dated the 7th of November, 1855, is now vested in the Appellants as the Assignees of a woman whom it will be convenient to designate by her original name, *Hoossein Buksh*, or in the Respondent, *Mussumat Hossainee Begum*, as the heiress and representative of *Mirza Abdoollah Beg*.

The suit in its inception was one brought by the Appellants to enforce the security against the Mortgagors, who are represented by the two other Respondents. The

* 13, Moore's I. A., p. 346.

Respondent, *Mussumat Hossainee Begum*, intervened by petition, alleging that *Hoosein Buksh* had no right to assign the mortgage security, which was part of the estate of the *Mirza*, and as such now belonged to her, the Petitioner, as his representative. She was admitted to defend her title as a party to the suit, which thus embraced two distinct questions, viz., first, whether the Appellants, under the title derived from *Hoosein Buksh*, were entitled to stand in the shoes of the original Mortgagee, and, if so, secondly, whether they were entitled to the relief sought against the Mortgagors. The first only of these questions has been fully tried in the Courts below, or argued on the appeal here.

In a former suit touching the estate of *Mirza Abdoollah Beg*, between the Respondent, *Mussumat Hossainee Begum*, and *Hoosein Buksh*, it had been determined by the decrees of two Indian Courts, confirmed on appeal by Her Majesty in Council (*a*), that the latter was not, as she alleged, a Wife, but a mere Concubine of the *Mirza;* that a document which she had propounded as his Will in her favour was spurious; and that the Respondent, *Mussumat Hossainee Begum*, as his heiress-at-law, was entitled to his estate.

The following is the history of the security in question. In November, 1855, the Mortgagors being the Owners of a half-share in *Talook Komurpore*, which they had previously mortgaged to *Bishnoo Doss*, the Father or ancestor of the Appellants, borrowed Rs. 7,000 in order to pay off that mortgage, and for other purposes. As a security for the repayment of the new loan with interest, they executed the Deed of conditional sale of their share in the *Talook* to enforce which this suit is brought. By instruments of the same date (the 7th of November, 1855) they took from the Mortgagee a lease of the mortgaged premises at a yearly *jumma* of Rs. 3,996 12 as. and 6 p.; and accordingly remained in possession, under the obligation of paying out of that sum the Government and other charges on the property, and accounting for the balance, being Rs. 840 *per annum*, as profits to the Mortgagee on account of this usufructuary mortgage. The mortgage was taken, and the sum granted, in the name of "*Mussumat Jariut-ool-Butool*, otherwise *Bebee Hooseinee Kullan*, Wife of *Mirza Abdoollah Beg*." And the question, as already stated, now is, who was the real Mortgagee?

This question was, in the Courts below, treated as involving two issues, viz., first, who was the person designated by the above description, *i. e.*, whether it was *Hoosein Buksh*, or the admitted Wife of *Mirza Abdoollah Beg*, one *Zenut Bebee;* and, secondly, whether the money was not advanced by the *Mirza*, and the security taken for his benefit, though *Benamee* in the name of the person, whoever she might be, to whom the description was intended to apply.

Their Lordships are of opinion, that if the money advanced can be shown to have been the money of the *Mirza*, it becomes immaterial to consider who was the nominal Mortgagee. For the case made by the Appellants, and sworn to by their Witnesses, is, that the money was advanced by *Hoosein Buksh* out of her own moneys; and the mortgage taken in her name for her own benefit. There is no suggestion on the record that, though the money came from the *Mirza*, the transaction was by way of gift, or provision for her; and the Appellants cannot now be allowed to set up a title inconsistent with that asserted in the Courts below. This being so, it is to be regretted that the judgments of those Courts do not so much proceed on a clear finding on this material issue, to which the evidence taken was almost wholly directed, as upon inferences from the conduct of *Hoosein Buksh*, and other circumstances, which will be hereafter considered.

The case made by the Appellants was, as already stated, that the money was that of *Hoosein Buksh*. It is supported only by the testimony of Servants, of whom one at least has been discredited in the former suit. Some of them undertake to swear that when she came into the *zenanah* of the *Mirza* she brought a large sum of money (Rs. 15,000 or more) with her—a circumstance far from probable. The Prin-

(*a*) See *Mussumat Jariut-ool-Butool* v. *Mussumat Hoseinee*, 11 Moore's Ind. App. Cases, p. 191; *Ante*, p. 213.

cipal *Sudder Ameen* has expressed an opinion, that the Appellants' Witnesses are untrustworthy as compared with the Witnesses of the other party, and their Lordships feel that very little reliance can be placed upon them. *Hoosein Buksh* herself has not been examined; nor is her story corroborated as it might have been, to some extent, by the production of the Collector's receipts for revenue, which, as appears from the instrument called the acceptance of the lease, the Mortgagors were bound to hand over to the Mortgagee.

The case of the Respondents as to the money is, that it was made up of a sum of Rs. 6,900, which was brought for the purpose from the Bank of one *Narain Doss*, under an order of the *Mirza*, and of a sum of Rs. 100 added to it from his cash in the House. The Witnesses who depose to this are, for the most part, also menial Servants. Nor can their Lordships, who have not the means of seeing them, judge how far the Principal *Sudder Ameen* was warranted in considering them more worthy of credit than those on the other side. The evidence of the *Gomashtah* called to prove the payment from the Bank of *Narain Doss*, if free from the objections taken to it, would unquestionably turn the scale in the Respondent's favour. Those objections have now to be considered.

The first is, that the date of the entry in the Banker's Books as given in the record, corresponds with the English date, the 22nd of November, 1855, and is, therefore, inconsistent with the Respondent's case, inasmuch as it shows that the payment of the Rs. 6,900 was posterior to the date of the mortgage transaction. Their Lordships, however, are not satisfied that the Hindee date is correctly printed in the record. It is *Mitu Katuk Soodee*, 13th. The Hindee date of the Conditional sale is *Katuk Boondee*, 13th. The name of the month and the number of the day are the same. The difference is between *Soodee* and *Boodee*, or "the light" and "the dark side of the moon." An error, therefore, in one letter would account for the discrepancy. Their Lordships cannot but think that if there had really been this gross inconsistency between the Respondent's evidence and her case, the fact could not have escaped the notice of the native Judge who tried the suit in the first instance, or of the Appellants. Yet the former admitted the entry without comment, and apparently gave credit to it; and neither in their reasons of appeal, nor, so far as appears, in the argument before the appellate Court, was this objection taken by the Appellants.

A more formidable objection to the entry is its particularity. It is asked, why should it state that the money was paid "through *Thakoor Hurrun Singh* for a mortgage in presence of *Sheikh Mahomed Hossein* and *Sheikh Mahomed Hussun* to *Bishnoo Doss* and *Gopal Doss*." The statement seems to point rather to a payment at the Bank than to one at the House of the *Mirza*. Nor do the other Witnesses speak to the payment to *Bishnoo Doss* and *Gopal Doss*; though such a payment at some time and in some place must have formed part of the transaction.

It is also argued that, if the Respondent's case were true, she might have proved it by calling *Sheikh Mahomed Hossein*, the surviving Mortgagor, and other respectable persons named by the Witnesses or in the entry. That there is considerable force in these arguments cannot be denied. But it is to be remarked, that there was no cross-examination of the *Gomashtah* upon the entry or otherwise. The evidence seems to have been given without objection or comment in the Court below. If, therefore, the Indian Courts had distinctly found upon this evidence that the money was advanced by *Mirza Abdoollah Beg*, as alleged by the Respondent, and their judgments had expressly proceeded on that finding, their Lordships, notwithstanding the difficulties about the entry, and the character of the Respondent's witnesses, would not have seen grounds sufficient to justify them in disturbing these concurrent judgments.

Unfortunately, there has been no distinct finding on this issue of fact. And their Lordships must consider, whether the grounds which the Judges of the two Courts do assign for their conclusions, are sufficient to justify them.

The judgment of the Principal *Sudder*

Ameen proceeds chiefly on the ground that *Hoosein Buksh*, having included the mortgaged property under the description of "*Komurpore*," in the enumeration of the *Mirza's* properties at the foot of the spurious Will, must be taken to have admitted that it was part of his estate. The judgment of the appellate Court in *India* adopted this ground, but proceeded also on the conclusion that the nominal Mortgagee was not *Hoosein Buksh*, but *Zenut Bebee*. Its reasons for that conclusion are not, in their Lordships' opinion, satisfactory. It may be admitted that "*Jariut-ool-Butool*" is a term as applicable to the one person as to the other. But the *alias Hossainee Kallan* is at least nearer to the name of *Hoosein Buksh* than it is to that of *Zenut Bebee*. *Hoosein Buksh*, if her story is true, might well give to herself in the Deed a more noble title than properly belonged to her, and yet be careful in the Will to call herself by her original name in order to avoid any dispute touching the description of the Legatee. It is also perfectly consistent with her case that she should describe herself as the Wife of the *Mirza*. Nor, though improbable, is it absolutely impossible that he, if the transaction were with him, would allow her to be so described? Their Lordships, therefore, are not prepared to affirm that *Hoosein Buksh* was not the *benamee* Mortgagee, though they do not say that she has been satisfactorily proved to have been so.

The other grounds of the judgments seem to them to be stronger. It is met by the suggestion that the "*Komurpore*" mentioned at the foot of the Will is not the property comprised in the mortgage. The Principal *Sudder Ameen*, however, a native Judge with local knowledge, has held that the "*Komurpore*" in the Will did properly designate that property. The reasons of appeal make no specific objection to this finding; and the objection taken in argument before the Judges of the *Sudder* Court, who had not local knowledge, was only that the word might mean some other property; there was no attempt to show what it did mean. And their Lordships are disposed to think, that the Principal *Sudder Ameen* was correct in the conclusion that the spurious Will did treat the subject of this suit as part of the *Mirza's* estate.

The arguments founded on the dealing of the Mortgagors with the Respondent, *Mussamut Hoosainee Begum*, and on the purchase by the Appellants of *Hoosein Buksh's* title, do not, in their Lordships' judgment, do much to advance the case of either party. The Appellants have, with their eyes open, purchased a very doubtful title, and as far as they could, have provided for the refunding of the purchase-money (if any really passed), should they fail to substantiate it. As the Owners of the other moiety of the *Talook*, they had an obvious motive for entering into the speculation. On the other hand, though the recognition of the Respondent's title by the Mortgagors affords some ground for the inference that the *Mirza* was originally the real Mortgagee, yet the indulgent terms which the Respondents have granted them supply a motive for that recognition.

Upon the whole, their Lordships are of opinion, that the Appellants have failed to establish the title of *Hoosein Buksh* by evidence which would justify the reversal of the decrees under appeal. Their Lordships' only doubt has been, whether they ought not to remand the suit for a further and more satisfactory trial of the issue, by whom was the money advanced? But considering the weight of suspicion which attaches itself to the title of *Hoosein Buksh*, the preference which the Principal *Sudder Ameen* has expressed for the Respondent's Witnesses, and the reasons which he has assigned for his judgment, they feel unable to say that that judgment was wrong, and finding it confirmed by the Superior Court, they have come to the conclusion that it is their duty humbly to recommend Her Majesty to dismiss the appeal. The costs must follow the result.

24th and 28th February, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

SETH LUKHMEE CHUND RAO, BAHADOOR and SETH GOBIND DASS,* — *Appellants*,

versus

SETH INDRA MULL and others, ... — *Respondents*.

Evidence—Partnership Books—Act II. of 1855, s. 53.

A. & Co. and B. & Co. entered into a joint adventure in opium. A. & Co. were to send money to various places to be handed to the agents, who were to buy and sell. They now claimed against B. & Co. for money alleged to have been so sent after giving credit for sums received. The proof was the arrival of the money at A. & Co.'s places of business, supported by entries in A. & Co.'s books at each place, but there was no proof of payment to the agents save such entries. As to remittances to the other places, the only evidence was the books of A. & Co. at the place of despatch. *Held*, that there was no evidence as to the latter claims; and as to the former, although the evidence appeared insufficient, the case would not be remanded, as the Appellants, independently of these claims, had a balance against them.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

On the question of partnership their Lordships do not think it necessary to say much. If the proof of the partnership had depended on the evidence given of the agency of *Saliq Ram*, and of the circumstances which are alleged to have taken place at *Muttra*, their Lordships would certainly have been unable to find against the Respondents that *Saliq Ram*, as their accredited Agent, had made there a contract of partnership binding on them. The reason why the Appellants in their plaint gave such prominence to the earlier negotiations, and brought so much evidence to prove *Saliq Ram's* alleged character at that time, may possibly be, that they then felt pressed by the difficulty of making the Respondents amenable to the Court at *Muttra*, and thought that it was necessary to establish a contract made at *Muttra*, in order to found the jurisdiction of that Court. When the case came here on appeal from the Courts of *India (a)*, which had found that there was no such jurisdiction, the view which this Committee then took was, that the Letter written at *Ruttam*, if genuine, amounted either to a contract of partnership, or to a ratification of what had been previously done by *Saliq Ram*; and that the partnership, being one which was to be carried on principally at *Muttra*, any cause of action arising out of the balance resulting from the partnership transactions must be taken to have arisen at *Muttra*; and the cause was accordingly sent back for trial on the merits in that Court.

Their Lordships now think, that if there was a partnership at all, it was a partnership created, constituted and defined by the Letter written at *Ruttam*. They are disposed to think that the evidence preponderates in favour of the genuineness of that Letter, and, at all events, for the disposal of this case, they will assume that that Letter was written contemplating such a partnership as is there described.

The partnership so contemplated seems to have been a joint adventure of the two Firms in opium speculations, to be managed principally by *Saliq Ram*, who was to buy up opium in *Malwa*, and other parts of *Western India*, and was to act with the consent of both parties. The capital with which those transactions were to be carried on, was to be furnished by the Appellants' Firm at *Muttra*. They were to advance the capital, and to be allowed interest at the rate of 6 *annas per cent*. Therefore, if that agreement were

* 13, Moore's I. A., p. 365; 4 B. L. R., P. C., p. 31.

(a) See *Lukhmee Chund* v. *Zorawur Mull*, 8 Moore's Ind. App. Cases, 291; 1 P. C. J., p. 763.

strictly carried out, the Firm at *Muttra* would become accountable to their Partners in their joint adventure; the Respondents taking credit for the money which they advanced, and accounting for the returns of the opium when sold; and, on the other hand, *Saliq Ram* would have to account either to both Firms, or to the *Muttra* Firm, as the Agent of the joint adventure, for the disbursement of all the moneys received by him, and for his application thereof.

This being the relation of the parties, the Appellants have brought their suit to recover from the Respondents their share in the alleged loss upon this joint adventure, and have attempted to prove that loss by producing the accounts kept by them at *Muttra*, showing the gross amount of their advances, and giving credit for what they represent as the gross amount of the sum realized by the sales of the opium purchased. The accounts kept by *Saliq Ram* are not produced; though some such accounts must surely have been kept and rendered, in order to show what opium was purchased, and for what it was sold, *Saliq Ram* himself, who may have been alive when the suit was first instituted, though he is said to have been dead when it went back to *India* to be fully tried, is not examined. *Punna Lall*, the other Agent, is examined, and is unable to give any account whatever of these transactions. Therefore, the whole evidence seems to consist of the accounts and Books of account kept by the Appellants.

The learned Judge who tried the case in the first instance, allowed certain items of the sums, which the Appellants said they had advanced by way of capital for this adventure, and he disallowed other large items. The result was that, according to his mode of stating the account, there was a considerable amount of loss. It appears, however, that he made what is clearly a mistake in the calculation of the amount advanced. He gave the Appellants credit for the sum of twenty *lacks* of *rupees* remitted to *Mundesore*, whereas they had taken credit in their own accounts for only seventeen *lacks* sixty-six thousand and four *rupees*, the difference being the difference in value between the Company's *rupee* and the *rupee* current at *Mundesore*, calculated on the whole remittance. When the case went to the higher Court, that error was pointed out. It seems almost to have been admitted, and the result is, that if that error is rectified, and nothing more is allowed than the Judge below allowed, there is no proved loss, but, as the account stands, an apparent profit on the speculation of upwards of a *lack* of *rupees*.

The question, therefore, whether the Appellants have made out a right to recover anything against the Respondents, turns upon the question, whether the sum which they have been allowed to charge against the Respondents can be increased by either of the disallowed items? Their Lordships have considerable doubt, whether there was sufficient evidence to justify the charge against the Respondents of even those items which have been allowed. It seems to rest entirely upon the Books kept at *Muttra* by the Appellants (which cannot be likened to Books of a partnership to which all the Partners of the Firm have access, and which are kept by the servants of all), and upon the Books kept at the *Kootees* of the Appellants at *Mundesore* and *Indore*. No doubt the *Indore* Books, and the *Mundesore* Books, carry the case, as to those two items, to this extent, that while the *Muttra* Books show *primâ facie* that remittances to the amounts stated were made to those *Kootees*, the Books of those *Kootees* show *primâ facie* that those sums did find their way into the hands of *Saliq Ram* and *Punna Lall*. That those sums were really applied by those persons for the purposes of the joint adventure there is no evidence whatever. However, even this degree of proof is wanting as to the disallowed items. As to them, there is nothing more than the evidence of the Appellants' servants, corroborated by the Appellants' Books at *Muttra*, that certain drafts were drawn—one upon the Appellants' *Kootee* at *Bombay*, and another on the Appellants' *Kootee* at *Ruttam*—in favour of *Saliq Ram* and *Punna Lall*; but that those sums ever passed from those *Kootees* into the hands of those persons there is no evidence whatever.

Their Lordships, therefore, are clearly of opinion, that the Judge of the Court of

first instance was right in disallowing the latter items as insufficiently proved. Whether he was right in allowing the other items, their Lordships think is extremely doubtful; and they would not be disposed, without further inquiry, to charge those items, if the case turned upon them against the Respondents. But, as the case stands, the Appellants have failed to prove that there is any sum due to them from the Respondents; and the only question is, whether the suit is, therefore, to be dismissed as having failed, or whether their Lordships are, after this twenty-one years' litigation, to send it back for further inquiry and investigation, and allow the Appellants to amend their case? Their Lordships are of opinion, that they would not be justified in adopting the latter course. The Appellants seem to have had all the means they ever can have of proving their case. They had the benefit of all the machinery which the Courts of *India* afford for taking the account, and it is unreasonable that, having failed to prove their case, they now should ask their Lordships to send it back for further investigation, there being, moreover, no reason to suppose that they would have any better proof than they had before.

Under these circumstances, their Lordships think it is their duty to advise Her Majesty to dismiss this appeal with costs.

28th February, and 1st March, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty,) and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

BHYAH RAM SINGH and BHYAH JOBRAJ SINGH,* } *Appellants,*

versus

BHYAH UGUR SINGH and BBYAH RUNDEER SINGH, } *Respondents.*

Hindu Law—Succession of Gentiles according to Mitakshara.

According to the *Mitakshara*, the great-great-great-grandson of the great-great-great-grandfather of the deceased is entitled to succession as one of the gentiles.

28th June, 1870.

THE consideration of the judgment was reserved. Judgment was delivered by

THE RIGHT HON. SIR ROBERT PHILLIMORE:

The suit out of which this appeal arose was brought in the Court of the Principal *Sudder Ameen* of *Goruckpore*, by the Plaintiffs, as heirs, after the death of his Widow, who survived him, of one *Juskurun Singh*, to recover certain moveable and immoveable estate, the property of the deceased at his death.

The title as heirs was described generally in the plaint, but the course in which it was derived appeared by a pedigree exhibited by the Plaintiffs, and filed with the plaint. It thus appeared that the Plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor, *Chutter Puttee Singh*.

* 13, Moore's I. A., p. 373; 5 B. L. R., P. C., p. 293.

By the pedigree it appeared that the Plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his Great-great-great-grandsons. The Appellants contended that the Plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the Widow's death, the heirs of her Husband, at that time alive, were the legal heirs. The property claimed was at that time in the possession of the Defendants, under alleged alienations by the Widow. Into the validity of their titles, respectively, no inquiry could be made by the appellate Court in *India*, from the mode in which the case was submitted to it; and the Appellants may be treated simply as parties who had a right to put the Plaintiffs to proof of their title. It was conceded in the argument that they were not descendants of the common ancestor.

The Defendants denied the Plaintiffs' title. Admitting the pedigree to be correct as far as it went, and assuming, for the purpose of raising their objection to the title, all that the pedigree stated to be true, they contended by their answer, that the Plaintiffs were not within the line of heirs. They raised, also, two other objections in bar of any inquiry into their own title, viz., that the suit was barred by limitation of time, and that the matter of the Plaintiffs' title was *res judicata*, and had been adjudged against parties in privity of title with the Plaintiffs. As these two objections were not insisted upon on the argument of this appeal, it is unnecessary to state the facts as pleaded on which they rested.

The suit did not proceed in the *Zillah* Court beyond the framing of issues, at which stage the Judge framed three issues in bar, involving the three points above stated. Deciding all three against the Plaintiffs he dismissed their suit. On the title he took the opinion of the *Pundit* of the Court, whose *Bywustha* was to the effect, that the Plaintiffs were beyond the line of heirs, and was in direct affirmance of the objection raised by the answer.

From this decision the Plaintiffs appealed to the late *Sudder* Court of the North-Western Provinces, which reversed the decision of the Court below on all the three issues in bar, and remanded the case to the Court below for trial. The correctness of this decision on the second and third issues in bar admits of no dispute, and it is unnecessary to notice them further.

As no decision was given in the suit below, except on the issues in bar, as the *Sudder* Court remanded the suit for trial, and as the appeal to Her Majesty in Council is limited necessarily to the decree reversing that of the Court below on the issues in bar, their Lordships will be careful to limit their observations as well as their decision in this case, strictly to the matter on which the decree under appeal proceeded.

The decision in the *Sudder* Court, as well as that in the Court below, may be viewed as in the nature of a demurrer, on which any consideration of possible title on other assumed state of facts would have been irregular. The decision of this case involves the consideration of a most important part of that vexed and difficult subject—the Hindoo law of succession. It must be limited to the validity of the title pleaded.

The title pleaded is, that of some in the class termed "Gentiles," asserting priority in that class. The derivation of title to the succession of the deceased opening on the death of his Widow, who survived him, is made necessarily from a common ancestor, who is named, and from whom the lines of the deceased and the Claimants are respectively traced. The pedigree, if it be full and true, establishes community of family, kindred, and priority, unless the objection of the Defendants be sustained; and nothing more is needed to be pleaded or proved in support of that title, if valid. If it be not a good title of inheritance by the Hindoo Law, the Plaintiffs' suit must fail. The issue in bar submits the objection to decision. The pedigree for the purpose of the appeal must be taken to be both full and true.

No objection founded on alleged facts not apparent on the face of the pedigree can be urged against a decree which did not proceed upon, and could not have proceeded upon, grounds not raised by the issue in bar. The question, then, is reduced to

this, whether the Plaintiffs, being Great-great-great-grandsons of the common ancestor, were too remote in degree to be heritable as Gentiles.

The subject is important; it is beset by difficulties raised by varying opinions, decisions, and comments on a text clear enough, if interpreted by the principles of the Hindoo Law according to the *Benares* School, which is the most orthodox of the different Schools. The governing authority of that School is the *Mitácshará*. The compiler of the *Mitácshará* is said to have been an Ascetic, or Devotee, and from that source nothing at variance with the religion of the Hindoos is likely to have flowed. The Hindoo Law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of Hindoos, their Lordships observe, that the case furnishes no evidence whatever that the decision under appeal disturbs that harmony. On the contrary, the Judges of appeal overrule a former decision given in their own Court which, in their opinion, had disturbed it.

The *Mitácshará*, in the 5th and 6th sections of the 2nd chapter, recognizes two successive classes of heirs; first, "Gentiles;" next, *Bandhoos;* after them it places certain special persons, and after these last the State, the *ultimus hæres*.

Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The family is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of Commentators on the Hindoo Law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the *Mitácshará* is in the strictest conformity to these principles. The Gentiles, or *Gotraja* (from the *Gotra*,) are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the *Gotra*. These conditions are all that are stated as necessary to the constitution of the class of Gentiles.

As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as *Sapindas* and *Samanodacas;* the first it treats as prior to the second, but excludes neither, within limits wide enough to include the present Plaintiffs. As the Plaintiffs, then, in this case show a common ancestor, a *Gotra*, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds, and strictly conforms to the language of the *Mitácshará*, it follows that it must be affirmed, unless it can be shown that the plain language of the *Mitácshará* has received some qualification by usage or judicial construction.

The decision of the present case does not require that the Court should distinguish *Sapinda* from *Samanodaca*, nor define where *Sapindas* cease and *Samanodacas* begin. This is not a case of priority between two persons claiming as heirs, or between two classes of heirs, it is one of asserted exclusion from inheritance, raised by persons not competitors in the prescribed degrees of heirs.

The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference

is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindoos), viz., who best can confer on the deceased and his ancestors not fully benefited, the benefits which the grades of oblations offer in differing degrees. Where no sexual of personal incapacity exists, no ground of entire exclusion from inheritance exists if the opposing parties confer inferior benefits, or benefits in equal degree only. In such a case, what reason could justify a sentence of exclusion from inheritance on a claim to put a limitation on language which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy, is inapplicable to the solution of that question of precedence.

Had a course of decisions, or had the actual practice of Hindoos confirmed the view, which some framers of genealogical tables appear to have taken of this subject, it would have been the duty of the Courts of Justice to interpret the language of the *Mitácshará* by the aid of this modern light: but such is not the case, the weight of opinion and of decision is against the appeal.

The *Sudder* Court observed, that the judgment below had followed a case which had been overruled in two succeeding cases in the same Court. It treated the overruled case as one which broke in upon the uniformity of the law. The *Sudder* further supported its opinion by the authority of two cases decided in the Privy Council. The case of *Rany Srimutty Dibeah* v. *Rany Khoond Luta* in 4 Moore's Ind. App. Cases, p. 292; 1 P. C. J., p. 351, was governed by the law of the *Mitácshará*, but the point as to the calculation of the degrees for which it was cited as an authority was rather assumed than decided, for the decision proceeded on the ground that the *Bengal* School was the one to be followed in that case. In the case of *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*, in 2 Moore's Ind. App. Cases, p. 133; 1 P. C. J., p. 161, the very passages of the *Mitácshará*, and that from *Menu*, which has been relied on in this case and in the Court of appeal in *India*, referring to the "seventh person," and the limits of the line of *Sapindas*, received an authoritative exposition. That case, it is true, was one to which the doctrine of the *Mithila* School was applicable, but the interpretation of the text was unaffected by that distinction.

If this last case be attentively considered, and the learned and elaborate opinion of Mr. *Harrington* be carefully studied, it will clearly appear that the preponderance of the opinions of the various *Pundits* then consulted was greatly on the side of the literal construction of the *Mitácshará*. The judgment of the Privy Council concludes, that the *Bandhoos* do not inherit "till those on the Father's side to the seventh degree have been exhausted." As the judgment is founded in a great degree on that of Mr. *Harrington*, and expresses no dissent from his method of arriving at the seventh person, by taking six degrees in the descending or ascending line, the *Sudder* Court was justified in treating this point as settled by authority, and the Plaintiffs, as Gentiles within the degrees, and so entitled to inherit. The *Pundits* may be taken as fair exponents of the views of the Hindoo people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree amongst the class of *Sapindas*, there is no reason for supposing that the plain construction of the language of the text of *Menu*, and of its authoritative comment, will clash with the religious feeling of Hindoos.

Their Lordships are of opinion, that the decision appealed from, on the materials before the Court, on the issues in bar was correct, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

1st March, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir R. Phillimore, (Judge of the High Court of Admiralty) and the Right Hon. the Lord Justice Giffard.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court, North-Western Provinces.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,* } *Appellant*,

versus

MUSSAMAT KHANZADI, *Respondent*.

Acts of Government Officials binding Government—Act IX. of 1859.

Where, by a decree of the Special Commissioner's Court, established under Act IX. of 1859, a decree was made directing property to be made over to a claimant, the proceedings of officials making over that property were, when followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the propriety of the decree, or of the making over of the bulk of the property under it, *held* to bind the Government as to the right of the decree-holder to the property.

THE Judicial Committee, without calling on the Counsel for the Respondent, gave the following judgment:—

Their Lordships are of opinion that there is no ground whatever for this appeal. The Respondent's title rests upon the decree of the Commissioners, and it has not been alleged on the part of the Government, in their pleadings or otherwise, that that decree was other than a proper and binding decree; their Lordships certainly see no reason why it should not be binding; the plaint on which it is founded is for actual possession of the land, but it is quite consistent with that plaint that a decree should be made, falling short of the extent to which the plaint went. The decree is in these terms:—"A decree is passed, assigning to the Plaintiff for her food and maintenance five villages in *Zillah Bulandshahar*, equal in area, Government assessment, and income, to *Mauzas Lukhwali* and *Subi*, and *Ramghar* and *Dowlatabad* of *Pergunnah Siana*; and *Siorampur*, *Pergunnah Achar*, which were given in gift to *Bibi Mariam*, agreeably to a Deed of gift dated the 22nd of July 1854. This decree is to be carried into execution, and the Plaintiff put into possession of the villages; and she is, moreover, to receive the mesne profits from the date of action brought, up to the date of being put into possession."

At the date of the decree, the Government was in possession, and the proper person to give possession, and to carry out this decree, was the Collector. Their Lordships cannot at all come to the conclusion that the Regulation or the Circular to which reference has been made in any way affected the authority of the Collector (1). If the matter stood simply on the act of the Collector, their Lordships would hesitate long before they could accede to the view which has been advanced on the part of Government; but on turning to page 27 of the Appendix (2), what actually appears is,—that there were proceedings in the Civil Court founded on the decree—that the Government appeared in the Civil Court, raised no objection whatever, except as to a certain particular portion of the land of which possession was given, and that there was a decision by the Civil Court against the Government; consequently, the Respondent's title was confirmed by the decree of a competent Court.

For these reasons their Lordships are of opinion that the Government was much in the wrong in taking possession as they did, and that this appeal never ought to have been brought. Their Lordships will, therefore, humbly advise Her Majesty that it be dismissed. The dismissal should be with costs.

* 5 B. L. R., P. C., p. 312.

(1) Circ. Ord. Rev. Dept., N. W. P., No. 298, 10th April 1858.

(2) This was the summary suit to recover the portion of the land which the Collector doubted being included in the land assigned to the Respondent.

22nd June, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly (Master of the Rolls,) the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

NAWAB AZIMUT ALI KHAN,* ... ... } *Appellant*,

versus

HURDWAREE MULL and NARAIN DOSS, ... } *Respondents*.

Benamee Purchase in Child's Name—Presumption—Creditors claiming against Benamee-holder—Strictness of Proof.

Although a purchase by a Mahomedan with his own money of an estate in the name of his son raises a presumption of the son's name being used *benamee* for his father, proof that the father's object was to affect the ordinary rule of succession as from him to that property is sufficient to give as respects strangers a title to the son independent of and adverse to the father.

Where *bonâ fide* creditors of the ostensible owner of property are claimants on that property, the Court will require strict proof on the part of any one seeking to have it declared that he held it only *benamee*.

12th July, 1870.

THEIR Lordships' judgment was now delivered by

THE RIGHT HON. SIR JOSEPH NAPIER:

The *Nawab Rooknoodowlah*, the original Appellant, has died pending the appeal, and is now represented by his Son, the *Nawab Azimut Ali Khan*. The original Appellant will, to prevent confusion between them, be called the *Nawab* in the observations of their Lordships on this case.

This appeal is brought from a decision of the late *Sudder Dewanny Adawlut* at *Agra*, affirming a decree of the Judge of the *Zillah Saharunpore*, who had affirmed, on appeal to him, a decree of the Principal *Sudder Ameen* of that place, dismissing the suit of the *Nawab* against the present Respondents.

The Respondents, by trade Bankers, were Creditors of a deceased Son of the *Nawab*, named *Ruhmut Ali Khan*. The debt was evidenced by an instrument in writing, in the usual form there, of a Bond; but this instrument does not appear to have been a Mortgage Bond hypothecating any property of the Debtor. The Respondents obtained a decree in the Civil Court of *Saharunpore* for the amount of their demand against *Ruhmut Ali Khan*, who died before execution was had on that decree. The Respondents, after the death of *Ruhmut*, proceeded, agreeably to the law and practice of the Court, to attach the property of their Debtor, in order to obtain payment of their debt. They were proceeding to bring to sale the property which is the subject of the present appeal, when the *Nawab* intervened in the execution proceeding as an Objector, claiming the whole property as his own absolutely, and stating, the deceased *Ruhmut* to have been merely a fictitious or *Benamee* holder of the property for him. The Judge of that Court, for reasons which it is unnecessary here to state or consider, refused to allow the *Nawab* to proceed on that objection, and referred him to a regular suit. The *Nawab* accordingly preferred his claim by a civil suit against the Respondents, viz., the original suit before referred to in the Court of the Principal *Sudder Ameen* of *Saharunpore*. The properties sought to be recovered are named respectively *Bhensee* and *Babree*.

The whole contest in this suit was, whether *Ruhmut* held these properties *Benamee* for the *Nawab*. No case was made by the *Nawab* that the Son had a postponed interest or estate in the property. Such a case, even if substantiated, would not have enabled the *Nawab*, as an Opponent of the sale, to defeat by intervention the claim of the Creditors wholly. The ordinary mode of conveyance, under such

* 13, Moore's I. A., p. 395; 5 B. L. R., P. C., p. 578.

a judicial sale, viz., of the right, title, and interest of the Debtor, would have enabled the Creditors to realize their debt, or some portion of it, by a sale of the interest, whatever it might prove to be. The *Nawab* instituted no suit to protect any alleged life interest in himself against a title derived under the judicial sale. The Court, therefore, had in the *Nawab's* suit simply to decide, whether he had proved his Son, *Ruhmut*, to have been, from the time of the conveyance to *Ruhmut* until the death of the latter, a *Benamee* holder of these properties for the *Nawab*.

The title to *Bhensee* was one derived originally by mortgage. The Owner, *Wuzeer Ali* mortgaged this, with fifteen other *mouzahs*, to one *Bhuwanee Pershad*, for a certain sum, which, by a second advance and charge, amounted to Rs. 26,400; *Bhuwanee Pershad*, as the *Nawab* alleged, sub-mortgaged the whole sixteen *mouzahs* to him for the same sum, and he, according to his statement, had the conveyance taken *Benamee*, in the name of two of his infant Sons, of whom *Ruhmut* was one. The other of these two Sons died young; on his death, the *Nawab*, who was his heir, substituted another Son. This Son died young, unmarried, and without issue; his Father was his sole heir. The interest, therefore, of *Ruhmut*, if real, was to a moiety of this share of *Bhensee* originally conveyed to the two Sons. The title to *Babree* was by conveyance, as upon an ordinary purchase, for a money consideration, and the conveyance was in the name of *Ruhmut*. Some contest has been made about the real facts of this purchase, and the Respondents deny that it was, what it purports to have been, a purchase at all; but in the view which their Lordships take of this case, it will be unnecessary to advert further to this head of contention, or to distinguish further between the titles of the respective properties, since the explanation of the *Nawab* as to the reasons for the conveyance to his Sons applies alike to both properties.

The case made by the *Nawab* at the hearing of this appeal before their Lordships was, that the funds which purchased both properties were exclusively the funds of the *Nawab*; that a legal presumption thence arose that the proprietary right was the *Nawab's*, and that the Respondents, who have no better title than that of *Ruhmut*, have not rebutted this presumption.

The Counsel for the *Nawab* relied on the case of *Gopeekristo Gosain* v. *Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53; 1 P. C. J., p. 423), which they contended had been disregarded in the decision of this case in the Courts below.

Had this appeared to their Lordships to have been so, they must necessarily have recommended to Her Majesty to reverse the decisions under appeal, since the law as to *Benamee* conveyances taken by a Father in the name of a Son, whether in Hindoo or Mahomedan families, should be considered in all Courts in *India* as conclusively settled by that decision.

It becomes necessary, therefore, to see what were the real grounds of the decision in the Court of the Principal *Sudder Ameen*. It appears to their Lordships, that that Judge found as a fact, that the *Nawab* purchased the property with his own funds; a conclusion which, on the evidence before him, and in the absence of all evidence of property at that time in the Sons, their Lordships think a reasonable and proper conclusion. Had this fact received no other addition than that the conveyance was taken in the names of the *Nawab's* Sons, the case would have fallen within that of *Gopeekristo Gosain* v. *Gungapersaud Gosain* (6 Moore's I. A. Cases, 53, 1 P. C. J., p. 423), and the argument for the Appellant must have prevailed with their Lordships, but the Principal *Sudder Ameen* remarks, and relies on a very important addition to these facts, in the *Nawab's* own explanation of the cause of the conveyance to his Sons; the Court thence inferred that a motive existed for it in the state of his family, the existence of Daughters, and his desire, as expressed, to vary the rule of succession between Sons and Daughters in his family. The *Sudder Dewanny Adawlut* also, in their judgment, rely on these additional facts.

If the conveyance to the Sons was designed to produce an effect thereafter, by changing the amount of shares of the whole property on a succession between

Sons and Daughters, it could not be designed as a mere naked *Benamee* conveyance, because, as Mr. *Bell* correctly observed, a mere *Benamee* conveyance would in no way affect such succession. But if, as the *Nawab* himself represented the transaction, it was designed to affect the Daughter's claims, or interests, it could only so operate as a real transaction; that is, by a conveyance of interest to the Sons. It is immaterial in this case to consider, whether the legal effect of the arrangement would be to confer a resulting life estate on the *Nawab* or not, since the only contest made in the suit was, whether it was an absolute *Benamee* transaction. The case admitted, certainly, of being viewed thus, that the conveyances were merely colourable, to be treated as real should it become necessary to defeat a Daughter's claim, but fictitious as between Father and Sons. It is to be observed, however, that this view of the case was not presented to the Judge; and if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against Creditors of the Son made after the Son's decease in favour of the Father, alleging his own fraud. Their Lordships, therefore, think that the Principal *Sudder Ameen* was justified in regarding the whole evidence before him as not sufficient to establish the case of *Benamee* ownership, which the *Nawab* advanced. As the decision under review does not appear to conflict with any rule of law, as the question decided is one of fact, as the decision is sustained by sufficient evidence, and establishes the claim of Creditors against property of which their Debtor was allowed for many years to have, at least, the ostensible ownership, it is one which their Lordships would not disturb, unless it were clearly shown to be wrong. It is the duty of a Court of Justice in such a case to put the Objector to the rights of Creditors founded on apparent ownership to strict proof of his objection; he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were not exhibited, for a family to place the family property out of reach of Creditors. If the Father became indebted, the titular right would be then stated to have conveyed the real interest; but if the Son were indebted, then the claim would take the form to which this suit is adapted. Views of these dangers to the rights of Creditors seem to have been present to the Courts below; and in the present case their Lordships are unable to see that jealousy of a probable fraud has induced an incorrect estimate of the evidence. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed with costs.

22nd and 23rd June, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly (Master of the Rolls,) the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut of the North-Western Provinces, Agra.

NAWAB AZIMUT ALI KHAN,* ... ... } *Appellant,*

versus

JOWAHIR SINGH & others, *Respondents.*

Purchaser of equity of redemption of part of mortgaged property—Apportionment of mortgage debt to mortgaged estate—Suit to redeem—Mortgagee in possession—Account—Interest.

In a suit brought by the purchasers of the equity of redemption of the Mortgagor in a certain village, against the Appellant, the Mortgagee, and others the purchasers of the same Mortgagor's interest in certain other villages, all of which, and certain others purchased by the Appellant, were comprised in the same mortgage deed, and in which suit the Appellant contended that the whole proprietary right and interest of the Mortgagor had vested in him; such purchasers were allowed to redeem and recover possession of their village, on payment of the proportion of the mortgage debt attributable to such village.

The proportion of the debt chargeable on such villages ought to vary according to the actual value of the village; and the amount of Government re-

* 13, Moore's I. A., p. 404.

venue assessed on a village may not always be a correct criterion of its actual value.

Neither the rule nor the reason for the rule; that, when a creditor sues for his principal and interest, (the latter being equal or more than equal at the time of the commencement of the suit to the amount of the principal,) he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtors resistance of the demand, seem to apply to a case in which a Mortgagee in possession is, not a party suing for the money, but the party resisting by every means in his power a claim for redemption, and the final settlement of the account.

12th July, 1870.

JUDGMENT having been reserved, was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The original Appellant in this case was, in April, 1846, the Mortgagee of an estate comprising sixteen different *Mouzahs*, and known as *Talook Bhainsee*. This estate had been originally mortgaged (it is said by way of usufructuary mortgage) by its then Owner, *Vuzeer Ali*, for Rs. 26,400, to one *Bhowany Pershad*, who may be taken to have transferred, in 1822 or 1823, his interest as Mortgagee to the Appellant. Further sums, amounting to Rs. 15,700 in all, were afterwards advanced by the Appellant on the security of the estate, upon terms which will be afterwards considered. In 1839 the representatives of the Mortgagor brought a redemption suit, which was finally dismissed by the *Sudder* Court of the North-West Provinces on the 1st of August, 1843, by a decree, which is one of the exhibits in this cause. On the 8th of April, 1846, the estate was sold, subject to the mortgage, under process of execution, in satisfaction of decrees against the original Mortgagor or his representatives. It was sold in different parcels. One *Mouzah* (*Hosseinpore*) was purchased by *Jowahir Singh*, and the four other persons who, with him, are the Plaintiffs in this cause; *Mouzah Jeetpore* was purchased by *Buhal Singh* and *Bustee Ram*; *Mouzah Rookunpore* by *Hosein Ali Khan* and two other persons; and one-fourth of *Mouzah Chundharee* by *Mussumat Imamee Begum*. The residue of the estate was purchased by the Appellant; and the result of the sale was, consequently, that whilst he retained the rights of Mortgagee over the whole property, he became the Owner of the equity of redemption in twelve and three-quarters of the sixteen *Mouzahs* of which it was composed.

In 1862 the Plaintiffs, as the Owners of the equity of redemption in *Mouzah Hosseinpore*, brought a suit against the Appellant for the redemption of their *Mouzah* on payment of Rs. 4,737 7 as., which they alleged to be the rateable share of the mortgage debt payable by them. The suit was tried first by the Principal *Sudder Ameen*, and afterwards, on appeal, by the *Zillah* Judge. The latter held, that the Plaintiffs were entitled to redeem their *Mouzah* on payment of an additional sum of Rs. 1,212 13 as. But his decision was reversed, and his suit finally dismissed by the *Sudder* Court on special appeal on the 29th of April, 1864, principally, if not wholly, on the ground, that the purchasers of the other three parcels of land should have been made parties, and that the Plaintiffs should at least have offered to redeem those parcels, by paying their proportionate part of the mortgage debt attributable to them. The decree affirmed the principle established by a previous case in the Court, that the Plaintiffs were at liberty to redeem their *Mouzah* without bringing into Court that portion of the mortgage debt which was attributable to the *Mouzahs*, wherein the equity of redemption had been purchased by the Mortgagee.

On the 22nd of December, 1864, the Plaintiffs instituted their present suit. It was framed in the manner indicated by the last-stated decree. The purchasers of the parcels other than those purchased by the Appellant or the Plaintiffs, were made parties on the record; and the Plaintiffs, having paid into Court a sum which they alleged to be sufficient to cover the proportion of the mortgage debt attributable to those parcels, as well as to their own village, claimed absolutely to redeem the latter, and to recover possession of that and the three other parcels, with mesne profits, from the date of the institution of the suit. This suit, like the former one, was tried in the first instance by the Prin-

cipal *Sudder Ameen*, who decreed in favour of the Plaintiffs; and his decision was affirmed on regular appeal by the *Zillah* Judge, and afterwards on special appeal by the *Sudder Dewanny Adawlut* at *Agra*. The present appeal, which has been heard *ex parte*, is against these decrees.

The Appellant does not, as their Lordships understand, contest the proposition of the Plaintiffs, as purchasers of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of some proportion of the mortgage debt. His objections to the decrees may be divided into three classes:—First, objections to the mode in which the rateable share of the debt payable in respect of *Hosseinpore* has been calculated; secondly, objections to the mode in which the gross amount of the mortgage debt to be apportioned has been ascertained; and, thirdly, to the mode in which the decrees deal with the villages whereof the equity of redemption belongs, or is alleged to belong, to the other Defendants on the record.

Under the first head of objection it was strongly argued, that the principle upon which the debt was apportioned amongst the different villages was erroneous; that the apportionment should have been made according to the actual and ascertained values of the several *Mouzahs*, and not according to the amount of revenue assessed on and payable in respect of such *Mouzahs* to Government.

Their Lordships do not deny that there is some force in this objection.

The proportion of the debt chargeable on such village ought to vary according to the actual value of the village; and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value.

On the other hand, there might be a difficulty in applying the principle contended for by the Appellant to cases in which the amount payable by a Mortgagor seeking to redeem, is not ascertained, as in this Country, by inquiry and account, but must be calculated and tendered or brought into Court by him before the commencement of the suit. Their Lordships, however, do not feel called upon to affirm the correctness of the principle adopted in the Courts below, or to give any opinion which may have the effect of sanctioning its adoption in other cases, because they are clearly of opinion, that the objection is not one which this Appellant is now entitled to take. They cannot find any trace of its having been taken in the Courts below. The written statement of the Appellant does not raise the question. On the contrary, he seems, in coming to the conclusion, that Rs. 27,387 6 as. 6 p. was the amount which the Plaintiffs ought to have brought into Court to have adopted the same principle of apportionment, as will be seen by referring to his own petition and the account annexed thereto; though the latter account claims something more than the Rs. 27,387 6 as. 6 p. as the sum payable in respect of all the four villages.

It is questionable, whether the Appellant has lost anything by reason of the principle of apportionment of which he now complains; but it is certain that by yielding to the objection now for the first time taken, and re-opening the whole account, their Lordships would do great injustice to the Respondents, and make a very dangerous precedent.

It is true that the Appellant's written statement did object to the particular application of the principle, on the ground that the revenue assessed on *Hosseinpore* was taken at somewhat less than its real amount; and contended that consequently the amount brought into Court by the Plaintiffs was less by a few rupees than even on their calculation it ought to have been. But this objection does not seem to have been pressed in the Courts below—certainly not in the two appellate Courts. And their Lordships are of opinion, that the decrees, if otherwise correct, ought not to be disturbed on that ground.

The next question is, whether the gross amount of the debt to be apportioned has been correctly ascertained in the Courts below. Mr. *Leith*, in the course of his argument, remarked strongly on the scantiness of the evidence on which those Courts have proceeded. It is, however, to be observed, that for this and any consequences that may have followed from it, the Appellant is chiefly responsible.

The Plaintiffs are mere purchasers of

the equity of redemption in a portion of the estate at an execution sale, and are not likely to have a single document relating to it, except the Bill of sale of their particular village. On the other hand, almost every document of title relating to the property or to the mortgage debt incurred upon it, is presumably in the possession or power of the Appellant, who has been in actual possession of the estate since 1823. In truth, both the parties and the Courts have been content to proceed upon certain findings in the decree of the 1st of August, 1843, which dismissed the redemption suit of the representatives of the original Mortgagor. On these findings it has been taken as proved that the principal money secured by the mortgage amounts to Rs. 42,100, and that that sum consists of Rs. 26,400, advanced in two sums on two different occasions to *Vuzeer Ali*, upon usufructuary mortgages of the property, of a sum of Rs. 5,000, advanced to his representatives, and bearing no interest on condition of their agreeing not to sue for redemption for twenty years, and of a number of different sums advanced to several of those representatives on their respective bonds at interest, and aggregating to Rs. 10,700. These were all held, by the decree of the 1st of August, 1843, to be charged on the estate; and the suit in which that decree was made was dismissed, on the ground that the Plaintiffs had not tendered or deposited a sum sufficient to cover those charges.

The following is the manner in which the Courts below have dealt with the questions of interest on these items. They have treated the interest on the Rs. 26,400 as satisfied by the rents and profits of the property of which the Mortgagee has been in possession, no account of those rents and profits having been required from or rendered by the Mortgagee. They have held that no interest ran upon the Rs. 5,000; and that, under section 5 of *Ben.* Reg. XXXIV. of 1803, no larger sum could be recovered in respect of interest on the Rs. 10,700, than the amount of the principal. The result of taking the account would be to make the whole mortgage debt apportionable amongst the different villages, Rs. 52,800.

The original contention, however, of the Appellant, seems to have been this:—He treated the decree of the 1st of August, 1843, as having conclusively determined, as between the Mortgagors and the Mortgagee, that the mortgage debt from that date was to be taken to be Rs. 42,100, carrying interest at the rate of twelve *per cent. per annum.* He calculated the amount of such interest for twenty-one years and some months at Rs. 1,08,093 12 as., and insisted that the amount due on the mortgage at the date of the commencement of this suit must be taken to be Rs. 1,50,193 12 as., of which the proportion attributable to *Hosseinpore* and the other premises sought to be redeemed was Rs. 27,387 6 as. 6 p. This mode of calculation, which does not give credit for one rupee in respect of the rents and profits realized from the property during more than twenty-one years is obviously erroneous.

Moreover, the whole argument is based upon a misconception of the nature and effect of the decree of the 1st of August, 1843. That decree, in fact, did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited (the sums tendered being only Rs. 26,400, and Rs. 400). According to the course and practice of the Court in *India*, the only point to be determined in such a suit is whether the mortgage debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the Mortgagee in a subsequent suit. But in truth, this decree, after dismissing the suit, merely said that the Plaintiffs would not be entitled to redeem until they should liquidate the whole of the money due to the Appellant, both on account of the past and the present, according to the conditions set out in the various deeds. If, therefore, according to the terms of the original contract no interest was to run upon the Rs. 5,000, this decree would not convert that loan into a loan bearing interest. Nor would it alter the rights or liabilities of the parties in respect of the other sums which made up the Rs. 42,100.

The question now under consideration, viz., the amount of the whole mortgage debt to be apportioned between the different *mouzahs*, may be treated without reference to apportionment, and as if it arose between a sole Mortgagor and the Mortgagee. It is also to be considered with reference both to the sufficiency of the tender or deposit, and to the actual sum payable on redemption.

It was clearly not necessary for the Mortgagor to deposit anything by way of interest on the Rs. 26,400 if, as seems to be assumed, that sum was secured by usufructuary mortgages. He had a right to assume, until the contrary was shown, by taking an account, that that interest was covered by the rents and profits. Again, he was under no obligation to deposit anything in respect of the Rs. 5,000, if no interest was chargeable on that loan. The question of sufficiency is, therefore, reduced to this: Was he or was he not justified in the assumption that the Mortgagee was not entitled to recover by way of interest on the Rs. 10,700 more than the principal, and in limiting the deposit in respect of interest to that sum.

The contracts on which this liability arose were entered into long before the passing of Act, No. XXVIII. of 1855, and *primâ facie* fall within the rule enacted by the 5th section of Regulation XXXIV. of 1803. The contention on the part of the Appellant is, that they are taken out of the scope of that rule by the application of Construction No. 359, to the facts of this case, and in particular to the two former suits for redemption which were dismissed by the decrees of the 1st of August, 1843, and the 29th of April, 1864. Their Lordships are, however, of opinion, that the Courts below have correctly held that the Construction in question does not apply to this case. The effect of it is, that when the Creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the amount of principal,) he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his Debtor's resistance of the demand. Neither the rule nor the reason of the rule seem to their Lordships to apply to a case in which a Mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption, and the final settlement of the account.

Their Lordships are, therefore, of opinion, that the sum to be apportioned between the different villages has for the purposes of deposit been correctly taken to be Rs. 52,800.

With respect to the final adjustment of the account, their Lordships have to observe, that if the suit had been conducted in the ordinary way, the Mortgagee must have accounted for the rents and profits received by him whilst in possession. The result of such an account would not improbably have been considerably in favour of the Mortgagor, who does not, however, complain that it has not been taken. But, however that may be, the Mortgagee, whose duty it was to render such an account, who has the best means of knowing what would be the result of such an account, if taken, and who does not suggest that he has been prejudiced by the omission to take it, cannot be heard to complain of these decrees in so far as they treat the interest on the Rs. 26,100 as satisfied by the rents and profits. And what has been already stated shows that in their Lordships' opinion he is not entitled to claim any interest in respect of the Rs. 5,000, or interest on the Rs. 10,700 in excess of the principal.

The remaining question is, what upon the facts founded by the Courts below ought to have been their decree? The Appellant now complains that the Plaintiffs have been allowed to redeem as against him the villages other than their own village of *Hosseinpore*, *i. e.*, to put themselves in his shoes as Mortgagee in respect of these villages; and further, that the decree was wrong in refusing to treat him as the Owner under a subsequent purchase of three-fourths of *Rookunpore*.

The first objection does not come with a good grace from the Appellant, who defeated the Plaintiffs' former suit on the ground that they had not offered to redeem the villages in question, and who in this very suit has included in his calculation of

the amount which, as he alleged, ought to have been brought into Court the shares of the mortgage debt which he said were chargeable on those villages. The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the *Sudder* Court. It merely ruled that the Plaintiffs were bound to offer to redeem the villages in question, it did not rule that they were entitled to do so, or to acquire the interest of the Mortgagee in them against his will. It is unnecessary to determine in this suit, whether in the peculiar circumstances of this case the former proposition is correct. Their Lordships are of opinion, that the latter cannot be supported. They think that Appellant, if desirous of retaining possession of these villages as Mortgagee, is entitled to do so against the Plaintiffs, whose right in that case is limited to the redemption and recovery of their village of *Hosseinpore*, upon payment of so much of the sum deposited in Court as represents the portion of the mortgage debt chargeable on that village. On this view of the case it is unnecessary to consider, whether the Appellant had or had not given sufficient evidence of his alleged purchase of three-fourths of the equity of redemption in *Rookunpore*.

Their Lordships are, nevertheless, of opinion, that the Appellant was properly condemned in the costs of the suit, and ought not, any variation in the decree notwithstanding, to be relieved from them. His defence in the former suit, which is inconsistent with his present contention, defeated that suit, rendered the present suit necessary, and invited the claim on the part of the Plaintiffs which he now resists. In this suit he ought at the earliest stage to have submitted to the redemption of *Hosseinpore* alone on payment of that portion of the sum deposited which represented the debt due in respect of that village. Instead of doing so, he raised issues touching the sufficiency of the deposit, which have been determined against him. It is the course of practice in *India* that the costs of this kind of suit follow the result of the finding on such an issue, and are not, as in an English redemption suit, added to the mortgage debt. And their Lordships are of opinion, that this rule has, in the present case, been most properly applied to a Mortgagee who has so long, and by so many expedients, inequitably and vexatiously resisted the right of redemption. Their Lordships will, therefore, if the Appellant desires it, humbly recommend to Her Majesty that the decree of the Principal *Sudder Ameen* be varied by declaring that the Appellant is entitled to receive Rs. 5,947 1 an., part of the Rs. 9,654, deposit, and that the balance of that sum be returned to the Plaintiffs; and that the Plaintiffs are entitled to redeem and recover possession of the village of *Hosseinpore* with mesne profits, from the date of the commencement of this suit until the date of the delivery of possession; and that the Appellant should pay his own and the Plaintiffs' costs in the Court below. The Plaintiffs have not appeared on this appeal, and their Lordships give no costs of the appeal.

By an order in Council, dated the 24th of October, 1870, it was ordered, that the decree of the Principal *Sudder Ameen* of *Zillah Saharunpore*, of the 13th of April, 1865, be varied by declaring that the Appellant was entitled to receive Rs. 5,947 1 an., part of the Rs. 9,654, deposit, and that the balance of that sum be returned to the Plaintiffs; and that the Plaintiffs are entitled to redeem and recover possession of the village of *Hosseinpore*, with mesne profits, from the date of this suit until the date of the delivery of possession; and the Appellant should pay his own and the Plaintiffs' costs in the Court below.

23rd, 24th and 25th June, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Romilly (Master of the Rolls,) the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William in Bengal.

GERESH CHUNDER LAHOREE,* ... ... } *Appellant*,

versus

MUSSUMAT BHUGGOBUTTY DEBIA & MUSSUMAT RAM SOONDREE DEBIA, ... } *Respondents*.

Construction of Act I. of 1845, ss. 20 & 21—Benamee purchase—Stridhun—Purdah woman.

The Court was not satisfied that the 20th and 21st Sections of Act No. 1. of 1845, raised a presumption fatal to the case of *Benamee* purchase set up by the Appellant in a suit wherein one of the points raised was, whether the lands were purchased by a Hindoo female out of monies constituting her *Stridhun*, or peculiar estate, or were held by her *Benamee* for her husband.

The Judicial Committee of the Privy Council, and the Courts of *India*, have always been careful to see that Deeds taken from *Purdah* women have been fairly taken; and that the party executing them has been a free agent, and duly informed of what she was about.

When the disposition is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeds, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed, and expresses his real intentions.

12th July, 1870.

THEIR Lordships reserved judgment, which was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant in this case is the heir-at-law of *Saroda Pershad Lahoree*, who was the adopted Son and heir of *Kally Kant Lahoree*. The Respondents are the Sisters of *Mirnomoye Debia*, deceased, who was the Widow of *Kally Kant Lahoree*. The suit which has given rise to this appeal was in the nature of an action of ejectment brought by the Respondents, claiming under a Deed of gift from *Mirnomoye* to recover from the Appellant three several parcels of land. Their case was that these lands, which, on three different occasions, had unquestionably been purchased in the name of *Mirnomoye*, were part of her *Stridhun*, or peculiar property; that she had, therefore, the power of disposing of them; and had effectually exercised that power by the Deed of gift in question. The case of the Appellant was, that the lands, though purchased in the name of *Mirnomoye*, were purchased by *Kally Kant Lahoree* with his own funds in the name of his Wife, and formed part of his estate, in which, under his Will, she had only a life interest; and, further, that the alleged Deed of gift was either a forgery, or, having been procured from *Mirnomoye* by the fraud and contrivance of her Brothers, was not an effectual disposition of the property. It lay, therefore, upon the Respondents, who were seeking to disturb the possession of the Appellant, to establish both that the property was the *Stridhun* of *Mirnomoye*, and that she had effectually conveyed it by this Deed of gift. If either of these issues be determined against them, it follows that, on the death of *Mirnomoye*, the title to the lands in question passed to *Saroda Pershad Lahoree*, who was the heir-at-law of both his adoptive Father and his adoptive Mother; and that the Appellant as his heir is entitled to retain possession of them. Both issues were, however, determined, first by the *Zillah* Court, and afterwards, on appeal, by the High Court, in favour of the Respondents; and the present appeal is against those decisions.

Their Lordships are of opinion that, upon the evidence before them, they ought not to disturb the finding of the Courts below upon the first of these questions. They do not adopt all the reasons assigned by either Court for coming to this conclusion. They desire to state in particular that they are not satisfied that the 20th and 21st

* 13, Moore's I. A., p. 119.

sections of Act, No. I. of 1845, raise a presumption of law fatal to the case of *Benamee* purchase set up by the Appellant; and they observe that this objection, if well founded, would at most apply only to one of the three parcels of land in dispute (*Somashpara*); and not, as is stated by the learned Judges of the High Court, "to all the denominations of lands claimed by the Defendants." They find, however, that *Mirnomoye* had certainly some *Stridhun*. They find that *Kally Kant Lahoree* in his life-time solemnly and deliberately admitted that these purchases were made out of her funds, and for her benefit, as well as in her name. The evidence no doubt fails to show satisfactorily that her peculiar funds amounted to a sum which would cover all the purchases which she is said to have made. But it cannot be said conclusively to prove the contrary.

Again, though the extracts from *Kally Kant Lahoree's* Books afford some evidence in support of the allegation that these purchases were made out of his funds, and were, therefore, presumably taken *Benamee* for him, they are not absolutely conclusive. Their Lordships are unable to say how the separate funds of the Husband and Wife may have been intermixed by them. We know by his own statement that he did on one occasion take and employ Rs. 8,000, belonging to her. It seems, therefore, to their Lordships, that this evidence cannot fairly be taken to outweigh the positive admissions of *Kally Kant Lahoree* himself. It is argued, however, that credit is not to be given to those admissions, because they may be assumed to have been made falsely, with the object of defeating the claim of the present Appellant to share in the self-acquired property of *Kally Kant Lahoree*, including these parcels of land. But looking to the remarkably fair and open character of the pleadings in which the statements in question were made, and considering that the defence of *Kally Kant Lahoree* (a defence which proved successful) was that the Plaintiff in that suit (the present Appellant) was not entitled to share in any part of his self-acquired property, whether held *Benamee* or otherwise; and that those pleadings admitted that some of the purchases then in question had been taken *Benamee;* their Lordships feel that they would not be warranted by the evidence before them in imputing to *Kally Kant Lahoree* that he had been guilty in a judicial proceeding of deliberate falsehood. It is, therefore, unnecessary to consider how far a Court of Justice is at liberty to disregard admissions so made, in favour or for the benefit of a person, claiming as the heir of him by whom they were made.

Assuming, then, that the Courts below have correctly found that the property in question was the *Stridhun* of *Mirnomoye*, their Lordships have to consider, whether the Respondents have established that the Deed of gift was, under the circumstances of its execution, a valid disposition of it in their favour.

It cannot be said that this issue has been fully or satisfactorily tried in the Courts below. It does not appear on the record, whether there was any formal settlement of the issues; or, if there was any, in what terms this particular issue was framed. The statement of the *Zillah* Judge, that the conveyance by *Mirnomoye* to her Sisters is not denied by the Defendant, implies either that he mistook the effect of the Defendant's written statement, which unquestionably disputed the validity of the Deed, or that he never addressed his mind to try an issue on which nevertheless both sides had put in a considerable amount of evidence. The appellate Court observed on this part of the case, that the Judge below had apparently, by inadvertence, taken for granted that the conveyance was not denied, and had passed no opinion, except inferentially, on its validity. But instead of sending the cause back for the trial of the issue on which the Court of first Instance had thus failed to pass any satisfactory judgment, the learned Judges of the High Court proceeded to dispose of it on the evidence which had been taken in the Court below. It follows, therefore, that the only Court which has really tried the question was equally with their Lordships under the disadvantage of having to determine it on the written depositions, and without an opportunity of seeing the Witnesses.

What are the undisputed facts of the

transaction? About the end of May, 1856, *Mirnomoye*, labouring under the decease of which she died, left her House in *Rajshahye*, and went, for the sake of medical advice, to *Shoyabad*, near *Moorshedabad*, where she took up her residence in the House of the Pundit, *Gobind Kant*. She was accompanied by her Sisters (the Defendants), her *Dewan*, *Krishnonath Sannyal*, and other servants. Early in the following July, her Brothers, *Ram Kristno Chowdry* and *Doorgadoss Chowdry*, came to her from *Rajshahye*. The *Hibba*, or Deed of gift, bears date the 16th, and was produced for registration on the 18th, and actually registered on the 19th of July, 1856, under a *Mookternamah*, purporting to have been executed by her contemporaneously with it. Early in August, 1856, other *Mookternamahs*, and a petition purporting to have been also executed by *Mirnomoye*, were produced; the first in the Collectorates of *Rajshahye* and *Bogra*, the last in the Court of the Judge of *Zillah Rajshahye*. Their object was to give publicity to the *Hibba*, and to cause the properties comprised in it to be transferred in the Books of the Collector into the names of the Respondents. The *Zillah* authorities required that these documents should be verified. On their requisition the Principal *Sudder Ameen* of *Moorshedabad* appears to have sent a *Peiskar* to take *Mirnomoye's* deposition at the House of the Pundit, and on his report to have declared them to have been verified. The order to that effect was passed on the 19th of August, and on the 25th of August, 1856, *Mirnomoye* died. Nothing further was done between these dates to give effect to the *Hibba*, or Deed of gift. After her death the validity of the Deed, as well as the power of *Mirnomoye* to dispose of the property, was disputed by the Guardian of *Saroda Pershad Lahoree*, and a contest for the mutation of names was carried on in the Revenue Courts, which was finally determined by the Board of Revenue in favour of *Saroda Pershad Lahoree*, whose possession was confirmed, the Respondents being left to assert their title by a regular suit in the Civil Court.

Their Lordships now proceed to consider more particularly the evidence by which the Respondents have attempted to prove the due execution of the *Hibba* by *Mirnomoye*. Their principal Witnesses are the Pundit, *Gobind Kant*, whom the learned Judges of the High Court seem to have considered a respectable Witness, the *Dewan*, and *Ram Kristno Chowdry*, one of the Brothers of *Mirnomoye*. The Pundit seems now to be employed as Pundit in one of the Civil Courts, but at the date of the transaction he did not hold that office, but stood in some kind of spiritual relation to the two Brothers (the *Chowdries*), they being his "*Jujman*." His story is that, early in July, 1856, *Mirnomoye* expressed to him an intention to give all the property, over which she had a disposing power, to her Brothers; and desired him to write to them, and request them to come to *Shoyabad*. He did so write, but the Letters are not produced. He goes on to state, that *Ram Kristno Chowdry* came to the place several days before *Doorgadoss Chowdry*, who accounted for the delay in his coming by saying, that it had been occasioned by his having caused a draft of the instrument, for which he had been brought, to be prepared at *Rampoora*.

From the cross-examination of the Pundit, it appears that finally, *Mirnomoye* was made to execute two *Hibbas*, viz., the one in question in this suit, and one by which she gave other part of her *Stridhun* to her Brothers in the names of their Wives; that the actual form of this disposition, varying as it did from the intention said to have been expressed by her to the Pundit, was prompted by the Brothers, one of whom brought the drafts, from which the instruments executed were prepared, with him. He also states a conversation which supports the allegation of the Defendant, that the gift in question, though nominally made to the Sisters, was for the Brothers. To the actual execution of the instrument this Witness does not speak. He accounts for his absence by saying that he was suffering from fever, and unable to bear the press of the crowd which assembled on that occasion; that he retired to the House of one *Prem Baboo*, situated at a short distance from his own, and was informed, from time to time, of what was going on

by his Disciples; that he made one short visit to his own House, where he saw the *Dewan* writing with stamped paper before him, but could not stay there.

Their Lordships are compelled to say, that this absence of the Pundit begets a suspicion in their minds which the story told by him of its cause does not dispel. It is by no means improbable that a person in a respectable position in life, knowing that a Deed was about to be unfairly obtained, would take care not to be personally present, and would contrive to give only such corroborative evidence of the transaction as he might think he could safely give. In the present instance the only legal proof which the Pundit gives of the actual execution of the document is the subsequent and verbal admission of *Mirnomoye* in a conversation with him. The learned Judges of the High Court laid some stress on this admission. But their Lordships need not remark upon the danger of trusting to that kind of evidence, unless the Witness is wholly above suspicion.

Doorgadoss Chowdry deposes, that he has no interest in the Deed of gift, and treats it as made for the benefit of the Respondents. He does not confirm the account given by the Pundit of the change of intention on the part of *Mirnomoye;* he does not speak of having brought any draft with him; or give any account of the preparation of the Deed; or show how it came to be made in the names of the two Sisters; or who gave the instructions for it.

The *Dewan* who wrote the *Hibbanamah*, says that the gift was intended to be in favour of the Brothers; that he cannot tell why it was executed in the names of the Sisters; and he does not state from what draft or under whose instructions he wrote the Deed in the form in which it was executed. He says that the Respondent, *Ram Soondery*, put *Mirnomoye's* seal to the document at her request. The Brother and the subscribing Witnesses say that *Mirnomoye* sealed it herself.

Of the testimony of the subscribing Witnesses it is unnecessary to speak at length. They are either Cultivators living at a distance from the place of execution, or menial servants. It is not satisfactorily explained why some of them were there at all. And the testimony of the *Dewan* makes it, to say the least, extremely doubtful, whether they were in fact there; and whether, according to a reprehensible practice, not uncommon in *India*, their names were not afterwards written on the Deed. Only one of them professes to have written his own name. They were not examined when the Deed was registered, and the subscribing Witnesses who were then examined were not produced at the trial of this cause. Some of them speak of *Mirnomoye* as present in the verandah, amidst a crowd of men, giving her own instructions, and describing the property verbally, and personally asking the Witnesses to become subscribing Witnesses.

It is further to be observed that, although the Pundit says he heard of the execution from the *Kobiraj*, and other respectable persons, and although *Doorgadoss Chowdry* names several persons far more respectable in station than the subscribing Witnesses, as present at the execution, none of those persons either subscribed the instrument, or have given their testimony in support of it. Again, if it had been clearly proved by the Officer sent to verify the execution of the *Mookternamahs* by *Mirnomoye* that she had acknowledged those instruments to be hers, that would have been an important corroboration of the Respondent's case. But that Officer was not called as a Witness; his actual report is not forthcoming, and the testimony of the *Dewan* leads to the conclusion that he performed his duty in the most perfunctory manner, and was satisfied, on the report of a maid-servant, not called or examined, that *Mirnomoye* had admitted the execution of the *Mookternamahs*.

Is, then, the evidence adduced by the Respondents, and considered without reference to any conflicting testimony on the part of the Appellants, sufficient to establish the due execution of this Deed of gift? Their Lordships, differing respectfully from the Judges of the High Court, have come to the conclusion that it is not.

The disposition is one by a *Purdah* woman, made not very long before her death, and whilst she was labouring under a mortal disorder. Their Lordships consider that it is not open to the objection of

inofficiousness. Her preference of her own blood relations to a Son adopted by her Husband, and otherwise provided for, was not unnatural. But this Committee and the Courts in *India* have always been careful to see that Deeds taken from *Purdah* women have been fairly taken: that the party executing them has been a free agent, and duly informed of what she was about. Again, when the disposition, as in this case, is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed, and expresses his real intentions. In the present case, the Respondents' evidence is conflicting as to the party intended to be benefited, and leaves it uncertain, to say the least, what were the instructions for the Deed, and from whom those instructions emanated. Evidence so untrustworthy, so uncertain, and so conflicting, is not such as enables their Lordships to declare affirmatively that the *Hibba* was in any sense the act and deed of *Mirnomoye*, or even that she herself put her hand and seal to it.

Their Lordships, therefore, have come to the conclusion that the Respondents, having failed to prove a material link in the title upon which alone they can recover, the decrees under appeal ought to be reversed, the suit dismissed with costs in the Courts below, and that the Respondents should pay the costs of the appeal. And they will humbly advise Her Majesty accordingly.

27th June, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Petition from the High Court of Judicature at Bombay.

GUNGOWA KOME MALUPA,* *Appellant,*

versus

ERAWA KOME JOGAPA, ... *Respondent.*

Leave refused to appeal, in a suit in which no application for leave had been previously made to the High Court of *Bombay*—the Court making the decree—and in which the amount involved was below the appealable value; as, even if there were no other difficulties, the decision was not one which would govern other cases.

If there are any grounds to be assigned as an explanation of the circumstance that no leave to appeal to Her Majesty in Council has previously been applied for to the High Court, those grounds should be stated in the petition.

THIS was an application for special leave to appeal from a decree of the High Court at *Bombay*, in a case in which the amount involved in the suit was below the appealable value, Rs. 10,000.

The petition set forth, that a plaint was filed by the Petitioner, *Gungowa Kome Malupa*, in the Court of the *Sudder Ameen* of *Bazalcote*, as the Widow and heiress of her Husband, *Mublapa Desace*, against the Respondent, *Erawa* and others, to obtain a declaration of her right to, and to recover possession of certain ancestral property, being a portion of her *Enam*, consisting of a house and lands, situate in the village of *Amaljari*, which had been let to *Erawa* on a lease at will. That the *Sudder Ameen* dismissed the suit, on the ground that the suit had not been brought within the period of twelve years from the time the cause of action arose, and consequently was barred by the Act of limitation of

* 13, Moore's I. A., p. 433.

suits. That an appeal was made to the District Judge of *Kulhadghed*, who confirmed the decree of the *Sudder Ameen*. That the Petitioner presented a petition for special leave to appeal from this decree of affirmance to the High Court of Judicature at *Bombay*, which Court admitted and confirmed the decree of the Court below. That as the value of the property in dispute amounted to Rs. 1,500 only, the Petitioner was excluded from obtaining from the High Court leave to appeal to *England;* but it was submitted, that besides the property in dispute there was other property, belonging to the *Enam* of the Petitioner, which exceeded in the aggregate Rs. 10,000, the appealable amount, and that the other property was in occupation of Tenants of the Petitioner, who had continued to hold the same according to custom, as tenants at will, for terms much longer than the period prescribed for limitation of suits, and the petition alleged, that in consequence of the decree of the High Court being adverse to the Petitioner, many of the Tenants had refused to pay rents in respect of property which they occupied, and had set up their claim as absolute Owners thereof, and that the Petitioner had reason to fear that the remainder of the Tenants would follow their example, and prayed for special leave to appeal from the above decree.

It appeared that an application for review of judgment was made to the High Court, but no application was made to that Court for leave to appeal on the ground, that it was a fit case for appeal to the Queen in Council, as provided for by the rules of the High Court founded on the *Bombay* Charter *(a)*, but the present petition for special leave to appeal was made direct. The petition was heard *ex parte*.

Mr. *H. C. Merivale*, for the Petitioner:

It is admitted, that the amount in issue is under the appealable value, but the question raised in the suit is one between Landlord and Tenant, which involves indirectly the Petitioner in litigation with other Tenants having similar holdings to an amount far exceeding Rs. 10,000, the appealable value. He referred to the 39th and 40th sections of the *Bombay* Charter of 1862 *(a)*.

(a) See Macpherson's Civil Procedure for India, Appx. p. ccxxviii. [Ed. 1871.]

(a) The sections of the Letters Patent of the 14th of May, 1862, constituting the High Court of Judicature of *Bombay*, in pursuance of the Act, 24th & 25th *Vict.* c. 104, in respect of appeals to the Privy Council, are these :—

Sec. 39. "And we do further ordain that any person or persons may appeal to Us, Our heirs or successors, in Our or their Privy Council, in any matter not being of Criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at *Bombay*, made on appeal, and from any such final judgment, decree, or order, made in the exercise of original jurisdiction, by a majority of the full number of Judges of the said High Court, as hereinbefore mentioned: Provided, in either case, that the sum or matter at issue is above the amount or value of Rs. 10,000, or in case such judgment, decree, or order shall involve, directly or indirectly, any claim, demand, or question to or respecting property amounting to or of the value of Rs. 10,000; or from any other final judgment, decree, or order, made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council. Subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts in the said Presidency. Except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf."

Sec. 40. "And we further ordain that it shall be lawful for the said High Court of Judicature at *Bombay*, in its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said High Court, in any such proceedings as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences."

THE RIGHT HON. LORD CAIRNS:

If there were any grounds in this case to be assigned as an explanation of the circumstance, that no leave to appeal to Her Majesty in Council was applied for to the High Court, those grounds ought to have been stated in the petition; but in refusing the prayer of this petition their Lordships proceed upon this ground—the value of the property in question in this particular litigation is clearly below the appealable value. The only reason, therefore, that would induce their Lordships to make an exception in this case would be, if they found that there were some general right affecting other holdings, the aggregate amount of which would be above the appealable value; that such general right was called in question in this suit; and that the decision of this suit would affect litigation that might arise in other suits respecting other holdings similarly circumstanced. When their Lordships look to the statements which were made in the grounds of appeal to the High Court of Judicature at *Bombay*, they find that none of such grounds were otherwise than peculiar to this particular case, or such as would, in their Lordships' judgment, affect the decision in any other case which, it is suggested, might arise; they are grounds with reference to the admission or rejection of particular evidence in this particular case, to the applicability of the Statute of Limitations to this case, and to the question of the character in which a particular House was occupied by a person who was called the servant of the Petitioner, in this case. All these are matters peculiar to this individual litigation which could not rule or govern any other litigation, with reference to any other parts of the same property. Therefore, even if there were no other difficulty in the case, their Lordships do not see that the decision here is one which could govern other cases, and that, therefore, an exception ought to be made to the general rule in favour of this Petitioner.

28th June, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty,) and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, North-Western Provinces, Agra.

NAWAB MAHOMED AMEENOODEEN KHAN,* } *Appellant,*

versus

MOOZUFFUR HOSSEIN KHAN, ... } *Respondent.*

Practice—Act VIII. of 1859, s. 2—Waiving objection in Court below, effect of on Appeal—Form of decree against widow in possession of estate as security for dower.

Where a party has a good objection, such as an absence of tender before suit, to urge to the prosecution of a suit, his omission to do so in the first instance is fatal to his availing himself of it as an objection on appeal.

Where a woman is in possession of her husband's estate as security for unpaid dower, the proper decree, in a suit against her for possession by the heir, is a decree for possession, subject to the amount due, with a direction for an account as to mesne profits received by her.

A Mahomedan died, leaving, among others, a widow and a sister entitled to shares in his estate. The widow got possession of the whole. The sister died; and after her death, her husband, on behalf of himself and grandson, sued the widow to obtain the shares to which the deceased's sister was entitled, and obtained a decree for payment of the same after satisfaction of the widow's lien for dower, in certain proportions to himself and grandson. The husband's interest in the decree was subsequently confiscated by Government for having taken part with the enemy in the mutiny. He subsequently died, leaving his grandson. The widow died during the mutiny, and her brother was put into possession of the property, by the Government as her heir. The grandson now sued the widow's brother to recover his own and his grandfather's share, alleging that the lien for dower had been satisfied. *Held*, the suit was not barred by Act VIII. of 1859, section 2.

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* 5 B. L. R., p. 570.

Mr. *Leith* appeared for the Appellant, Mr. *Mackison*, Q. C., and Mr. *Edwards* for the Respondent.

Mr. *Leith*.—There are several objections to the suit: 1st, the Plaintiff had no title in consequence of the confiscation; 2nd, if he had any title, his right to possession was subject to the condition precedent that he should pay the dower. [SIR L. PEEL.—If the widow, having a right to dower, was in possession, would she not pay herself off? LORD CAIRNS.—Is it Mahomedan law to put a widow in possession as a Mortgagee when she has a claim for dower? Mr. *Mackison*.—No—*Ameeroonissa* v. *Mooradoonissa* (1).] It is a primary charge on the estate, and she is entitled to take possession. The decree is that they are not to oust her from lien while the dower is unpaid. [LORD CAIRNS.—How does it appear she was not paid; surely it must be a matter of account?] There is no cross-appeal. The suit was a simple action of ejectment for three-fourths. [SIR J. COLVILE.—The Plaintiff comes into Court and says, 'by receipt of the rents and profits you have been paid off.' LORD CAIRNS.—There ought to have been an account.] The Court thought that by Mahomedan law she was entitled to possession: in the absence of a prior tender, the suit should have been dismissed with costs. The property was vested in the Government. Before this suit the rights of the Plaintiff as against the Government should have been determined, and having established his rights in law, he ought to have tendered the money due for dower. It was in consequence of the Appellant's objection that the Government was made a party; the suit in fact results in a repetition of the decree in the former suit, and is bad under the Civil Procedure Code (2). The learned Counsel then commented on the evidence as to there having been confiscation of the Respondent's rights.

Mr. *Mackison*, Q. C.—We seek not only to dismiss the appeal, but also to have the decree varied by getting an order for an account. [SIR J. COLVILE. How can you do so without a cross-appeal?] We hope to be allowed this indulgence. The law in giving a right to *jatu* property in satisfaction of dower limits such taking to the amount of the claim—*Ameeroonissa* v. *Mooradoonissa* (1). That case gave such a decree as might be followed here by giving us leave to sue for mesne profits. [LORD CAIRNS.—The Appellant says: 1st, that the suit is not necessary; 2nd, that there was no deposit; and 3rd, that the Plaintiff's rights were confiscated. The Appellant himself in his own written statement denies that Government has any title.] The suit was properly framed; and even if the objections had any weight in them, it would simply be a question of costs.

Mr. *Leith* in reply.—The suit should not have been brought. There was a bar until the orders for confiscation were set aside.

THEIR Lordships then delivered the following judgment:—

In this case, so long ago as the year 1855, the widow, who has been termed in the proceedings the *Begum*, was, by a decree of the Court, put into possession of the property of her husband, in order to obtain by that possession payment of her dower, which was fixed by the decree at a sum of Rupees 10,000; and she during her life-time, and after her death, her heir, who is the present Appellant, have continued in possession of the property ever since that time.

Whatever might have been the presumption as to payment by means of possession at the end of a year or two years after possession was taken, certainly at the end of fifteen years there would be a very strong presumption either that payment of Rupees 10,000 had been effected by means of the possession, unless (as does not appear to have been the case) the value of the property was extremely inconsiderable, or at all events that justice would not have been done unless an account were taken for the purpose of seeing whether, by means of possession, payment had been effected.

Therefore, when the present plaint, out of which this appeal originates, was brought before the Court, the course to be taken, according to our ideas of what is proper to be done in such a case, would have been to

(1) 6, Moore's I. A., p. 211.
(2) Act VIII. of 1859, section 2.

(1) 6, Moore's I. A., p. 211.

have directed an account (which, indeed, was asked by the plaint,) for the purpose of seeing what had been the amount of receipts by the *Begum* and her heir during the time they were in possession, and of finding whether she had, in point of fact, been overpaid her dower, and in that event, making her heir repay the difference; or, if it was found that she had been underpaid, to order the Plaintiff in the suit to pay the difference as the terms of obtaining possession of the estate.

Now, that has not been done; but the Plaintiff has been ordered to pay the exact sum representing that proportion of the whole of the dower of the *Begum* which corresponds to the share of the estate which he claims. If an appeal had been brought, not by the Appellant but by the Respondent, complaining that scant justice had been done by that form of decree, their Lordships would have been under the necessity of considering whether there had not been miscarriage of the Court, and whether less of justice had been done to the Plaintiff in *India* than ought to have been done to him.

But no such appeal has been brought. The form of the decree abroad has dismissed the whole of the plaint, except that part of it in respect of which relief has been given, and therefore has, in effect, dismissed the plaint so far as it asked for an account of mesne profits.

There has been no appeal against that, and their Lordships, with some regret, find that in disposing of this appeal, they are unable even to leave open the question of whether in *India* a decree could hereafter be made for an account of mesne profits.

But now, turning to the grounds of complaint made by the Appellant with regard to this decree, their Lordships find them to be these:

The Appellant, in the first place, complains that this second suit was unnecessary, and that the Respondent, resting upon the former decree, the decree of 1855, might, on tendering his share of the dower, without more have obtained possession of his share of the estate. It is sufficient on that point to observe, that when brought into Court, the Appellant assumed no such attitude; on the contrary, he contested the whole right of the Respondent; and although if he had, upon being brought into Court, said to the Respondent, that the only complaint he had was that the suit was unnecessary, and that on receiving his share of the dower he would be ready to give up possession, such an argument might have been urged as now that the suit was unnecessary; their Lordships think that, after the resistance offered by the Appellant to the suit in *India*, it is impossible for him now to take an objection, which after all is only an objection on the score of costs.

The next objection is of the same kind. The Appellant complains that, before instituting this suit, the Plaintiff in the suit should have settled with the Government, or the agent of the Government, the question whether there had been any confiscation of the property of this Respondent. That, again, is simply a question of costs. It is simply that a plaint with a greater amount of costs has been thrown upon the Appellant than would have been thrown upon him if these preliminary proceedings had been taken. Their Lordships are not prepared to say that the form adopted was an improper form, or that it was by any means inconvenient, in proceeding for the recovery of this property, in the same suit to call on the Government Collector to clear away any cloud upon the title that might exist by reason of the argument that the confiscation awarded against *Hossein Khan* might extend to the property of the present Respondent.

The next objection made by the Appellant is that the money—the Rupees 3,750—was not tendered before this suit was instituted. Their Lordships think that the decree has done full justice to the Appellant on this score. The decree has ordered payment to be made as the terms of the Respondent obtaining possession of the property. Then as to the claim for some expenditure upon a mosque, that was hardly urged at the bar before their Lordships; and no right whatever is shown to add that sum by way of charge upon the estate before the estate is given up. Then as regards the two villages, which, it appears, were given to the present Respondent by the *Begum*, it is said that those

villages ought to have been taken into account in diminution of the share of the property awarded now to the Respondent. Their Lordships are unable to see how that could properly be done. It is scarcely credible to suppose that when those two villages were made over by the *Begum* to the present Respondent, the *Begum* intended to make them over simply as liberating them from her claim and security for dower, for that is the result that would arise from the view taken by the Appellant. They were made over by the *Begum* to the Respondent, apparently, by way of gift, and if so, they must have been made over, not out of the portion in dispute, but out of the other portion of the estate to which the *Begum* was entitled.

Under these circumstances, their Lordships are of opinion that the appeal fails on all the grounds urged by the Appellant, and all they can do with it is humbly to recommend Her Majesty to dismiss it with costs.

8th and 12th July, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William, Bengal.

ALEXANDER JOHN FORBES,* *Appellant*,

versus

MEER MAHOMED TUQUEE and others, ... } *Respondents.*

Sanad, Rent-free—Jaghire and Service Tenures—Resumption—Power of Zemindar to resume—Government Sale, Effect of, on Jaghires—Admission in other Suit when Evidence.

In 1775 a rent free *sanad* was granted to M. for having put down wild elephants, the consideration in future being to cultivate and keep up a body of men, and take care of the *ryots*. M. died, and a fresh *sanad* was in 1786 granted to K. and R., they being thought to be his heirs; but in 1807, M.'s true heirs having established their title, the Government gave them a fresh *sanad* in lieu of the one to K. and R., reciting the circumstances; both these *sanads* were to cultivate, keep up a body of men, keep off elephants, and attend to the safety of the *ryots*. *Held* that this was not a service tenure that could be resumed, and the subject of service tenures was explained.

The *zemindary* in which these lands were situated was settled in 1802, and was in 1850 sold for arrears of Government revenue; the Appellant claimed to set aside the *sanad* of 1807, on the ground that Government had no right to give such a *sanad*, but he contended that, if it had, it could be set aside by a purchaser at a Government sale. *Held*, that the *sanad* was not a new grant, but a confirmation of the one made before the decennial settlement, and that Government was competent to give such confirmation.

An admission by a *jaghiredar* in a suit brought by Government to assess the lands that the lands were comprised in a *zemindary*, is evidence of that fact in a suit by the *zemindar* to resume those lands.

26th July, 1870.

THE consideration of the judgment was reserved, and was now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant is the Owner of the *zemindary* right in *Pergunnah Sultanpore*, and *Talooka Remae*, in *Zillah Purneah*. These *mehals* were purchased by him in April, 1851, from one *Baboo Pertaub Sing*, who, on the 24th of July, 1850, had purchased the estate of which they then formed part, at a sale for arrears of Government revenue: and the estate so purchased by *Baboo Pertaub Sing* had once been part of a far more entensive *zemindary*, which, in 1802, was first permanently settled with one *Ranee Indrawuttee*.

In July, 1862, the Appellant commenced the suit which has given rise to this appeal, in which he claimed against the Respondents, first, the right to resume 9,000 *beegahs* of land held by them upon the tenure which will be afterwards considered; and, secondly, the right to recover from them 2,000 *beegahs* of land, described as *Towfer*, or excess, being lands which, he alleged, they had wrongfully acquired under colour of their tenure by gradual encroachment, or otherwise.

The Court of First Instance allowed the first of these claims, but rejected the

* 13, Moore's I. A., p. 438; 5 B. L. R., p. 529.

second. On appeal and cross appeal, the High Court of *Calcutta* rejected both claims, reversing the decree of the Court below on the first, and affirming it on the second; and dismissed the suit. This appeal again raises both questions.

The claim of *Towfer* may be shortly disposed of. It was very faintly pressed at the Bar. Mr. *Leith*, it is true, relied upon a passage in the *Ameen's* report; but the Principal *Sudder Ameen* was of opinion that, on the *Ameen's* report, taken as a whole, no excess of land was shown to be in the Respondent's possession; but that, on the contrary, they appeared to hold less than 9,000 *beegahs* in all. The High Court has confirmed that decision, and no grounds have been laid before their Lordships which would justify them in disturbing the concurrent finding of the two Indian Courts on what is, in fact, a mere question of boundary and measurement.

In dealing with the question of resumption, their Lordships desire to state, in the first place, the conclusion to which they have come touching the origin and duration of the tenure on which the lands sought to be resumed are held.

The following is its history:—In 1775 the lands in question were granted by *Sunnud* to *Meer Syud Ally*, a Persian, who had done, and was doing, good service in repressing or preventing the incursion of wild Elephants coming from the *Morungs* or *Terai* upon the cultivated lands of *Pergunnah Sultanpore*. This first *Sunnud* contained no words of inheritance. In 1786, *Meer Syud Ally*, being then dead, the Government granted the second *Sunnud* in favour of *Meer Abdool Hossein Khan* and *Meer Ally Rezza*, who represented themselves to be the elder Brother and Nephew of *Meer Syud Ally*, and as such, his heirs. This *Sunnud* does contain words of inheritance, and made the Grantees and their descendants fixed *Jaghiredars*. It is not shown what, if any, interruption of possession took place between the death of *Meer Syud Ally* and the date of this second *Sunnud*.

In February, 1804, *Mirza Mahomed Saduk Goolstana* and others brought a suit against *Meer Ally Rezza* and the Widow of *Meer Abdool Hossein*, alleging that they were the true heirs of *Meer Syud Ally*, and that the Grantees under the second *Sunnud* had falsely pretended to be his Brother and Nephew. The first decree in this suit declared the Plaintiffs to be the true heirs of *Meer Syud Ally*, and directed the Defendants to relinquish the possession and enjoyment of the *Jaghire* to them, treating, apparently, the former as Trustees for the true heirs. On appeal, the Provincial Court affirmed this decree, and dismissed the appeal. But considering, apparently, that it could not, without the sanction of Government, transfer the benefit of the second *Sunnud* from the persons named in it to the true heirs of *Meer Syud Ally*, it directed that the possession of the former should remain undisturbed "until an Order should be issued from head-quarters," meaning the Governor-General in Council.

In consequence of these decisions, the third *Sunnud* was granted on the 10th of January, 1807. It recited the two former *Sunnuds*, and that by the decrees in the last-mentioned suit the heirship of the Plaintiffs had been proved, and the *Jaghire* continued to the Plaintiffs. And it went on to state that, under these circumstances, the Government had, on the application of *Meer Mahomed Saduk*, confirmed the *Jaghire* lands to the Plaintiffs, from whom the present Respondents derive their title.

Under the three *Sunnuds*, the lands comprised in the *Jaghire* have been held rent-free for nearly a century.

One of the questions raised in the suit is, however, that, under the circumstances above stated, the title of the Respondents must be held to have been first created by the third *Sunnud* in 1807; and that inasmuch as the *zemindary*, of which *Pergunnah Sultanpore* was then part, was permanently settled in 1802, the Appellant, who claims through an auction purchaser, is entitled under Act, No. I. of 1845, to set aside the tenure as one created within his *zemindary* since the perpetual settlement.

Their Lordships are of opinion, that this contention cannot be supported. It is perfectly clear that the effect of the second

Sunnud was to create sixteen years before the settlement of the estate, in 1802, an hereditary *Jaghire* tenure; and that the settlement was made upon the assumption of the subsistence of that hereditary *Jaghire*. The grant was perfectly good against the *Zemindar*, who could not have come into Court to set aside the second *Sunnud* on the ground that the Grantees had obtained it from Government by fraud or misrepresentation. Nor, in fact, has any Court or any authority ever revoked or set aside that second *Sunnud*. The decrees in the suit between the real and pretended heirs of *Meer Syud Ally* made (subject to the sanction of Government) the latter Trustees for the former, and directed them to relinquish the enjoyment of the lands accordingly. And the Government by the third *Sunnud* sanctioned that arrangement, and confirmed the title of the true heirs. On this view of the transaction, the action of Government, and the inaction of the *Zemindar* in 1807, become intelligible. For it is not to be presumed that the Government would have assumed the power of granting a new tenure in a settled *zemindary*, or that the *Zemindar* would have submitted to such an invasion of his rights. Their Lordships, therefore, concurring on this point with the High Court of *Calcutta*, are of opinion, that the *Jaghire* of the Respondents must be held to be a tenure created before, and subsisting at the time of, the Decennial Settlement; and consequently that it is within the exception of the 26th section of Act, No. I. of 1845; whether the Appellant has or has not in respect of his estate the powers of an auction Purchaser under that Act (as to which their Lordships express no opinion;) and, whether the lands comprised in it were or were not part of the *zemindary* settled in 1802.

Has, then, the Appellant established his right to resume the lands comprised in this ancient *Jaghire?* His case is that they are within the limits of the *zemindary* settled in 1802; that as between the Government and the *Zemindar* they were then treated as *mal* or revenue-paying lands, and a revenue assessed upon them; although they were then, and have ever since been, held rent-free as between the *Zemindars* and the *Jaghiredars;* that under these circumstances they must be deemed to be *chakeran* or service lands, and that the services on which they were held being no longer required or performed, the right of the *Zemindar* to resume them has accrued.

Some attempt has been made on the part of the Respondents to show that the lands comprised in the *Jaghire* are not even within the geographical limits of the settled *zemindary*, or, at least, have not been proved to be so. But, looking at the pleadings and the evidence, their Lordships are of opinion, that upon this point the Appellant has established his case. He has given strong *primâ facie* proof of the fact, and there is no evidence at all to the contrary.

If this be so, the next question is, How were the lands dealt with on the occasion of the Settlement? They were then unquestionably held rent-free, under a subsisting *Sunnud*, and the presumption is that they would be treated as *Lakhiraj*. In that case no revenue would be assessed upon them. Nor would the *Zemindar* acquire any right to question the validity of the title on which *Lakhiraj* land of that extent was held. That question could only be raised by Government; and having been decided adversely to Government in 1845, the title of the Respondents would now be indefeasible.

On the other hand, it seems to follow that if on the occasion of the Settlement, revenue was assessed on these particular lands as between the Government and the *Zemindar*, they must, since they produced no money-rent payable to the *Zemindar*, have been treated as in the nature of *chakeran* lands within the meaning of the 41st section of Regulation VIII. of 1793, upon the notion, that the services to be performed by the Tenant were equivalent to rent payable to the *Zemindar*. It is, therefore, a very material issue whether, in point of fact, these lands were, on the occasion of the Settlement, treated as part of the *mal* assets of the *zemindary*.

Their Lordships are not prepared to say that the Appellant has established the affirmative of this issue beyond reasonable doubt.

He relies mainly on the evidence afforded by the Quinquennial Register, and the proceedings in the resumption suit, brought by Government against the Respondents, or those through whom they claim, which was finally determined in 1848.

Their Lordships do not concur with the High Court in thinking that the first of these documents has not been properly authenticated. The learned Judges of that Court seem to have confined their attention to the extract of the Quinquennial Register of the *Mehal Pergunnahs* attached to the Collectorate of the District of *Purneah*, and to have taken no notice of the fuller extract of the Registry also put in evidence, which not only bears the Collector's seal, but is shown by the indorsements upon it to have been the identical paper produced by the *Jaghiredars* in the resumption suit. The Appellant's case is, that the lands in dispute are included in the villages *Talooka Ramgunge*, and *Mouzah Goorka*, part of *Talooka Remae*, on which a revenue of Rs. 850 appears to have been assessed.

Their Lordships cannot assent to the proposition of the learned Counsel for the Respondents, that *Talooka Remae* is something different from *Pergunnah Sultanpore;* and that the Appellant is bound to show that the lands in question are *mal* lands within *Sultanpore* proper. They think it is proved, that *Talooka Remae* was part of *Pergunnah Sultanpore* in the larger sense of that denomination. Nevertheless, if the Appellant's case depended solely on the Quinquennial Register, their Lordships would doubt, whether it had been sufficiently proved that the lands in question were subject to the assessment. For even if it be assumed that the different villages of divisions of land mentioned in the *Chukbund* and *Ameen's* report are comprehended within the denominations of *Talooka Ramgunge* and *Goorka*, it seems consistent with that Register that those *mouzahs* may have included the 9,000 rent-free *beegahs* in excess of the 5,819 *beegahs* mentioned in it as the lands in respect of which the revenue of Rs. 815 was assessed. But it is argued that the identity of the *Jaghire* lands with the *mal* lands in *Talooka Ramgunge*, &c., has been admitted by the Respondents, or those through whom they claim in the resumption suit. The question then arises, what is the weight to be given to that admission?

Their Lordships cannot agree with the learned Judges of the High Court in treating it as a mere admission or argument at the Bar by a *Mooktar*, whose authority to make it is not proved. It seems to them to be the foundation and substance of at least one of the defences deliberately pleaded by the *Jaghiredars* in the resumption suit to the claim of Government. It was not the sole defence, nor can the ultimate decision of the case be said to proceed upon a finding by the Collector that the lands were *mal*, and not *Lakhiraj*. For he seems to have held that the proof of the *Sunnud* was of itself a bar to the claim of Government in that proceeding. Nevertheless, the admission appears to their Lordships to be one of a grave character; and though it is not to be treated as an estoppel, it at least casts upon the Respondents the burthen of explaining it, and of showing that what was then deliberately asserted was not the fact. The *onus*, then, of showing that the *Jaghire* lands are something distinct from the *mal* lands of *Talooka Ramgunge* and *Goorka* is shifted upon them. And this fact they have not attempted to establish by direct evidence. They have been content to rest on the alleged insufficiency of the proof on the other side. Their Lordships, therefore, are constrained to say that though the evidence before them is not conclusive, the preponderance of it is in favour of the allegation that the *Jaghire* lands were made the subject of assessment, in the Settlement between the *Zemindar* and the Government in 1802.

But is it a necessary consequence of this finding that the Appellant is entitled to resume these *Jaghire* lands? His right to do so must depend on the nature of the tenure; and it is worthy of observation that, so little value did the *Zemindar* in possession between the years 1835 and 1845 attach to this supposed right of resumption, that he did not intervene, as undoubtedly he might have intervened, to resist the then claims of Government.

The settlement between Government and the *Zemindar* cannot affect the rights of the *Jaghiredars*. The lands held on this tenure, even if then treated as in the nature of *chakeran* lands, differ widely from the ordinary *chakeran* lands contemplated by section 41 of *Ben.* Regulation VIII. of 1793. They seem hardly to fall within the description of "lands held by a public Officer or a private servant, in lieu of wages." Neither *Meer Syud Ally* nor his descendants were by the *Sunnuds* appointed to an office known as Elephant Hunter for the *Pergunnah*," or by any like description. Still less ground is there for saying that they were the private servants of the *Zemindar*. Their right, whatever it be, was derived not from any *Zemindar*, but from the Supreme authority in the State.

Their Lordships have carefully considered the various authorities cited at the Bar; but they can find none which expressly govern the case.

Of those which have been decided by this Committee, it is sufficient to say that in the *Madras* case, *Unide Rajaha Raje Bommaruze, Bahadur* v. *Pemmasamy Vencatadry Naidoo*, in 7 Moore's I. A. Cases, p. 128; (1 P. C. J., p. 637,) the question really discussed and decided was, whether the tenure in question was *Enam* or *Amaram*, it being established and almost admitted that, if it were the latter, it was resumable at pleasure; and the case of *Joykishen Mookerjee* v. *The Collector of East Burdwan*, in the 10th Moore's I. A. Cases, p. 16, (*Ante*, p. 54,) decided that lands held in lieu of remuneration by a village *Chowkeedar*, though unquestionably *chakeran* within the meaning of Regulation VIII. of 1793, sec. 41, were not resumable at the pleasure of the *Zemindar*, if the public, or the Government representing the public, had an interest in the appointment of the *Chowkeedar*.

The Indian authorities are not quite consistent with each other, but taken altogether, they do not appear to their Lordships to establish the right for which the Appellant contends in this case.

In the case of *Hurreenarain Ghose* v. *Mussumat Urnoo Dossee*, the 11th May, 1857 (14 S. D. Dec. *Ben.*, p. 786), the *chakeran* lands had been assigned for the maintenance of a *Chowkeedar*, and the existing *Chowkeedar* had no connection with them, being otherwise remunerated. Other provision had, therefore, been made for the service to be rendered in return for them.

In the case of *Maharajah Sreeshchunder Rae* v. *Madhub Mochee*, of the 30th November, 1857 (15 S. D. Dec. *Ben.*, p. 1772), the tenant whose services had been dispensed with, or had otherwise ceased, was clearly the mere private servant of the *Maharajah* (the *Zemindar*). He was the person bound to perform all the leather work required in the family.

The case of *Tekayet Jugmohun Singh* v. *Rajah Neelanund Singh*, the 11th December, 1857, 15 S. D. Dec. *Ben.*, p. 1812, was one of *Ghatwallee* tenure; and one of the learned Judges who decided it (Mr. *Justice Trevor*), in the subsequent case of *Munrunjun Singh* v. *Rajah Lelanund Singh*, decided by him and Mr. *Justice Campbell*, (3 Weekly Reporter, 1865, p. 84); and again in the case of *Baboo Koolodeep Narain Singh* v. *Mahadeo Singh*, decided by the full Bench, 6 Weekly Reporter, 1866, p. 199, concurred in the ruling that all that was laid down in the first-mentioned case, beyond the decision that the *Zemindar* was entitled to resume, when the *Ghatwal* had actually failed to render the service which he was bound to render, was mere *obiter dictum*. Both these cases in the Weekly Reporter support the contention of the Respondents rather than that of the Appellant. Both also relate to *Ghatwallee* tenures. The case of *Mahbub Hossein* v. *Patasu Kumari*, decided in 1868 (1 Bengal Law Reports, p. 120), is to the effect that, the Government having concurred in the suppression of the office, the Son of a *Ghatwal*, who had held his office, not by hereditary right, but on the appointment of the *Zemindar* (though practically the Son had continually been appointed in succession to the Father), could not successfully sue to recover lands which the *Zemindar* had resumed.

Their Lordships do not think it necessary for the determination of this case to examine minutely these decisions touching

the *Ghatwallee* tenures. And they abstain the more willingly from doing so since it was stated at the Bar that some of them are likely to be brought regularly before this Board by appeal. But they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the case in the 6th Vol. of the Weekly Reporter, p. 203.

Another case cited is that of *Bhugoo Rae* v. *Azim Alee Khan*, of the *Sudder Dewanny Adawlut* Decisions for *Bengal* for 1858, p. 84. The property, as in this case, was a *Jaghire*. The decision did no more than remand the case for re-trial, with the following intimation of opinion, p. 85:—"The issue raised by the Plaintiff is not solely whether the grant to the ancestor of the Defendant is hereditary, but also whether it has any condition of service annexed to it or not, and if it has, whether that service be still performed; should a condition of service be annexed to the grant, the hereditary nature of the grant will not be the test of its present validity, but the performance of the required service; and if this service be not performed, then, notwithstanding its hereditary nature, the tenure will be liable to resumption."

To this ruling, if it be understood to mean only that where the continued performance of certain services is, upon the true construction of the grant, the condition on which the lands are to be held, their Lordships conceive no exception can be taken; but if it means that whenever service enters into the motive or consideration for a grant, the grant will become void if for any reason the service ceases to be performed, their Lordships think that the proposition is far too wide.

The conclusion which they would draw from the decided cases, as well as from the reason of the thing, is, that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant.

They agree with the observation of Mr. Justice *Jackson*, Weekly Reporter, Vol. 6, p. 209, that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands.

They have already stated that, in their opinion, the grant in question does not fall within the latter category.

Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But, in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that, the service ceasing, the tenure should determine.

It appears to their Lordships that neither the first nor the second *Sunnud* is a grant of the kind last-mentioned. Each proceeds in part upon the past services of *Meer Syud Ally*; nor is the consideration, so far as it is unexecuted, wholly the keeping up of a body of men to repeal the incursions of the elephants, for the grantees are also to cultivate the waste land. The latter stipulation was probably designed to protect the already cultivated districts of *Pergunnah Sultanpore* by interposing a further belt of cultivation between them and the forest. Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future, services. Again, neither *Sunnud* contains any words which expressly import that the tenure shall cease if and when any of the services cease to be performed. Such a provision is something very different from one which merely casts upon the Grantee the performance of certain duties so long as they are necessary. The former makes the grant determinable when there is no further occasion for the services. But, in the latter case, if the operation of any natural cause (as, *e. g.*, the progress of cultivation, which has caused the wild Elephants to cease out of the land) removes the necessity for the services, the Grantee will hold the lands practically freed from the condition originally imposed upon him. Their Lordships are, therefore, of opinion, that upon the true construction of these *Sunnuds* the Grantees, though bound to protect the *Pergunnah*

from the incursions of wild Elephants so long as those incursions lasted; and though still bound to do so should, by any chance, those incursions be renewed; and though they may be liable to forfeit the tenure if they wilfully fail in the performance of this duty, are not liable to have their lands resumed because there is no longer any occasion for the performance of this particular service, "there being now no fear of the depredations of Elephants in those places."

Had this been a grant reserving to the *Zemindar* a small money-rent, as well as the services, if indeed the latter are reserved to the *Zemindar*, their Lordships would have had no doubt upon the case. But it seems to them that the unexplained anomaly of making *mal* lands rent-free in the hands of the *Jaghiredars*, does not affect the construction of the *Sunnud*, or the rights of the parties.

It emphatically lay upon the Appellant, who is seeking to dispossess, or to rack-rent, the Respondents, who by themselves, or their ancestors, have brought these lands into cultivation, and enjoyed them for so long a period; who must have been permitted by former *Zemindars* to continue undisturbed in such enjoyment long after the incursion of wild Elephants had become mere matter of tradition, to make out a clear title to resumption. In their Lordships' opinion he has failed to do so; and therefore, though they dissent from the particular grounds on which the High Court has dismissed the suit, they think its dismissal was right, and ought to be affirmed. They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

465-66 & 472

11th July, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

FELIX LOPEZ,* ... *Appellant*,

versus

MUDDUN MOHUN THAKOOR, BRIJ MOHUN THAKOOR, and HURRY MOHUN THAKOOR, ... *Respondents.*

Diluviation of Land—Rights of Proprietors to Accretion.

Where property is wholly submerged by a river, any land forming afterwards on the site will, when the ownership of that site is proved to exist in the former owner, remain in him, and the accretions will not belong to the adjacent proprietor.

The decision in *Katteemonee Dossee* v. *Ranee Monmohinee Dabee* (3 W. R., p. 51) is erroneous in not regarding the site of the increment.

WITHOUT calling for a reply, their Lordships' judgment was pronounced by

THE RIGHT HON. THE LORD JUSTICE JAMES:

The Plaintiff in this case, *Feliz Lopez*, was the proprietor of a very considerable estate, a *mouzah*, on the banks of the *Ganges*. By the year 1840, by reason of the continued encroachment of that River, it was wholly submerged, and it was, to adopt an expression used in this class of cases in *India*, "diluviated;" that is, the surface soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of

* 13, Moore's I. A., p. 467; 5 B. L. R., p. 521.

only temporary cultivation by hand sowing, has become hard and firm soil, capable of being cultivated in the usual manner. The Plaintiff says, "This was my property. The *Ganges*, which swallowed it, has again yielded it up, and I claim my property, which, having been buried and lost to sight, has again re-appeared."

The rule of the English law applicable to this case, is thus expressed in a work of great authority, *Hale, de Jure Maris*, p. 15:—"If a subject hath land adjoining the Sea, and the violence of the Sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art or industry regained, the subject doth not lose his property." "If the mark remain or continue, or the extent can reasonably be certain, the case is clear." And in another place, p. 17, he says: "But if it be freely left again by the reflux and recess of the Sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the Sea, and within the Admiral's jurisdiction while it so continues."

This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a Vineyard which is covered by lava or ashes from a Volcano, or a field covered by the Sea or by a River, the ground, the site, the property, remains in the original Owner.

There is, however, another principle recognized in the English law, derived from the Civil law, which is this,—that where there is an acquisition of land from the Sea or a River by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the Owner of the adjoining land, *Rex* v. *Lord Yarborough* (2 Bligh, N. R., 147). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable River, so that there the Owner of the River gained from the land in the same way as the Owner of the land had in the former case gained from the Sea (*In re The Hull & Selby Railway*, 5 Mee. & Wel. 327). To what extent that rule would be carried in this Country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a Mine under the Sea, or other means of that kind, has never been judicially determined.

This principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of *India*, and it is on the operation of such positive written law that the Defendants' case is based. This law is to be found in the Regulation XI. of 1825, a Regulation for declaring the rules to be observed on the determining of claims to lands gained by alluvion, or by the dereliction of a River, or the Sea. There is a recital in that Regulation, as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by the 4th section of the Regulation. By cl. 1, of that section it is provided that, "when land may be gained by gradual accession, whether from the recess of a River or of the Sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from the Government," or from any intermediate landowner. And the Defendants' contention is, that the Plaintiff's land having been wholly submerged, so as to make their (the Defendants') land the River boundary, the subsequent recession of the River has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the Plaintiff's *mouzah*.

It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The Plaintiff here says,—"I had the property. It was my property before it was covered by the *Ganges*. It remained my property after it was submerged by the *Ganges*. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person." And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another.

In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with, was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the Sea belonging to the State, a public River belonging to the State; this was a gift to an individual whose estate lay upon the River or lay upon the Sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable.

And on the very words of the section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that the 4th section did not govern the case, and that the question would have to be determined by the general principles of Equity, to which all cases not in terms provided for are referred by the 15th section. Those principles would not give the Plaintiff's property to the Defendant. But the question is not raised for the first time. The very point came for consideration in *India* before a Court comprising Sir *Barnes Peacock*, Mr. Justice *Bayley*, and Mr. Justice *Kemp;* and after full consideration, it was decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognized, are not lands gained within the meaning of section 4, Regulation XI. of 1825, viz., they do not become the property of the adjoining Owner, but remain the property of the original Owner.

And the same point arose in a case in this Court of *Mussumat Imam Bondi* v. *Hurgovind Ghose*, reported in 4 Moore's I. A. Cases, 403, (1 P. C. J., p. 371.) It is there said,—"The whole of the District adjoining the land in dispute, as well as that land itself, is flat, and very liable to be covered or washed away by the waters of the *Ganges*, which River frequently changes its channel. The land in dispute was inundated about the year 1787; it remained covered with water till about 1801, and then became partly dry, until, in the year 1814, it was again inundated. After this period it once again re-appeared above the surface of the water, and, by the year 1820, it became very valuable land." That is a state of things very singularly like what has occurred in this case.

In that case it was held as follows:—"The question then is, to whom did this land belong before the inundation? Whoever was the Owner then remained the Owner while it was covered with Water, and after it became dry."

This authority appears to their Lordships conclusive in the present case.

In a subsequent case, however, *Kattee-monee Dossee* v. *Ranee Monmohinee Dabee*, (3 W. R. p. 51, 26th May, 1865), it was held by a Court comprising Justices *Trevor*, *Loch*, *Bayley*, and *Morgan*, that

all gradual accessions from the recess of a River or the Sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the River. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.

Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a Sea or a River is, under all circumstances, and after any lapse of time, to be recovered by the old Owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the Sea or River of the State, and so liable to the written law as to accretion and annexation.

But in this case not only did the parties themselves take the proper, prudent, and honest means of preventing the necessity of any dispute arising by interchanging the *Tanabundee* which has been put in evidence, but the Plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged *mouzah* recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are, therefore, of opinion that the property now being capable of identification by means of that *Tanabundee* and otherwise, the property having been the property of the Plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the *Ganges*, is still his property; and they will, therefore, recommend to Her Majesty to reverse the decision of the Court from which the appeal has come, to affirm the decision of the Principal *Sudder Ameen*, and that the costs of the litigation both below and here should be given to the Appellant, the Plaintiff.

14th July, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon Sir James William Colvile, and the Right Hon. Sir Joseph Napier. Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

MAHARAJAH DHEERAJ MATAB CHUND, BAHADOOR,* } *Appellant*,

versus

BULRAM SINGH & another, *Respondents*.

Act XIV. of 1859, s. 20—Execution—Limitation—Proceeding—Ram Sahaye Singh v. *Degum Singh (1).*

So long as an actual *bonâ fide* contest is going on in Court between a decree-holder and the judgment-debtor as to the judgment, there is a pending "proceeding" within section 20 of Act XIV of 1859, and the period of limitation must be computed from the Court's decision.

The decision in the case of *Ram Sahaye Singh* v. *Degum Singh* (1) commented on and approved of.

THE RIGHT HON. LORD CAIRNS:

THE question in this appeal is, the proper construction of the 20th section of Act, No. XIV. of 1859, which enacts [His Lordship read the section,]† and proceeded:

* 13, Moore's I A, p. 479; 5 B. L. R, p 611

(1) Case No. 778 of 1865; 11th September, 1866.

† The 20th section enacts that, "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce any such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution."

—Was there, at any time within three years preceding the application for execution made in the Court below, any proceeding which had been taken to keep in force the judgment, decree, or order originally made in favour of the present Appellant?

What took place was this. The original Debtor died. The Appellant desired to have the benefit of his judgment against the heir, or heirs-at-law of the Debtor. In this state of things he applied to the Judge for process of execution against the Respondents as heirs, and on the 26th of December, 1861, this application was made to assume the form of a cause. It was marked and described as No. 106 of 1861, and was sent by the Judge to the Principal *Sudder Ameen*, who directed the usual notices to issue. It is the history of that cause which we have to trace for the purpose of seeing, whether it was kept alive, or whether it became at any, and what stage, inoperative.

On the 24th of January, 1862, the *Nazir* of the Court made his report that another Officer, a *Peon*, had gone to the place stated, and searched for the Judgment-debtors, but was unable to find them, and had affixed the notice in a particular way, and served it upon the village Watchman. Then, in February, 1862, the next month, the Respondents filed a petition of objections before the Principal *Sudder Ameen*, not disputing the service of the notice, but objecting to execution proceeding on the grounds, that it was barred by limitation, and that no estate of the Judgment-debtor had come into their possession. There was, therefore, a *litis contestatio* between the parties to this suit, the representatives of Defendants to the suit appearing, and contesting the right of the Plaintiff to have the benefit of the execution against the original Defendant. In March, 1862, without any delay, the Appellant put in a petition by way of answer to the petition which the Respondents had put in, contesting the allegations in point of law that the Respondents had made. In that state of things, both parties having placed their view of their respective cases upon record, on the 4th of March, 1862, the Principal *Sudder Ameen* ordered that on the last petition, if there were no objection, the notice of sale should be drawn up in due order; and it appears that, following upon this, on the 29th of November, 1862, a species of hearing was brought on before the Principal *Sudder Ameen*, for the purpose of discussing all or some of the allegations which had been made in these petitions, and it was then, upon that day, the 29th of November, 1862, that the Principal *Sudder Ameen* pronounced his opinion as follows: "Whereas the heir of the Judgment-debtor is a respectable woman, the final process cannot be issued against her. Let the number of the suit be struck off from this record, at present."

Now, I pass by the question, whether that was meant to be a final judgment, or only a temporary delay interposed in the proceeding of the suit, and I will suppose, for the purpose of argument, that it was meant to be a final judgment. It was at this point, and at this point for the first time, that the suit, which up to that time had been pending, was disposed of by any Order of the Court, and up to that time there appears certainly to have been no delay on the part of either side. It was prosecuted *bonâ fide*, and defended *bonâ fide*; and it appears to their Lordships, that so long as that process was going on, so long as there were these allegations and counter-allegations, as to the right to revive and prosecute the decree, there was a pending proceeding, and it would have been out of the power of the Appellant to have done anything but wait for the result and the Order of the Court upon that pending proceeding.

Their Lordships, therefore, were the case not affected by any authority, or by any prevalent course of practice in *India*, would have no hesitation whatever in holding, that there was here a proceeding to keep in force a judgment, decree, or order originally made; that that proceeding was pending every day of the time until it was disposed of on the 29th of November, 1862, by the Order to which I have referred.

But it has been suggested in the judgment of the Court, in the present case, that the matter is affected by a former decision of the Court in *India*, *Gooroo Doss*

Auckholee v. *Modhoo Koondoo* (6 W. R. Mis. 98), which had led to a conclusion different from the one which we have expressed. Their Lordships have referred to the case relied upon, and they desire to say, that they see no reason whatever to find fault with the decision in that case. That case appears to have laid down this rule, that all acts done either by the Court, or by an Officer of the Court, or *bonâ fide* by the Applicant for enforcing the decree, or keeping it in force, would satisfy the term "some proceeding" in the 20th section; but then the Court go on to qualify that by saying, that there might be things done by the Court, or there might be things done by the party which might appear at first sight to be steps taken in execution and prosecution of his right, but which really might be done in such a way as, so far from showing diligence or vigilance on his part, might be so tainted with want of good faith, that they would lead to a totally opposite conclusion; and in the particular case before the Court, they found that there had been an application made to execute the decree, that that had been pending for a considerable time before the Court, and had ultimately been dismissed by the Court itself by an act of the Court for want of prosecution; and applying other general observations to that case, they appear to have arrived at the conclusion, that the circumstance that there had been a want of diligence which obliged the Court to dismiss the suit for want of prosecution, made the act of the Court there not to be an act which could satisfy the expression "some proceeding" within the 20th section.

Their Lordships see no reason whatever to disapprove of that decision. It would, as it has been pointed out, be a very strange result should the mere chronicling or recording by the Court of the fact that there had been delay and laches on the part of the litigant, such as obliged them to strike the suit off the file, if that act of the Court done under such circumstances were to redound to the benefit of the litigant, and to enable him to say that he had been using due diligence within the period of three years. Not in any way disapproving, therefore, of the decision to which we have been referred, their Lordships are of opinion that in the present case the proceeding which has been taken were within three years after the Order of the Principal *Sudder Ameen* of the 29th of November, 1862, was made. We, therefore, will humbly recommend to Her Majesty that the Order should be reversed, and that the Appellant should have his costs of this appeal.

14th July, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

RAJAH LELANUND SINGH,* ... ... } *Appellant,*

versus

MAHARAJAH LUCKMISSUR SINGH BAHADOOR, } *Respondent.*

Practice—Execution of Decree made on Appeal—Mesne Profits.

When the Privy Council declares an Appellant entitled to real property of which he was out of possession, and directs the High Court to make the inquiry necessary to ascertain what is comprised therein, and to proceed in the suit as upon the result of such inquiry may appear to be just, the High Court on being applied to for execution ought, besides giving possession, to ascertain and award the mesne profits up to the date of giving possession.

15th July, 1870.

THE consideration of their Lordships judgment was reserved, and now pronounced by

THE RIGHT HON. LORD CAIRNS:

The Appellant in this case originally sued to recover from the Respondent cer-

* 13, Moore's I. A., p. 490; 5 B. L. R., p. 605.

tain villages and lands, alleging that on a true adjustment of the boundaries they belonged to the *Nizamut Mehals*, and not to *Havalee*. He claimed also mesne profits. The suit was dismissed by the Court of First Instance, and that dismissal was confirmed by the *Sudder Dewanny Adawlut*.

Their Lordships, on whose recommendation the Order in question was made, thought that this dismissal was wrong, and in an ordinary case they would have made the final decree which the appellate Court in *India* ought to have made. Not having materials for doing this, they recommended the Order in Council in question, which declared the Appellant absolutely entitled to the villages of *Gourmahee* and *Goruckpore*, and to all the rest of the land in dispute which was not comprised in the settlement of *Havalee*. By the declaration in the Order in Council it limited *Havalee* to 123,207 *beegahs*, including 129 *beegahs* and 19 *biswahs*, part of *Beadon* settlement, and so much of the land in dispute as belonged to or was attributable to the *Bunkur* and *Boondee Mehals*. It then directed the High Court of *Calcutta* to make the inquiry necessary to understand what this last-mentioned land was, and to proceed in the suit as upon the result of such inquiry might seem just,—dealing with the whole question of costs, including the taxed costs of the appeal.

Now, in this state of things, their Lordships are of opinion, that the Appellant might well have waited the result of those inquiries and accounts before applying to the High Court in *Calcutta* for the execution of the earlier part of the decree with reference to those villages to which he was declared entitled; and their Lordships also are of opinion, that the High Court at *Calcutta* might well have declined, if they had been so minded, to execute the earlier part of the decree until they had completed the whole of the inquiries and accounts. However, the Appellant did apply to the Court for the execution of the part of the decree which related to the two villages of *Gourmahee* and *Goruckpore*, to which his title had been declared, and the single Judge of the High Court, on whom appears to have devolved the duty of answering the application, was willing to execute, and proceeded to execute the decree, so far as regards possession of these two villages. He stated his opinion to be, that with regard to mesne profits, inasmuch as the Order of Her Majesty in Council had not specifically mentioned anything about mesne profits, it would not be proper for the Court in *India*, in executing a decree, to make any Order with regard to the mesne profits.

That Order standing would of course be an impediment hereafter, even after the inquiries directed by the other part of the decree were completed, in the way of any application by the Appellant on the subject of mesne profits from those two villages; and, inasmuch as their Lordships are of opinion, that had the first part of the Order in Council stood alone, it would have been one of the consequential directions proper to be given, to ascertain the amount of mesne profits at the time that possession of the villages was given, they think that, inasmuch as one part of the Order, namely, that with regard to possession, has been executed by the High Court, everything connected with that possession should be executed at the same time.

Their Lordships are of opinion, that the right to mesne profits is consequential on the declaration in the Order in Council, and upon possession. They, therefore, think that the High Court should proceed to ascertain, either itself or by an issue properly framed, to be ascertained by the local Court, what the amount due to the Appellant for mesne profits upon these two villages is. They will, therefore, humbly recommend to Her Majesty that an Order should be made to that effect; but, inasmuch as the difficulty has arisen, partly by the application of the Appellant to execute the decree piecemeal, and partly by the erroneous apprehension which the Court appears to have entertained of the effect of the judgment of their Lordships, their Lordships think it a case in which there ought to be no costs of the appeal (*a*).

(*a*) See *Rodger* v. *The Comptoir D'Escompte de Paris*, 7 Moore's P. C. Cases (N. S.), 314, as to the effect of an Order in Council carrying by its own force interest.

15th July, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, Madras.

SRI GAJAPATHI RADHIKA PATTA MAHA DEVI GARU,* ... ... } *Appellant,*

versus

SRI GAJAPATHI NILAMANI PATTA MAHA DEVI GARU, ... } *Respondent.*

AND

SRI GAJAPATHI RADHIKA PATTA MAHA DEVI GARU, ... } *Appellant,*

versus

SRI GAJAPATHI HARI KRISHNA DEVI GARU, } *Respondent.*

Disputes settled by Family Arrangement —Interpretation—Document.

Where a dispute in a Hindu family as to legitimacy and the right to succession resulted in a family arrangement as to the mode in which the estate was to be held by the sons,—*held*, that such a document ought not to be construed narrowly by a strict interpretation of the literal meaning of the words, but that the object and general spirit are the best keys to the interpretation.

Where a family arrangement, if construed strictly, would have given a *Talook* in the event of the death of a younger son to such of the lawful widows as should have male issue,—*held* that, as such a disposition would contravene the ordinary rules of devolution of Hindu property, and be contrary to the usages of Hindus, and as there was no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers was inadmissible.

29th July, 1870.

THEIR Lordships' judgment having been reserved, was now delivered by

THE RIGHT HON. LORD CAIRNS:

These are appeals from a decree of the High Court of Judicature at *Madras*.

The property which is the subject of litigation is called the *Tekaly Talook*. This property was acquired by purchase by one *Pathmanaha*, described hereafter as the common ancestor. A Lady, described as his principal Wife, by whom he had no issue, survived him. He left also two Sons by different Mothers. Between the elder of these Sons, named *Gopinadha Davu*, and his Father a quarrel of long standing existed, which continued to the time of the death of the latter. *Gopinadha Davu* was at that time thirty-six years old; he did not live with his Father, and was absent at the time of his death.

The common ancestor left also a younger Son named *Khrishna*, who, at the death of his Father, was a child about seven years of age. This boy appears to have been treated by his Father as legitimate. The legitimacy of both Sons was doubted by the Collector of the District, who, at the death of their Father, placed the above-described Widow in possession of the *Talook* by way of a temporary arrangement for the management and protection of the family estate, and with a view to the interests of the Government, in the collection of the revenue.

The doubts about the legitimacy of these Sons, which the Collector entertained, may have had their origin in the nature of the marriages contracted by the common ancestor with their respective Mothers, which were in the *Gandharva* form, and in the alleged difference of caste between the common ancestor and his Wives, the Mothers of these Sons. This irregularity was supposed by some persons to render the progeny of such marriages illegitimate.

Whatever was the origin, and whatever the weight of these doubts concerning the legitimacy of the Sons, or of either of them, it is at least certain that they were grave enough to lead to the family arrangement about to be stated.

Supposing the Sons, or either of them, to have been legitimate, the Widow would have been entitled to maintenance only. Had both the Sons been illegitimate, their claim, unless some special custom governed the case (which is not in proof), would have been to maintenance only. In this

* 13, Moore's I. A., p. 497; 6 B. L. R., p. 202.

last-named case, the Widow would have had the ordinary estate of a Hindoo Widow.

As each Son asserted his own legitimacy, and denied that of the other, the dispute, unless adjusted and settled amicably, would probably have led to litigation, and as the estate was already an embarrassed one, the Collector, not without reason, represented such litigation as likely to involve the ruin of the family.

The management of the estate under the Widow was not prosperous. The Collector proposed to her to place the estate under the management of the elder Son, of whom he appears to have entertained a favourable opinion. The Widow is described as at enmity with the elder, and favourable to the younger Son. The Collector's advice, which was undoubtedly directed to the preservation of the family property, was adopted, and if reluctantly adopted, it was nevertheless acted on by the members of the family. The Collector had advised a compromise, and in consequence of this advice and suggestion, the Lady addressed a petition to the Collector, dated the 26th of November, 1838. In her petition she stated, that she had that day made a settlement, reconciled both her Sons, and caused an interchange of agreement between them to the effect that they were equally entitled to the *Talook* which belonged to her Husband. Her petition then proceeded to state further terms of this arrangement, to the effect that the management should be held by *Gopinadha* until *Khrishna* attained his majority; that on the younger attaining his majority, the elder should give up a moiety to the younger as his own, and retain a moiety for himself. It prayed that the sale of the *zemindary* might be stayed, and possession given to *Gopinadha* of the *Talook*. The petition also contained a statement of the allowances to be made to herself and the Sons, and of some minor matters not material to the decision of this appeal.

This agreement constituted the basis of the compromise suggested, it amounted to a family arrangement entered into for the preservation of the estate; and though the younger Son was a minor at the time, he ratified it at full age, and became bound from its date by all its terms.

The construction and effect of this agreement will be afterwards considered.

The agreement was acted upon until the younger Son reached his majority. That was the period originally fixed for the actual division of the estate, and its separate possession in moieties. At that time, the actual division of the estate was judged by the Sons to be inexpedient, and it was further postponed. Another document was at this time executed between the two Sons, bearing date the 24th July, 1844. This document stated that disputes existed between them respecting the ancestral property in cash, the division of the *Talook*, and the accounts of receipts and disbursements of the *Talook*. It stated that they had addressed several *Arzees* (petitions) to the Collector, that he had explained to them the circumstances, and then it proceeded to state "the terms for our future guidance."

This document does not state any new compact or agreement to have been formed to vary the essential terms of the original compromise, but seems rather to have been designed as supplemental to it, and made with a view to carry out its provisions conformably to the Collector's explanations with such variations of detail as the convenience of the parties required. After stating certain inconveniences, which would result from an immediate division of the *Talook*, it provides "that the division should be postponed at present," but the reason assigned is to avoid the probability of loss from a present division. Consequent on that postponement it contains some provisions as to equality of rank and dignity between the Sons, whilst the elder retained the ostensible headship, but it provides that the affairs of the *Talook*, or *zemindary*, should be managed by both unanimously.

A document of this character between natives should not be construed narrowly, by a strict interpretation of the literal meaning of the words. Its object and general spirit are the best keys to the interpretation of language probably not very carefully studied.

The second clause of this document, if it were construed literally, would appear to give the *Talook*, in the event of the

death of the younger Son, to such of the lawful Widows as shall have male issue; but as such a disposition would at once contravene the ordinary rules of devolution of Hindoo property, and not be in accordance with the usages of Hindoos, and as there is no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers, is obviously inadmissible.

The document provides also that *Khrishna*, after the death of his elder Brother, shall be recognized as the *Zemindar* of the whole *Talook*.

This provision might take effect without any substantial alteration of the terms of the first agreement. It is consistent in its terms with a custom prevalent in some properties in this part of the country. The headship in such cases is constituted in one member of a family, whilst the beneficial enjoyment of the proceeds may be shared with the other members. It by no means follows, even from the literal terms of that section, that either Brother deliberately agreed to exclude his own male issue if he had any, as sharers, during the survivorship of the other Brother. This clause contains a further provision, about which considerable doubt has been entertained, both as to the true translation of the words and its legal effect. This clause states an alternate contingent provision consequent on the failure of legitimate male issue by the Widows of both Sons; it provides that the *Talook* shall be divided in equal shares, if there be Sons born out of wedlock. This agreement further provides, that Rs. 100 a month shall be paid of the *zemindary* to the family which shall have no title to the *Talook;* but it contains no declaration of the cause of cessor of interest, so as to show in what event they thought such exclusion might arise. It is to be observed, further, that there is no express gift to illegitimate issue, and that the time of the division of the *Talook* on that contingency is not defined.

The younger predeceased the elder Son. The elder retained the headship and property of the family; there was no one entitled to dispute it with him, as *Khrishna* left no male issue, unless the family had been a divided one, in which case the Widow of the latter would have been entitled to her Husband's share. She does not appear to have preferred any claim to it during the elder Son's life-time; but no inference unfavourable to her subsequent claim should be drawn from that circumstance alone, as Hindoo females are often ignorant of and unable to assert their rights.

On the death of the elder Son, a dispute arose as to the possession. His Widow was placed or preserved in possession of the estate. This step decided nothing as to her proprietary right. As the Widow of the surviving Brother, apparently the sole proprietor, she was rightly placed in possession.

Her title to retain and enjoy the sole possession and usufruct was disputed by the Widow of *Khrishna*, who claimed a moiety as the Widow of a deceased Brother in a divided family. She preferred her suit numbered 72 of 1861, against the present Appellant, the Widow of the elder Son.

Another suit was brought about the same time by *Hari Khrishna* against the same Defendant, which suit is numbered 62 of 1861. The title was stated to be as Son of the last Owner, the elder Son. He claimed the whole property, stating his title either as a legitimate or as an illegitimate Son, to be preferable to the alleged title of either Widow.

In suit, No. 72, the Plaintiff stated the property to be divided, and that allegation was one necessary to her recovery.

In suit, No. 62, the Plaintiff declared the property to be joint, and to have become solely owned by his Father by survivorship.

The Judge dismissed both suits.

Both Plaintiffs appealed to the High Court. The present Appellant, the original Defendant in both suits, was Respondent in both appeals.

The appeals were allowed by the High Court, which reversed both decrees below, and made a decree declaring each Widow and the Son, *Hari Khrishna*, whom it found to be illegitimate, to be entitled in equal shares, together with any other illegitimate Sons of either Brother. It di-

rected the suits to proceed as an administration suit, and directed inquiries as to the illegitimate issue. The result of this inquiry has been that, two other illegitimate Sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two Widows and three illegitimate Sons respectively.

From this decree the Widow of the elder Son, the original Respondent in each suit, has alone appealed.

Much of the evidence which engaged the attention of both Courts below, may be dismissed from the consideration of their Lordships.

The evidence as to the nature of the marriages, and the rules or laws of caste, together with the consideration of the effect on legitimacy of irregular marriages between persons of unequal caste, is in the view which their Lordships take of this case unnecessary to be stated, or observed upon.

The litigation was confined to persons, all of whom claimed under the Sons respectively. The estate was taken possession of, and enjoyed by these Sons, under the compromise or family arrangement before stated. That compromise proceeded on the basis of legitimacy.

Whether both Sons were legitimate, or only one legitimate, and to whichever of the two that *status* might really attach, was a question no longer material to the consideration of the rights devolving to persons taking under that compromise and family settlement, by which the *status* assumed was to be taken as the real state of the family.

The case of *Abraham* v. *Abraham* (9 Moore's Ind. App. Cases, 195, *ante*, p. 10), shows that a family ceasing to be Hindoos in religion, may still enjoy their property under the Hindoo law; and the same principle is applicable, *inter se*, to the members of a Hindoo family entering into possession of an estate under such a compromise as that which took place in this family.

The Widow, though in one passage she terms the *Talook* her *zemindary*, as in a certain sense it was, did not intend to convey, and did not in fact convey, the property to the Sons; she executed no deed nor instrument of gift whatever. Neither Son admitted his illegitimacy, nor consented to take a gift on that admission. The Widow accepted maintenance, and surrendered possession. Possession was taken by her Sons, upon her abandonment of the estate; and this possession was taken also under their own agreement, which, as well as her petition which referred to it, proceeded on an acknowledgment common to all three of an antecedent right in both the Sons whom she describes as "her Sons." She had no estate entitling her to be an absolute Donor, in any view of her position. Whatever effect this transaction might have as against heirs of the common ancestor, after the death of the Widow, it bound her and the Sons, and all claiming under them.

These instruments do not purport to give any new quality of descent to the *Talook*, even if such quality were capable of being derived from the agreement of two or more Owners. There is no evidence to show that the nature of the estate and its descendible character were meant to be affected by this transaction.

The case depends entirely on the construction of the petition and the agreements before referred to. The *Talook* itself is not the sole subject of the arrangement. A reference is made to one item—ancestral cash, as forming an element of dispute, and to other articles of property. The decision appealed against has given neither Widow a preference over the other. In the opinion of their Lordships, the High Court erred in making the illegitimate Sons sharers with the Widows, and their Lordships have now to consider the more difficult part of this case, whether the Widow of the elder and surviving Son has a title by survivorship to the whole *Talook*.

If this case could rightly be viewed as it was viewed in the Court of First Instance, as one governed by the ordinary presumption in Hindoo Law, that family property is joint, and by the ordinary law of the place where this *Talook* was situate, as to the devolution by survivorship under such failure of male issue as occurred in this case, the decision of it would be at-

tended with no difficulty, and the decree of the Court below dismissing the Widow's suit would have to be restored; but, upon this subject, though not for the reasons assigned by the Judges of the High Court, their Lordships think such conclusion inadmissible.

The property was held under a family arrangement which silenced disputes, but contained no admission that such disputes were without foundation.

Neither Son admitted that they were, *inter se*, antecedently heirs to each other in the then state of the family, nor admitted a right of succession of either to the other beyond that which this arrangement itself specifies.

It is not stipulated in terms that the property shall be enjoyed as that of a joint undivided Hindoo family; nor is any succession by Widows on the true construction of the instruments provided for. The documents in question contain terms some of which are consistent, and others inconsistent, with the rights to the possession, use, and enjoyment of an undivided estate.

The first agreement contains in the first condition words that impart division and consequent management. This division is not in terms referred to a time subsequent to the commencement of the management spoken of. The next sentence clearly points, on the majority of the younger Son, to an actual division and a possession in moieties. It provides for each Son (the younger being a mere child) an equal present income by way of maintenance, and further, that each should pay out of his own income his own expenses of maintaining his own servants and relations; and by the last article it provides for an equal division, from that time, of such surplus as might exist after defraying all the outgoings spoken of, which are to fall on the common money. These provisions are not such as would be applicable to a joint Hindoo family property. On the other hand, it seems to have been supposed by both Sons, that a survivorship by one would or might exclude the family of the other, and there are several other provisions which, though not absolutely inconsistent with mere managership, more resemble that of the constituted Manager of a joint Hindoo family.

The second agreement recites that disputes had arisen concerning the ancestral property in cash, the division of the *Talook*, and the accounts of the receipts and disbursements of the *Talook*: it proceeds to state that "the Collector having sent for both of us to the *Nuzar*, and communicated the circumstances to us, we understand the same; and the terms for our future guidance are hereunder specified." This language is certainly more consistent with disputes arising out of the existing arrangement than with a substitution for it by the Sons alone, of their own authority, of some new terms of compromise. The disputes seem also to imply some precedent division of property constituting rights in a surplus after receipts and disbursements are accounted for. So far they are consistent with the provisions of the first agreement as to the division of any surplus. Again, the fifth article, which relates to future debts; the sixth, which provides for the division of future surplus profits of the *Talook*; and the seventh, which refers to a settlement in respect to the ancestral money and the money already acquired from the *Talook*, and implies a division of these funds, are all inconsistent with the hypothesis that the Brothers were, or considered themselves to be, members of an undivided Hindoo family.

Nothing is stated to show that the *Talook* must be regulated by one law of succession and the rest of the property by another. It seems, therefore, to their Lordships, more proper to consider the provisions, as to the *Talook*, as regulated by its peculiar nature, and influenced by the necessities of its proper management, and the maintenance of the dignity attached to it, rather than as furnishing alone the rule for the solution of the difficult question to be determined between the two Widows.

The construction of these documents is beset with considerable doubt and difficulty, but their Lordships are on the whole of opinion, that although they postpone indefinitely the actual division of the *Talook* by metes and bounds, and provide for

its joint management, and, in certain events which have not happened, for its devolution otherwise than by the law which regulates the succession to separate property, they nevertheless contemplate its enjoyment in other respects by the two Brothers as by members of a divided family, and the actual division of other family property. Their Lordships accordingly think, that the finding of the High Court that the Brothers were not members of a joint and undivided Hindoo family must be taken to be correct. It follows that, at least wherever the agreements have not specifically provided for the contrary—even assuming that they could so provide—the succession to this property must be governed by the law which governs the succession to separate estate. How, then, is the law which makes each Widow succeed to her Husband's share affected by the terms of the particular instruments?

Equality between the two Widows is consonant to the expressed desire to maintain, as far as possible, equality between their respective Husbands. The exclusion of Widows by male legitimate issue, is an exclusion which would prevail equally in a divided, or undivided, family. The agreement provides, by language not apt nor correct, for the devolution on Sons of lawful Widows: in case one has male issue, and the others none, a preference is declared; but where each is childless, the agreements prefer neither. In such a case, then, the law alone can regulate the succession. The instruments do not support by any clear expression of intention, the claim of the Widow of the elder Son to exclude the other. There is no ground for confining the estates of the Sons to life estates. The mortgage is inconsistent with that view. The provisions as to the possession of the *Talook* alone may refer merely to the titular dignity, and ceremonial usage. The equal division between Widows and illegitimate Sons is not likely to have been conceived by the framers or advisers of this compromise.

Their Lordships will, therefore, recommend to Her Majesty that the decree (or decrees, if separate decrees have been made in the two suits) of the High Court of the 22nd of April, 1865, be reversed, and that in lieu thereof a decree be made in suit, No. 62, of 1861, affirming the decree of the *Zillah* Judge of the 13th of March, 1862, and dismissing the appeal therefrom to the High Court with costs; and that in suit, No. 72, of 1861, a decree be made declaring that, according to the true construction of the agreements of the 26th of November, 1838, and the 29th of July, 1844, the Widow of *Gopinadha*, the Appellant, and the Respondent, the Widow of *Khrishna*, upon the deaths of *Gopinadha* and *Khrishna* without male issue, became entitled from and after the deaths of *Gopinadha*, as Hindoo Widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the Respondent, *Nilamani Patti*, but without costs. The High Court, in executing Her Majesty's Order, must take all necessary steps to undo whatever may have been done under the decree reversed inconsistent with the rights thus declared. Adverting to the difficulties occasioned by the instruments executed by the Brothers, their Lordships think there should be no costs, as between the Widows either in the Courts below, or here on appeal.

1st and 2nd December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

BABOO BODHNARAIN SINGH, and others,* ... } *Appellants*,

versus

BABOO OMRAO SINGH, & others, ... } *Respondents*.

BY REVIVOR

AJOODHYA PROSHAD SINGH, and others, representatives of BABOO BODHNARAIN SINGH, } *Appellants*,

versus

BABOO OMRAO SINGH, & others, ... } *Respondents*.

Evidence, Hearsay, admitted under the Circumstances—Lunacy—Act XXXV. of 1858.

Where the High Court founded their judgment upon evidence which did not justify the conclusion, the Judicial Committee reviewed the whole evidence, in order to ascertain whether the decree could be supported.

On an inquiry as to the fact of lunacy under Act XXXV. of 1858, any finding as to the actual time when the lunacy began is beyond the jurisdiction of the judicial officer making the enquiry.

Where the fact of lunacy was admitted, and the question was the date at which it commenced, the evidence of a planter in the neighbourhood as to common report for years in the village as to the lunacy having been admitted by the lower Court, the Judicial Committee refused to reject it.

The rule as to admission of evidence laid down by Dr. Lushington in *Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo*, (7 Moore's I. A., p. 137, 1 P. C. J., p. 639) followed.

* 13, Moore's I. A., p. 519; 6 B. L. R., p. 509.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

In this case an action in the nature of an ejectment was brought by the Respondent, *Baboo Omrao Singh*, as the Committee, and in right of his Wife (a lunatic) for the recovery of certain parcels of land which were admitted to be in the possession of the Appellants. The plaint also asked that a certain *Ikrarnamah* should be set aside. Their Lordships may at once dispose of the latter question by saying that it appears to them, as it appeared to the High Court of *Bengal*, to be one which cannot be disposed of in this suit; that it is a question which can only be determined between the Appellants and the persons who are named as their co-Defendants on the record. Their Lordships, therefore, will deal with the case, as being nothing but an action in the nature of an ejectment for the recovery of the lands in question from the Appellants.

The title upon which the Plaintiff sued, is based upon the fact that his Wife, as the Daughter of *Mussumat Indrabuttee*, the last surviving Widow of one *Teijnarain Singh*, became on the death of her Mother entitled to the property as the next heir of her Father, *Teijnarain Singh*; and the principal issue raised in the cause is, whether that Lady had not lost her right to inherit, by reason of her lunacy. It seems to be admitted on both sides (the point has not been argued here, nor was it argued in the Court below) that by the Hindoo law, if she was, when the succession opened to her, that is to say, on the death of her Mother, insane, she did lose her right, and that it passed to the three persons who are mentioned in the record to be her Sons.

The sole question, therefore, for their Lordships' determination, is a question of fact, whether the Lady was or was not insane at the time of her Mother's death, or whether, as alleged by the Plaintiff, she became insane within two months after that event. This issue of fact was found in favour of the Appellants by the Court of First Instance, the Principal *Sudder*

Ameen. His judgment was reversed by the High Court upon certain grounds, and it has been contended before their Lordships that those grounds are unsatisfactory, inasmuch as the appellate Court has given undue weight to a certain document which had been admitted in evidence in the cause. Hence, there being two conflicting judgments, and a grave question touching the weight which ought to be given to a particular document, it has fallen to their Lordships to deal with this case according to their own view of the evidence taken in the cause, and to form their own conclusions upon it.

It seems to their Lordships desirable in the first instance to consider whether, by reason of the undue weight which the High Court gave to the document in question, the value of its judgment is destroyed. That document is the report of the *Moonsiff* made upon the application for the appointment of the Husband as Committee. It appears that within two months after the death of *Mussumat Indrabuttee*, *Baboo Omrao Singh* applied to the *Zillah* Judge, under Act, No. XXXV. of 1858 of the Indian Legislature, to be appointed Committee of his Wife, alleging her lunacy. The Act directs that in case the party lives at a certain distance from the *Sudder* station, the Judge shall delegate the inquiry to a local Officer; who in this case was the *Moonsiff*. The local Officer has to report to the Judge, who passes the final Order in the case. The Act, however, contemplates only the question of lunacy or sanity at the time of the inquiry; there is no provision in the Act that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

In these circumstances the Appellants, who had long been pressing their claims in respect of this property against the other branch of the family, thought it expedient to appear as Objectors on this proceeding. It is not clear that the Judge passed any Order allowing them to go before the *Moonsiff*, but in some way or other they appear to have been admitted before the *Moonsiff*. They did not attend throughout the inquiry, and they failed to produce Witnesses to prove that the Lady had been a lunatic from the time at which they alleged she became so, or at any time before the death of *Mussumat Indrabuttee*. The result, therefore, was, that they did not go into their case before the *Moonsiff*. The *Moonsiff*, on the other hand, took evidence on the part of the Respondent, who was seeking to be appointed Committee, and came to the conclusion that the Lady was of unsound mind. His report states what has just been said about his having taken the evidence, and then contains this passage:—"In this case both parties acknowledge the lunacy of *Mussumat Sreebuttee;* but the dispute between them is on this subject. The Applicant writes that *Mussumat Sreebuttee* became insane in the month of *Maugh*, 1267, *Fuslee*, subsequent to the death of her Mother, *Mussumat Indrabuttee*, and the Interveners state contrary to this, that she has been a lunatic for a very long time, that is to say from anterior to the death of *Mussumat Indrabuttee*, her Mother. From the evidence of the Witnesses which have been produced on the part of Applicant (from Nos. 1 to 29), it has become known that *Mussumat Sreebuttee*, Daughter of *Mussumat Indrabuttee*, deceased, after her death, became insane, in the month of *Maugh*, 1267, *Fuslee*, at *Mouzah Dinnaree*, *Pergunnah Kundhour*, in the house of her Husband, and that she continues in the same state up to this time. From the evidence as to the luncy taken by me before the Interveners, it has been ascertained that the *Mussumat* aforesaid, is quite insane. The Interveners have produced no proofs before me from which it may be learnt that the *Mussumat* aforesaid has been insane for a greater length of time." This report having been made to the Judge, the Appellants again objected before the Judge, but the Judge very properly held that he had no jurisdiction to decide the question between the parties; that the simple issue was whether *Mussumat Indrabuttee* was a person possessed of any property, and if so, whether she was sane or insane, and required the protection of a Committee; and accordingly he appointed the Husband Committee. The learned Judge who delivered the judgment of the High Court seems to have thought that

the evidence before him being conflicting, the scale was turned by the document to which I have just referred. He says, "The evidence adduced by them (the Appellants) is not only very far from satisfactory, but it is directly opposed to the recorded opinion of the *Moonsiff* deputed by the *Zillah* Judge, in 1860, to investigate the matter of *Mussumat Sreebuttee's* lunacy." It appears to their Lordships that if he meant to give to this finding, what we do not think he did mean to give, the effect of *res judicata* between the parties, he was clearly wrong. There was no adjudication by any competent Tribunal upon the point in issue in this suit. The *Moonsiff* had no jurisdiction to decide it; nor had the Appellants in strictness any *locus standi* before him. If, on the other hand, he meant to say, that the conduct of the Appellants, as evidenced by that proceeding, had been such as to lead to an inference that the case they afterwards made was untrue, he seems also to their Lordships to have given an effect to their conduct which it does not fairly bear. All that appears is, that they went unnecessarily before a Tribunal which could not have decided the question between them and the opposite party, and that being there they failed to produce their evidence. Their Lordships are of opinion that it is neither a necessary nor a legitimate inference from that fact that the evidence which the Appellants have produced in this suit ought not to be believed. That being so, their Lordships think that the judgment of the High Court, whether the Judges came to a right conclusion or to a wrong conclusion, has been put upon grounds which do not justify that conclusion.

Their Lordships have then to consider the effect of the whole evidence. The issue is a remarkably simple one; it is whether this Lady, admitted on both sides to be a lunatic, became a lunatic between the death of her Mother and the period at which the Husband applied to be appointed Committee,—that is to say, two months afterwards,—or whether she had been a lunatic for some considerable period before the death of *Mussumat Indrabuttee*. Now, their Lordships will concede that the burden of proof may be on the side of the Appellants,—that it may be sufficient for the other party, in proving his title, to prove that this Lady, now a lunatic, but who certainly had not always been a lunatic, was the nearest heiress to *Teijnarain Singh*; but it is evidently a burden which becomes of a much lighter character when the lunacy is admitted to have supervened within two months of the critical time, the death of *Mussumat Indrabuttee*.

Then, again, the case of the Respondents is open to the observation which has been made at the Bar, that if it is true, far better evidence of it might have been produced than has been produced by the Respondents. For instance, if the woman became mad within two months of her Mother's death, one would suppose that that madness must have been caused by some disorder which would require and receive medical treatment. We have, however, no medical evidence whatever. We have nothing to show, that, having been sane up to a certain period, she became suddenly ill. Again, we have none of the near relations of the family produced. The mere fact that the Husband verifies in the ordinary way the truth of the allegation in the plaint, is no answer to the suggestion that, if he had a true case, he, the nearest relation of this party, might have come forward and shown how the madness came on and all the circumstances relating to it. He, again, has within his power all her family and female domestics; but there is not a single Witness produced on that side, except the Witnesses of the character so common in the Indian Courts, viz., male menial servants, dependants, and *Ryots* living in the neighbourhood, who are all obviously persons less likely to have the circumstances deposed to within their knowledge, and to be far less trustworthy, than the members of the family who might have been produced. On the other hand, it is said that the evidence produced by the Appellants is of no better character. It does not seem to their Lordships that this observation is altogether just. There is certainly, at least, one person produced by the Appellants who does stand to the parties in near relationship. No doubt his testimony is open to the observation that

though the Uncle of the lunatic, he is also the Father-in-law of one of the Appellants, but still he is a man of position; he is a man who from his relationship must have had the means of knowing what he deposes to, and he seems upon the whole to be the most trustworthy Witness that has been produced to give direct evidence as to the date of the lunacy on either side. Again, there are the other Witnesses referred to by Sir *Roundell Palmer*, viz., the two servants, one of whom was employed to take care of her, and they seem to have had more peculiar means of knowledge than those possessed by most of the Witnesses on the other side. Then a great deal has been said touching the evidence of the Witness upon whom the Principal *Sudder Ameen* seems, from the expressions in his judgment, to have placed the greatest reliance,—I mean the evidence of Mr. *Duff*. It has been argued that Mr. *Duff's* evidence, being mere hearsay, was not admissible at all. Their Lordships are not prepared to admit that this evidence is properly described as mere hearsay. The Witness speaks of his own knowledge to the fact, that at a particular period the insanity of *Mussumat Sreebuttee* was rumoured and generally believed in the District with which he was conversant. Their Lordships do not feel it necessary to decide whether that testimony, if objected to, would have been receivable on the trial of such an issue as this in an English Court of Justice. It has been received in *India;* and their Lordships conceive that they ought to deal with it according to the principles enunciated by Dr. *Lushington* in *Unide Rajaha Raje Bommarauze, Bahadoor* v. *Pemmasamy Vencatadry Naidoo,* the case mentioned in the course of the argument (7 Moore's Ind. App. Cases, 137; 1 P. C. J., p. 637), as those which govern this Board, viz., that when evidence of doubtful admissibility has, under the looser practice of the Indian Courts, been received in a cause, their Lordships, sitting as an appellate Court, will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. In the present case their Lordships think, that they ought not wholly to reject Mr. *Duff's* testimony. The next question is, what effect can legitimately be given to it. If we had to deal here with the broad question of sanity or insanity,—whether *Mussumat Sreebuttee* were now sane or insane,—Mr. *Duff's* evidence would be of little or no value. But when it is an admitted fact that the woman is insane, and the question is, whether she first became so before or after the date of the death of *Mussumat Indrabuttee*, the testimony of a trustworthy Witness, that long before that period she was, to his knowledge, reputed insane, is an important corroboration of the direct testimony given in the cause to the fact of her insanity at that time.

Their Lordships, moreover, deem it right to observe, that if Mr. *Duff's* deposition was struck out of the record they would, nevertheless, be of opinion that the preponderance of the evidence is in favour of the conclusion that the Lady was insane at the time of *Mussumat Indrabuttee's* death. And they are confirmed in that opinion when they come to consider the *res gestæ* of the case. This family was originally a joint family, and there was an attempt at a partition as early as 1802. From that time forth, however, the two branches of the family represented by the Appellants seem to have contended that the estates were to a certain extent joint, and that the descent of them was to be governed by the rules regulating the descent of joint property. Their Lordships do not say whether they were right or wrong. In the life-time of the two Widows there seems to have been an arrangement by which the Widows were left in possession of the property, but it is said on some understanding that on their death it was to go as if it were joint estate to the male heirs. Whatever may be the merits of that contention, it seems to their Lordships impossible to resist the conclusion that the *Punchayat* which is alleged to have been held was held. Possibly the circumstances which led to it may have been circumstances of violence tending to a breach of the peace, but with that we have nothing to do. In point of fact their Lordships believe, that the *Punchayat* was held, that the *Ikrarnamah* was executed in pursuance of the *Punchayat*, and that the possession of the lands, which is now

admitted to be in the Appellants, followed upon the execution of that instrument. It is unnecessary to consider, whether that document was obtained by duress or fraud, or anything of that kind, for that is a question which can only arise between the Sons of this Lady, who executed it, and the Appellants; but if the transactions above-mentioned did take place then, then it follows, that at that time, which was immediately after the death of *Mussumat Indrabuttee*, the Sons, and not the Mother, were held out to be, and were dealt with as, the heirs. If the Lady had not then been insane, it seems most improbable that some person would not have put forward her interest, or that the Appellants would have dealt with those as heirs, who really did not possess that character.

Therefore, weighing all the circumstances, their Lordships have come to the conclusion, that the Principal *Sudder Ameen* was right in the view which he took of the evidence, that *Mussumat Sreebuttee* was of unsound mind at the time of her Mother *Mussumat Indrabuttee's* death, and that consequently the Plaintiff in the action has failed to make out his title. Their Lordships must, therefore, recommend Her Majesty to reverse the decision of the High Court, and to order that in lieu thereof the appeal to that Court against the decree of the Principal *Sudder Ameen* dismissing the Appellants' suit be dismissed with costs. The Appellants must also have their costs of this appeal.

3rd December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice James, the Right Hon. the Lord Justice Mellish, and the Right Hon. Sir James William Colvile.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GABINDSUNDARI DEBI,* . *Appellant*,

versus

JAGADAMBA DEBI and another, .. . } *Respondents.*

Fact, disputed—Concurrent Decisions of Courts below.

Where the Court of appeal in *India* concurs in the finding of the Court of first instance on a question of fact, the Privy Council will not disturb that finding, unless satisfied, beyond all reasonable question, that there was some miscarriage in respect of the principle on which the decision rested, of a presumption to which too much weight was given, or of something as to which the Judicial Committee could see there was a principle involved which ought to be set right for the guidance of the Court in other cases.

THEIR Lordships, without calling on the Respondents, delivered the following judgment:—

This is an appeal from the decision of the High Court of Judicature at Fort William in Bengal, affirming a decision of the local Court. The question was a mere question of fact, depending upon evidence, and depending upon the inferences to be drawn from the acts and conduct of the parties.

Their Lordships do not feel themselves called upon to go as minutely into the details of the evidence which has been given on the one side or on the other, as if they had been a Court of first instance; or to satisfy themselves that if they had been such Court of first instance, they would have concurred in the judgment of the Court below as that which the weight of

* 6 B. L. R., p. 168.

evidence was in favour of. They consider that, in accordance with the rule which has been more than once laid down at this Board, upon a mere question of fact—a question of fact which has been decided in the same way by both Courts in *India*—it is the duty of the Appellant to satisfy them, beyond all reasonable question, that there was some miscarriage in the Court below in respect of some principle which they acted upon, in respect of some presumption to which too much weight was given, or in respect of something as to which they could see that there was a matter of principle involved which this Board ought to set right for the guidance of the Courts of *India* in other cases.

In this case the question was a mere question of fact, and both Courts seem to have gone very minutely into all the questions of evidence. The Court below gave a very long and very elaborate judgment. The Court at *Fort William* admits, in favour of the Appellant, that abundance of oral evidence had been produced to prove the fact of the permission to adopt, the question in the cause having been first given verbally and then in writing; but they say,—"We entirely discredit the whole of the evidence, except that of Dr. *Elton*, knowing how easy it is, when family disputes arise, to raise claims, such as is made in the present case, and to support them with any amount of oral evidence, even that of the nearest relatives of the family, who generally range themselves on one side or the other, and who cast aside all regard for truth in order to secure the success of the party whose cause they have espoused; and our past experience tells us that such is particularly the case in suits to uphold or set aside alleged acts of adoption in *Zillah Mymensing*," the particular *Zillah* in question. Now their Lordships do not feel themselves at liberty to say that this was not a true statement of the practice, and of a danger to be guarded against. The Court below goes on to say: "There are, however, reasons beyond this general one which, in our opinion, render this testimony utterly worthless." And then they say,—"We find that *Umeshchandra* died in 1256 (1849); that from that time till 15th *Aswin* 1268 (30th September 1861), a period of twelve years, nothing was done by the Plaintiff in furtherance of the permission to adopt, which, as she alleges, she had received from her husband,—no publicity was given to this instrument,—no care was taken to register, nor to keep it in her own custody, and the instrument itself is not to be found; but the Plaintiff comes into Court with a plausible tale, that she was too young to take care of the paper when her husband died, and so made it over to her father-in-law, from whose custody it passed on his death to that of his son, and thus on his widow she casts the *onus* of producing it, or the *odium* of having destroyed it. After the death of her father-in-law she allowed her brothers-in-law to take possession of the estate, made no attempt to make the adoption, an act which would have secured to her, as guardian of a minor adopted son, a large share of the family property; but she proceeded with her mother-in-law to *Benares*, apparently with the purpose of spending the remainder of her life there, when the unexpected death of her youngest brother-in-law brought her back to the family residence, prepared to contest, with his widow, the right to the possession of the property, and supporting her claim by any amount of hard swearing which unscrupulous parties about her do not hesitate to put forward in her behalf. So long as any male member of her husband's family remained alive, she took no steps to carry out her husband's permission to adopt; but no sooner has the last male member deceased, and the possession of the property devolved on his widow, than the Plaintiff suddenly starts up from her long sleep, and tries to get possession by an alleged dormant permission to adopt." The inference drawn by the Court below from that statement of facts was, that the whole conduct of the lady and the conduct of the family was inconsistent with the oral testimony which was given, and they preferred that inference so drawn from such conduct to the oral testimony. The Court then proceeded to deal with the evidence of Dr. *Elton*, which they considered to be the only oral evidence that might be entitled to credit. They came to the conclusion that it was

mere hearsay testimony, in which opinion this Court also agrees.

Their Lordships are unable to see any sufficient ground whatever upon which they can say that the High Court in *Bengal* was wrong in preferring the conclusions to be drawn from these acts and the conduct of the parties to the oral testimony, that testimony being of a kind which, in their Lordships' experience, is generally liable to be doubly suspicious, there being also an amount of conflicting evidence. There is also this fact, which is not mentioned in the judgment, but which has struck their Lordships,—a document which is proved in evidence, which seems to be an authentic document, by which the father-in-law, years before his death, registers another deed or power of adoption in the same family, reciting in it there was no power of adoption given in respect of his eldest son who is deceased, a fact which apparently he had no reason whatever for inventing if it were not true.

On the whole, their Lordships are of opinion that there are no sufficient grounds for disturbing the conclusion which was arrived at by the High Court, and they will humbly recommend Her Majesty that this appeal be dismissed with costs.

5th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH CHANDRANATH ROY,* *Appellant*,

versus

RAMJAI MAZUMDAR, as Guardian of CHANDRANATH, *alias* RAMCHANDRA CHUCKERBUTTY, a Minor, } *Respondent.*

Hindu Law—Purchase by a Widow for one of her own Relations—Benami—Practice—Issue.

A step-son made over property to his step-mother for her support. Out of the produce, she bought properties for her nephew in the name of other parties. *Held*, under the circumstances, that the purchased property, on her death, went to the nephew, and not to the step-son as heir of her husband.

THEIR Lordships gave the following judgment:—

This was a suit brought by *Rajah Chandranath Roy*, as son and heir-at-law of the late *Rajah Anandnath Roy Bahadur*, to recover certain properties, six in number, from *Ramjai Mazumdar*, the nominal Defendant, being the guardian of *Chandranath*, alias *Ramchundra Chuckerbutty*, who is an infant; and the ground on which the suit was brought was that the Plaintiff was the heir of the *Rani Haripriya*, who had been one of the widows of his father, of whom he was the adopted son, and to whom he had made some very liberal allowances; the properties in question having been purchased by her out of the income which she enjoyed.

* 6 B. L. R., p. 303.

There is no doubt that, under these circumstances, he was her heir. But the question in dispute was, whether the properties in question had been purchased by her, as it is called, *benami*,—that is to say, had been purchased in the name of other persons, but so as to be her property? The Court below have decided that they were not so purchased, but were purchased with an intention that they should go after her death to the Defendant.

Now, the first objection taken by Sir *Roundell Palmer* was that the defence relied on in the case was not open on the pleadings. For that purpose it is necessary shortly to refer to what the pleadings were. Now, the plaint states generally the circumstances under which the Plaintiff says he became entitled; that *Haripriya* had purchased them in the way I have said *benami;* and accordingly as her heir, they came to him. Then the Defendant in his answer, no doubt, sets up a case which was not maintained by the evidence at all, that they had not been purchased with the *Rani's* money, but had been purchased with the proper money of the persons in whose name the purchase was made. Then the material issue, which was directed to be tried by the Court, being the first issue, was "whether *Rani Haripriya*, the stepmother of the Plaintiff, was entitled to, and in possession of, all the contested properties by acquiring them '*benami*' of the persons alleged by the Plaintiff; or whether they were acquired by the several persons alleged by the Defendant, and accordingly held in their possession, and have afterwards come to the minor, *Ram Chandra?*" Now, it is obvious that this issue, in substance, is this:—Is the Plaintiff's story, stated in his plaint, true, or is the Defendant's story, stated in his answer, true? It is, of course, a possible thing that neither of the stories may be true, and the question then arises, which of these two alternatives of the issue is the really material one? Their Lordships think that the really material one is the first part of the issue,—*viz.*, is the Plaintiff's story true? It is not as if the Defendant's defence was, as we should say in the Common Law, a plea in confession and avoidance, a plea which admitted that the Plaintiff's story was true, and then avoided it. If that had been the case, and the Defendant had failed to prove his case, of course the Defendant must have failed, and the Plaintiff ought to recover. But it is substantially what at Common Law we should call an argumentative traverse of the truth of the Plaintiff's story, for it does not admit that one word of it is true, but sets up certain things perfectly inconsistent with it. The real truth is that the second alternative of the issue ought to be rejected, and the real question is "whether the *Rani Haripriya*, the step-mother of the Plaintiff, was entitled to," which, I think, must mean was entitled to at the time of her death, because that is the material thing, "and in possession of all the contested properties by acquiring them '*benami*' of the persons alleged by the Plaintiff." If the Plaintiff has failed to prove the affirmative of that issue, if it appears on his own evidence that they were not so purchased, and did not so continue at the time of her death, the consequence is that the Plaintiff must fail, and the Defendant may say, "it is wholly immaterial whether I prove my case or not; you have not proved yours."

Their Lordships are therefore of opinion that it was perfectly open to the Court to decide the case on the grounds on which they do decide it. Their Lordships are also of opinion that the Court below have not at all miscarried in point of law; that if the real truth of the facts is this, that, though these properties were purchased, as unquestionably on the evidence their Lordships think they were, with the money of the *Rani Haripriya*, yet, nevertheless, if she purchased them with the express intention at the time that, after her death, they should go as to those which were purchased first to *Shib Sundari*, and as to those which were purchased afterwards to *Ram Chandra*, that would not be a purchase *benami* within the meaning of the issue, that would not be a purchase on the terms that the property was to be absolutely hers, but would be a purchase with the intention of benefiting the person in whose name the purchase was made; and their Lordships are of opinion that it would make no difference in point of law,

whether she did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life. One may observe that, on the evidence, it would rather appear that she, during her life-time, did bestow very considerable benefits on both the mother, *Shib Sundari*, and the boy; so that practically, in all probability, she gave them quite as much as the proceeds of the property.

Well then, the Court below, not having miscarried in point of law, so far from having miscarried in point of fact, the evidence is very strong indeed that the purchase from the very beginning was made with the intention that the property should not go to her heir-at-law, but should go to *Shib Sundari*, or if *Shib Sundari* was dead, should go to *Ram Chandra*. It is really quite sufficient to refer to a single witness at in the record:—"The witness, on hearing the deposition, said that his answer to the question by the Court has not been taken down; my answer is that the *Rani* used to say that all these properties were *Ram Chandra's*, and her care was that they remain as *Ram Chandra's*." It is perfectly plain that she had purchased them with the original intention of benefiting him, in order that, after her death, they might go to him.

That being the case, their Lordships are of opinion that they must advise Her Majesty that this appeal should be dismissed.

5th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty,) the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

On Petition from the High Court of Judicature for the North-Western Provinces.

IN THE MATTER OF VICTORIA SKINNER, *alias* NAWSHABA BEGUM.*

Special leave to appeal granted, against Orders of the High Court of the North-Western Provinces removing a minor from the custody of the petitioner, her mother, such leave to be without prejudice to any application to the Court below by the petitioner that she might be advised to make, to have access, at suitable times, to her daughter.

THIS was a petition by *Helen Skinner*, otherwise known as *Badshaw Begum*, an inhabitant of *Meerut*, in the North-Western Provinces of *India*, the Widow of *George Skinner*, who was a professed Christian, and Mother of *Victoria Skinner*, his Daughter, a Minor, for special leave to appeal from Orders of the High Court of Judicature in that Province, affirming a previous Order of the Judge of the District Court at *Meerut*, whereby the Minor, *Victoria Skinner*, was removed from the custody of her Mother by reason, as alleged, that the Petitioner was a professed Mahomedan, living, as the Court held, in adultery with a Mr. *John* (calling himself *Mahomed Jan Allam*,) professing the Mahomedan religion, and alleging himself to have contracted a Mahomedan marriage with the Petitioner, notwithstanding that he had a Christian Wife living at the time. The Petitioner sought restoration of her Daughter to her custody.

THE RIGHT HON. LORD JUSTICE JAMES:

Enough appears from the petition to induce their Lordships to grant special leave to appeal. Such leave, however, must be without prejudice to any application to the Court below by the Petitioner as she may be advised to make, to have access, at suitable times, to her Daughter.

By an Order in Council made on the petition, leave was given to the Petitioner to prosecute her appeal against the Orders of the High Court of Judicature for the *North-Western* Provinces of the 7th of July and the 16th of July, 1870, on giving the usual security; with liberty, pending the appeal, to make application to the High Court of Judicature for the *North-Western* Provinces for leave for the Petitioner, the Mother, to have access at suitable times to her Daughter.

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* 13, Moore's I. A., p. 532.

6th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice James, the Right Hon. the Lord Justice Mellish, and the Right Hon. Sir James William Colvile.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, North-Western Provinces.

MOHUR SINGH,* ... *Appellant*,

versus

GHURIBA, and others, ... *Respondents*.

Evidence—Wrongful Admission of Evidence.

Where evidence, such as hearsay, is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding.

Disapproval was expressed by their Lordships of the reception by the lower Court of evidence which ought not to have been admitted.

THEIR Lordships gave the following judgment:—

This case has been before three Courts in *India*, of which the High Court of course merely dealt with the points of law which were raised on special appeal, and have not been very strongly pressed here. There are two questions in the cause. The first is whether the Respondents, the Plaintiffs in the Court below, have succeeded in establishing that when their *putti* was confiscated and sold under one of the penal Acts passed during the time of the mutiny, it was purchased by the Appellant in the name of his son, upon the contract or understanding that upon payment of the whole purchase-money, of which the Plaintiffs had already paid part, the rest being found by the Appellant, they should be put in possession of the whole of their ancestral rights in the *putti*? That is a question of fact; and if that agreement is made out to have been the understanding and contract between the parties, the second question is, what are the equities which should be applied to it?

Mr. *Leith* having to contend with the judgment of the two Courts which tried the question of fact, has very fairly brought to our notice certain grounds upon which their conclusion should be impeached, and it is impossible to deny that several of those grounds have some foundation. He has urged, first, that a considerable amount of the evidence admitted was mere hearsay evidence; secondly, that among the evidence which was improperly admitted was the conviction by the Magistrate, which ought not in any point of view to have been used as evidence against the party in the civil suit, according to the strict rules of evidence, and which having been reversed by the Judge, no matter on what grounds, had ceased to be a standing conviction against the Appellant. The third ground taken was the state of feeling against the Appellant in the district; and in particular the strong animosity existing between him and the *Tehsildar* and *Syud Ali Shah*, who were two of the witnesses; and the last ground upon which the finding of the two Courts was impeached was the strong improbability that the Appellant, who had been instrumental in bringing to justice certain persons of this village connected with the Plaintiffs, should have been the person chosen to make the purchase on their behalf.

It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of Law in this country before which, on a motion for new trial, it is shown that evidence improper to be admitted has been admitted before the Jury. The Court in that case are not judges of fact, and are unable to say what weight the Jury may have given to the evidence that ought not to have

* 6 B. L. R., p. 495.

been admitted. But it is the duty of their Lordships who are judges of the fact in such a case as this to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees. Their Lordships, nevertheless, must express their regret that the Court of First Instance in the case before them should have been as lax as it has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal.

Now, setting aside all the hearsay evidence, setting aside the conviction, the proceedings in reference to which seem to have been of a somewhat singular character, and even, for the sake of argument, admitting that the *Tehsildar's* evidence is not to be entirely relied upon, though their Lordships are by no means prepared to say that that person is unworthy of credit, and resting solely on the evidence which was given by the bankers, and the person described as the *Zemindar* of *Baroot*,—it seems to their Lordships impossible to say that the finding of the Court below was wrong. The bankers' evidence is peculiarly valuable, because it is clear, upon the proceedings, that the whole of the village of *Baroot* was sold together. The bankers were the persons who were employed by persons interested in the other *putti* forming part of that village, to purchase it on their account. They admit such a contract. They speak from their own knowledge to the fact that the *Sings* bought in the same way for the benefit of the persons interested in the other *putti*, and they speak also to payment of the earnest-money. The other witness is apparently a witness of greater respectability than we usually find in such a case. It is impossible for their Lordships sitting here to estimate the force of the arguments which have been brought against the testimony of these witnesses by Mr. *Leith*: it is impossible for them to say what may be the feelings which have possibly prompted their evidence against the Appellant. Certainly the general feeling of the district seems to be strongly against him, and the conviction that the transaction which the Plaintiffs have put forward is really a true transaction appears to be general. But can we thence infer that the Respondents' case is a false story? It is just as likely to be true, and one can conceive no story which, if true, would be more likely to create a general feeling against the Appellant. If he felt that he was not likely to have a fair trial before the local Judge with that feeling in the district against him, his proper course was to petition the European Judge to remove the case into his Court, and to try it in the first instance. But if he has not done that—if he has taken a trial in the ordinary Court, and that Court has found against him, and the evidence properly received appears to their Lordships to be trustworthy, or at least to be such that it is impossible for them to say that it is not trustworthy,—how can their Lordships be called upon now to set aside the finding of that Judge, confirmed, as it was afterwards, on appeal by the *Zillah* Judge?

In the Court of First Instance, the Principal *Sudder Ameen* seems to their Lordships to have mistaken the effect of the contract, and to have held that the parties were entitled to recover only such a proportion of the land as the sum which they had actually paid might be taken to represent. The *Zillah* Judge, Mr. *Sapte*, seems to have put a more correct interpretation upon the contract. He treated it as a contract upon which, on payment of the balance, they would be entitled to the whole. He did not fix a period at which this redemption, if one may so call it, was to take place, but that was set right by the decree of the High Court.

It therefore seems to their Lordships that, on the whole, substantial justice has been done in this case, and they will advise Her Majesty to dismiss the appeal.

6th and 7th December, 1870.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bengal.

UMRITHNATH CHOWDHRY,* ... ... } *Appellant,*

versus

GOUREENATH CHOWDHRY, PARUSNATH CHOWDHRY, and MUSSUMAT MYNAPUTTY CHOWDHRAIN, ... } *Respondents.*

Joint Estate—Bhaugulpore Zemindaries—Primogeniture—Custom.

Where property is proved to be ancestral, the mere registration of one brother as proptietor is of little value as supporting a case of the property not being joint, and the burden of proving that the property is not joint, rests on him who alleges that to be the case.

There was no sufficient proof of a family or local custom that the descent of the *zemindari*, the subject of dispute, was regulated by the rule of primogeniture.

THE RIGHT HON. LORD JUSTICE JAMES:

THIS case, which has occupied the greater part of two days, appears to their Lordships, when reduced to its legitimate and reasonable dimensions, to be a very short case. The relevant and material facts are few and not substantially in dispute for any purpose which their Lordships have to decide.

The contention on the part of the Plaintiffs below—the Respondents here—is, that a certain estate, a *Talook* with accretions which, beyond all reasonable question, had been made by the investment of the profits of that estate, was an ancestral estate which descended to them and the Appellant, who was a Cousin, in coparceny. It is admitted that by the Common law of Hindostan, that is, the Hindoo law, the descent is in coparceny where no other custom or right is proved. The case of the Plaintiffs was, that this property was ancestral property, which had belonged to their Grandfather, one *Hurjee*, and descended from *Hurjee* upon the two Sons, *Bacharam Chowdhry* and *Sheebloll*, the Fathers of the respective parties.

The case mainly relied upon in the Court in *India* on the other side was, that there was no foundation whatever for this assertion, that the property was not ancestral property—that the Grandfather never had any property at all, but that it was an acquisition by *Bacharam Chowdhry* himself, under a grant made to him individually—or, as we should say in English law, an acquisition by him by purchase, so that he became a new root of descent, and so that the common title alleged to be derived from the Grandfather had no existence.

Now, it has been proved to the satisfaction of the Court below, and proved entirely to the satisfaction of their Lordships,—indeed was hardly disputed at last in the arguments at the Bar—that this property was originally a *zemindary*, of which *Hurjee*, the Grandfather, was possessed. Document after document, and all the evidence in the cause, go to show that *Bacharam* in the first Settlement, then in the Decennial Settlement, and then in the perpetual Settlement, claimed to have it made with him by reason of his hereditary right to the *zemindary* as hereditary *Zemindar*. That being proved, that it was *Hurjee's* property, and that *Bacharam* was entitled by descent, of course the next proposition would equally follow, unless there is something to exclude it; that is, that he would not be entitled to it himself, but that he and his Brother would succeed to it as coparceners.

Well, has anything occurred to divest that right which in a case of ordinary property was certainly vested in the two jointly at the time when the history of this case begins? Their Lordships are unable to find anything to alter the right which existed at the time when the descent was cast. The fact, that the Settlement

* 13, Moore's I. A., p. 542; 6 B. L. R., p. 232.

was made in the name of the elder Son, whether, originally, when he was a minor, or not,—the fact that he has continued to be solely registered from that time to this, affords no conclusive evidence against the title of the shareholder. There is documentary evidence, on the other side, of his being recognized as a shareholder, but not very strong, nor very conclusive evidence. The mere fact that one of the two Brothers was registered so as to be the proprietor to the outer world, does not seem to their Lordships to be of very great weight, any more than it did to the Court below, and in respect to the actual enjoyment of the property, there has been beyond all question a continuous enjoyment by both upon equal terms. The two lived together; the families lived together, they messed together, and all the marriage and funeral ceremonies and other ceremonies of their religion were performed at the joint expense out of the income of the property, and apparently, as far as their Lordships can see, upon equal terms, and not as the bounty of an elder Brother to a mere dependant who had no right whatever to the property

It appears to their Lordships, therefore, that the case as principally alleged in the Court below has entirely failed, and it becomes necessary to consider the other topics which have been very much relied upon at the Bar here, as they were at a late part of the case in the Court below. It is alleged that, admitting it to have been *Hurjee's* property, admitting it to have been ancestral property in that sense, it was property which descended to *Bacharam* as the eldest male heir, by reason of its being subject to a custom of primogeniture. The custom of primogeniture is stated in two ways, first as a custom of a District so as to bring it within the Regulation X. of 1800; that is to say, it is the custom of a District supposed to be a *Jungle mehal*, in *Zillah Bhaugulpore*. Now, of the existence in any known District whatever of anything which can be predicated as a *Jungle mehal* in which this *zemindary* is situated there is neither pleading nor evidence. There is nothing at all to show any custom, except a Collector's Letter with respect to a custom extending to all the *zemindaries* throughout the whole *Zillah Bhaugulpore;* and certainly it would be very strong indeed to hold, merely upon that evidence, that there was a custom proved extending to the whole of the *Zillah* of *Bhaugulpore*, or to the whole of any undefined District within that *Zillah*, of which the Court below says it has never heard anything, it being, they say, perfectly notorious that no such custom exists within that District. Well, then, the evidence of that custom appears to their Lordships to be absolutely nothing. Then, there is the other custom,—supposed to be a family custom of this particular family,—under which custom it is alleged, that *Bacharam* succeeded at such a time; that is, before the year 1794, in such a way as to exclude the title of his younger Brother. Of that family custom there really is no sufficient allegation, if there be any allegation at all. Their Lordships find nothing on the pleadings to raise such a custom as that, in the manner in which it ought to have been raised, if it was intended to have been pleaded and proved in this case. It is, in fact, inconsistent with the case almost entirely relied on by the Defendant in the Court below; of the new acquisition made by him under the grant or *Pottah* from the Government. But if there be anything which is sufficient to raise it, which their Lordships do not see, there is an equal want of satisfactory evidence of any such custom. There is some trace in the Collector's Letter of a sort of general custom extending through the whole *Zillah* of *Bhaugulpore*, all the *zemindaries* being held by that kind of title, but the genealogical tree, which is the only thing contrary which is in evidence, is certainly, in their Lordships' judgment, insufficient to found a family custom, which the Court below have held must be proved by something like what we should call in this Country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back. Both these cases of family and local custom, the burden of which was entirely on the Defendant, have failed, and that brings it back to the case which the Plaintiffs below had to prove; that is the simple fact,

that this was ancestral property of their common Grandfather.

That being so, and it being substantially admitted that there was no other source from which the acquisitions could be made, the decree of the Court below seems to their Lordships to be right, and they will, therefore, recommend Her Majesty that the decree be affirmed and the appeal dismissed.

8th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

RAM SURUN SINGH and MOONSHEE SYED AMEER ALLY,* ... *Appellants*,

versus

MUSSUMAT PRAN PEARY, MUSSUMAT RAKABA, and LALLA IMRIT LALL, *Respondents*.

Pleading—Estoppel by Deed of Conditional Sale and Mortgage—Mortgagor at liberty to deny advancement of money, formal acknowledgment of its receipt under his hand and seal notwithstanding, against Mortgagee out of possession—Pleading by Defendants in one suit, no estoppel in another, with a different Plaintiff.

Held, that a deed of conditional sale and mortgage created no estoppel. That it was the case of a common mortgage in which the Defendant says the money was never advanced. That it is open to a Mortgagor to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing, and, that being so, and the instrument being relied on by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, that there was nothing whatever to prevent the Defendant from showing the real truth of the transaction.

It is clear that a pleading by two Defendants against the suit of a certain Plaintiff never can amount to an estoppel as between them and another Plaintiff in a different suit.

JUDGMENT was delivered by

THE RIGHT HON. THE LORD JUSTICE JAMES:

In this case their Lordships are of opinion, that it is impossible to treat this Deed of conditional sale and mortgage as creating any estoppel. It is sought to be enforced by a person out of possession. It is in truth the case of a common mortgage in which the Defendant says there never was the money advanced. It is open to a Morgagor in this Country to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the Defendant from showing the real truth of the transaction. Then with regard to the supposed estoppel by pleading, it is equally clear that a pleading by two Defendants against the suit of another Plaintiff never can amount to an estoppel as between them. Their Lordships are satisfied that the decision of the High Court was quite right. Their Lordships will, therefore, advise Her Majesty that it be affirmed and the appeal dismissed with costs.

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* 13, Moore's I. A., p. 551.

8th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice James, the Right Hon. the Lord Justice Mellish, and the Right Hon. Sir James William Colvile.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KALI CHUNDRA CHOWDHRY,* ... } (*One of the Defendants*) *Appellant.*

versus

SHIBCHANDRA BHADURI, and others, ... } (*Plaintiffs*) *Respondents.*

Evidence as to Adoption—Direct Evidence as opposed to Suspicion.

The *Sudder Ameen* having held an adoption proved, the Principal *Sudder Ameen*, on appeal, reversed that decision on the facts. The case came before the High Court on special appeal and the decision then given was appealed to *England*, and special leave was given by Her Majesty to appeal against the decision of the Principal *Sudder Ameen*. The decision of the High Court on the law was admitted to be good, but the Judicial Committee reversed the finding of the Principal *Sudder Ameen* on the facts.

Deeds, though unregistered (registration not being compulsory,) when proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside on mere suspicion of perjury and forgery.

THEIR Lordships delivered the following judgment:—

This is an action brought to recover a *talook*, called No. 396, *Sakir Mamud*, and both the Plaintiffs, who are Respondents in this appeal, and the first Defendant, who is the Appellant, claim by deeds under the same owner, *viz.*, *Gadadhar Tui*. A *kabala* under which the Plaintiffs claim was the first executed in point of time. It was not a *kabala* executed to the Plaintiffs themselves, but was executed to *Kedar Nath Lahuri*, who is the third Defendant, and who subsequently executed another *kabala* to the Plaintiffs. But it was objected on the part of the first Defendant in the Courts below, and also before us, that, at the time when *Gadadhar Tui* executed that *kabala* under which the Plaintiffs claim, he had no right or title to the property in question at all. It appears to be admitted on all hands in the Court below that, if he had no title to the property at the time he executed that *kabala*, his subsequently becoming entitled as heir would not make the *kabala* good.

Now, the question whether he had any title to the property at the time he executed that *kabala* appears entirely to depend upon this,—whether *Hari Kumar Tui*, who was the original owner of the property, had adopted *Beni Chandra* as his adopted son during his life-time; because, if he had so adopted him, then *Beni Chandra* was the heir of *Hari Kumar*, and became entitled to the property on *Hari Kumar's* death, and as *Beni Chandra* did not die until after the execution of the first *kabala* by *Gadadhar Tui*, under which the Plaintiffs claim, if the adoption of *Beni Chandra* was good, then that *kabala* was bad, and the Plaintiffs have not made out their title.

The whole question, therefore, turns on whether there was a good adoption of *Beni Chandra* by *Hari Kumar*. The two Courts, the first Court before which the case was heard, and the Court of Appeal, have come to different conclusions on the question. The Judge of the first instance —although he mentions other grounds, which their Lordships do not think tenable, for his decision—came to the conclusion that the adoption was good. He believed the evidence of it, and believed that the documents relating to it were genuine documents. On the other hand, the Principal *Sudder Ameen* came to the conclusion that the adoption never had taken place at all; he disbelieved the witnesses who spoke to it, and seems to have come to the conclusion that all the documents which were produced in support of it were forgeries.

Now, their Lordships have carefully examined the evidence on the one side and on the other, and they are of opinion that the

* 6 B. L. R., p. 501.

evidence in favour of the adoption very greatly preponderates. The adoption is proved by a considerable number of apparently respectable persons, and the documents necessary to constitute an adoption are produced and proved by the attesting witnesses. It will be right, however, to examine the reasons given by the Principal *Sudder Ameen* for refusing to believe that the adoption had taken place. In the first place, it is said that there are not sufficient members of the family and persons of the same caste called as might have been expected. The answer to that appears to be very clear, *viz.*, that it is admitted on all hands that *Hari Kumar* had in fact no relations whatever, except this *Gadadhar Tui*, who was a very distant relation, and therefore it is impossible that others should have been called. Then, another objection that is made is that the priest of the family, who appears to have been the person who is alleged to have performed the ceremony, when called as a witness, denies that there was any adoption at all. It appears, however, that this very priest is himself a witness to the deed of gift, and he denies that that deed was a genuine deed, and says that he himself, in fact, was a party to the subsequent fabrication of it; his story being that the adoption was a thing which had not taken place at all in *Hari Kumar's* life-time, but was only thought of after his death. Their Lordships are of opinion that no weight whatever ought to be given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them. Then it is said that the barber also gives evidence against it. Whether the witness who is supposed to be the barber was the barber or not, does not at all clearly appear. He does not himself say that he was a barber, he only says that he was a *ryot* who had the means of knowing, and who knew something about it, because, he says, he occasionally went to the house. But then it is a very strong confirmation of the truth of the adoption that, with one exception, all the witnesses who are called against the adoption, and profess to say there was no adoption, admit that this boy, *Beni Chandra*, was, some say one year and some two years before *Hari Kumar's* death, brought to *Hari Kumar's* house, and there lived with him, and was brought up, in fact, as his son,—one of them says with a view to adoption. Now, no doubt, that does not of itself make an adopted son, or make him the heir, but when you find a larger body of witnesses who appear to have had quite as much or better knowledge of the facts, come and say that the ceremonies of adoption were actually performed, and that they were present at them, and that the deeds were genuine deeds; then the fact that these witnesses who deny the adoption are obliged to admit that the boy was being brought up in the house during *Hari Kumar's* life-time very strongly confirms their evidence.

It is said also that the deeds were not registered. If they had been registered it would have been more clear, but it appears to be such a common thing not to register deeds, that their Lordships cannot think the mere circumstance of their not being registered is any ground why the adoption should not be believed. Then, indeed, the Judge who disbelieves the adoption himself, refers to the *wasiatnama*, which was executed by the widow, appointing the guardians, as a genuine instrument. If that is so, it is the strongest evidence of the adoption, for it in terms recognizes the adoption as having been made.

It is important also to consider on which side the possession went, because if the adoption was recognized soon or immediately after *Hari Kumar's* death, and between his death and the death of the adopted son and the adopted son was the party in possession, and not the alleged heir, that is very much in favour of the adoption. Nor the great weight of evidence clearly is that the adopted son was in possession. There was an inquiry before the Magistrate, which resulted in the adoption being recognized; the guardians of the infant took possession; they gave a lease of the property to the third Defendant, *Harakrishna Taraffdar*, under which he took possession, and under which possession has, in fact, been kept up to the present time. Therefore, the possession has gone along with it, and though *Gadadhar Tui* certainly seems

to have executed this *kabala* to the party under whom the Plaintiffs claim, he did not, as far as their Lordships can see, during the life of the adopted son, take any other step whatever. It is proved by two witnesses that the purchase-money which he was to receive was not paid at the time, whether it has been paid afterwards is left in a great deal of doubt, and that circumstance tends to show that he was not the real owner in possession, but a person who was merely selling a possible title.

Under these circumstances their Lordships are of opinion that although no doubt it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing, on a mere possible suspicion of perjury and forgery.

There was an appeal to the High Court purely on points of law, but those points have not been argued before their Lordships,—in fact, they have been abandoned.

Their Lordships will therefore recommend Her Majesty to affirm the decision of the High Court dismissing the special appeal; to allow the appeal so far as it relates to the decree of the Principal *Sudder Ameen*, to reverse that decree, and to declare that in lieu thereof a decree should be made dismissing the appeal from the Court of First Instance with costs; to declare further that any costs which the Appellant may have paid in *India* other than the costs of the special appeal be repaid to him, the Appellant to have the costs of this appeal except so far as they have been increased by appealing against the decree of the High Court.

9th and 10th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Madras.

PATTABHIRAMIER,* ... *Appellant,*

versus

VENCATAROW NAICKEN and NARASIMHA NAICKEN, ... *Respondents.*

Madras law of Mortgage—Right of Redemption—Reg. XVII. of 1806.

The sole question being, whether, under the law of the *Madras* Presidency, the interest of a Mortgagee under a deed of conditional sale, does or does not become absolute, according to the terms of the contract, by the mere failure of the Mortgagor to redeem at or before the time specified in the deed; the contract, dated 13th June 1808, being, that, the Mortgagee should hold possession of the land for five years, paying the Government revenue, that the Mortgagor should repay the principal and redeem the land on the 10th June 1813, and that, in default, the Mortgagee, and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c., and the transaction being one of mortgage by *Bye-bil wuffa*, or *Kut Kubala* usufructuary; the usufruct of the property being taken in lieu of interest. *Held*, that the first question which suggested itself, was, whether there was any rule of law to prevent the Court from giving effect to such a contract, according to the intent of the parties plainly expressed by its language. That no such qualifications as had been introduced in *Bengal* by *Bengal* Regulation No. XVII. of 1806 could be discovered in any Act of Legislation in the Statute Law applicable to *Madras*. That what is known in the Law of *England*, as the *Equity of Redemption*, depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract; and that such a doctrine was unknown to the ancient Law of *India*. Decree of the *Sudder Dewanny Adawlut* at *Madras*, allowing the representative of the Mortgagor to redeem, set aside as erroneous.

Great and unexplained delay having taken place

* 13, Moore's I. A., p. 560; 7 B. L. R., p. 136.

in the prosecution of an appeal, eventually heard *ex parte*. No costs were given to the Appellant although successful.

20th January, 1871.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. LORD CHELMSFORD:

In this case the Appellant claims to be the absolute Owner of the lands in question under several conveyances from the first and second of his co-Defendants in the suit, or from those whom they represent. That the title of his Vendors or their ancestor was originally a mortgage title is undisputed; and the suit out of which the appeal has arisen was brought, in October, 1853, by the representatives of the Mortgagor to redeem the property, alleging it to be still redeemable. The decision of the Court of First Instance was in their favour, but that was reversed by the Principal *Sudder Ameen* of *Combaconum*, who decreed in favour of the Appellant. His decree was reversed by the late *Sudder Dewanny Adawlut* of *Madras* on special appeal; and the present appeal is against the decree of that Court.

The *Sudder* Court, having no jurisdiction to determine on special appeal any question of fact, and there being no cross appeal to Her Majesty in Council against the decree of the Principal *Sudder Ameen*, their Lordships must accept his findings on the facts as conclusive.

Those findings were:—

First, that the original contract between the Mortgagor and the Mortgagee was contained in the Deed of conditional sale, dated the 13th of June, 1808, and is there called Exhibit No. 1; and that the Plaintiffs had failed to establish that there was any other instrument of mortgage.

Second, that Exhibit No. 2, purporting to have been executed on the 16th of June, 1816, upon which the Appellant had relied either as a confirmation of the then absolute title of his Vendors, or as a conveyance or release of the right of redemption to them, was not a genuine document.

Third, that certain Letters, put in by the Plaintiffs in order to prove acknowledgments by the Mortgagees that the mortgage was a subsisting and redeemable mortgage as late as 1851, were also forgeries.

The conclusion of law which the Principal *Sudder Ameen* drew from his first finding was, that under Exhibit No. 1 the title of the Mortgagees became absolute on the 10th of June, 1813, by reason of the failure of the Mortgagor to redeem at that date; and the special appeal was admitted to try the correctness of that conclusion. Hence, the sole question for their Lordships' determination is whether, under the law of the *Madras* Presidency, the interest of a Mortgagee under a Deed of conditional sale does or does not become absolute, according to the terms of the contract, by the mere failure of the Mortgagor to redeem at or before the time specified in the deed.

This form of security being common in *India*, the question is of very general importance, and on that ground the Appellant obtained Her Majesty's special leave to prosecute this appeal, which, after considerable delay, has, unfortunately, come on to be heard *ex parte*.

The contract embodied in Exhibit No. 1 was, that the Mortgagee should hold possession of the land for five years, paying the Government revenue; that the Mortgagor should repay the principal and redeem the land on the 10th of June, 1813; and that, in default, the Mortgagee and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c.

The transaction then was one of mortgage by *Bye-bil-wafa* or *Kut-kabala* usufructuary; the usufruct of the property to be taken in lieu of interest. And the first question that suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract according to the intent and meaning of the parties plainly expressed by its language?

That this form of security has long been common in *India* is notorious. The fact is stated in the preamble to the *Ben.* Reg. I. of 1798. That such contracts were recognized and enforced according to their

letter by the ancient Hindoo law appears from several passages in *Colebrooke's* Digest (vol. I. pp. 183, 187, 188, and 193.) That they were equally recognized and enforced between Mahommedans is shown by Mr. *Baillie* in his introduction to his learned work on the Mahommedan law of sale. If the ancient law of the Country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation, or on established practice.

Nothing concerning such contracts is, so far as their Lordships are informed, to be found in the Statute Law relating to the Presidency of *Madras* except *Mad.* Regulation, XXXIV. of 1802. The 8th and 9th sections of that Regulation extended to *Madras*, the provisions of the 10th and 11th sections of the *Ben.* Regulation, XV. of 1793. Both these Regulations were passed with the object of fixing the legal rate of interest, and of preventing the taking of interest in excess of it; and both have since been wholly or in great part repealed with other usury laws, by Act, No. XVIII. of 1855. The clauses in question affected only that part of the contract now under consideration which related to the usufruct of the property. As to that they may have made it necessary, contrary to the intention of the parties, to take upon a redemption an account of the rents and profits as between Mortgagor and Mortgagee in possession, compelling the latter to set what he might have received in excess of legal interest against the principal; but they neither extended the time of redemption nor imposed upon the Mortgagee, when the Mortgagor had failed to redeem within the stipulated period, the obligation of taking any judicial or other proceedings in order to make his title absolute.

In *Bengal* there was further legislation. In that Presidency, Regulation XVII. of 1806, was passed, which allowed a Mortgagor, who had executed such a security as that now in question, to redeem at any time before the Mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure.

It is, however, unnecessary to observe that this *Bengal* Regulation had of itself no force in the Presidency of *Madras*. And their Lordships cannot find, either in the *Madras* Regulations or in the Acts of the Indian Legislature subsequent to the Charter Act of 1834, any Act, by which similar provisions have been enacted for *Madras*.

That, in cases to which Regulation XVII. of 1806 does not apply, the interest of a Mortgagee under a Deed of conditional sale becomes absolute according to the terms of the contract, by the mere failure of the Mortgagor to redeem within the stipulated period, has recently been decided by a full Bench of the High Court of *Bengal* in the case of *Sureefoonissa* v. *Shaikh Enayet Hossein* (5 Weekly Reporter, p. 88). In that case the mortgage bore date the 30th of November, 1801; the mortgage was made payable on the 28th of September, 1806. The Mortgagor sued for redemption, and the Mortgagee admitted that there had been no foreclosure pursuant to the Regulation. The High Court, however, ruled that, if the Regulation did not apply, the interest of the Mortgagee became absolute on the 28th of September, 1806, and, finding that the Regulation had not been promulgated, and, therefore, had not become operative in the District until the 7th of January, 1807, dismissed the Plaintiff's suit. The point, so decided, is also assumed to be law in the judgment delivered at this Board in the case of *Forbes* v. *Ameeroonissa Begum* (10 Moore's I. A. Cases, 348, *ante*, p. 153); and unless it be law it is difficult to see why the Regulation of 1806 was passed.

Their Lordships have been unable to discover that there has been any course of decisions in the Court of *Madras*, which can be set against the authority just cited. The utmost that can be gathered from this record is, that some uncertainty concerning the operation of these contracts may have crept into the Lower Courts of *Madras*. If the Principal *Sudder Ameen* was right in thinking, that this afforded a reason why the Appellant had sought to strengthen his title by the production of the false Deed No. 2, it is to be observed that the Plaintiffs, on the other hand,

showed their sense of the uncertainty of the law by setting up the false case that another form of mortgage had finally been substituted for the Deed of conditional sale. Moreover, the *Sudder* Court does not rest its judgment upon decided cases. The first reason advanced in support of that judgment is clearly untenable. That a party is precluded from relying upon a title established by a Deed conclusively found to be genuine, because he has foolishly and wickedly set up a false Deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or in law. Nor does the second reason assigned for the judgment appear to their Lordships to be better founded. It assumes that an obligation lay on the Mortgagee to do some act by way of enforcing what is not very correctly termed the penalty; and that there could be no adverse possession against the Mortgagor until there had been a tender and refusal of the mortgage money. But this assumption implies that in some way or another the rights and obligations of the parties as defined by the contract had been qualified by a known rule of law. Their Lordships have already stated that, so far as they can discover, no such qualifications have been introduced, as in *Bengal*, by any act of legislation into the Statute Law applicable to *Madras*. What is known in the law of *England* as "the equity of redemption," depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of *India;* and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. It must not, then, be supposed that in allowing this appeal their Lordships' design to disturb any rule of property established by judicial decisions so as to form part of the Law of the *Forum*, wherever such may prevail, or to affect any title founded thereon.

Their Lordships, therefore, being of opinion, that the decree under appeal is erroneous and ought to be reversed, and that the special appeal to the *Sudder* Court ought to have been dismissed with costs, will advise Her Majesty accordingly. But considering the great and unexplained delay which has taken place in the prosecution of this appeal, they do not think that they ought to give the Appellant the costs of it.

10th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

On Appeal from the High Court of Judicature North-Western Provinces, Agra.

MUSSUMAT MITNA, ... *Appellant,*

versus

SYUD FUZL RUB, MUSSUMAT CHUTTO BEBEE, HIDAYUTOONNISSA BEBEE, SHEIK MAHOMED AMEENOODDEEN, SHEIK MAHOMED FUTTEHOOLLAH, and SHEIK NUSEEROODDEEN, ... *Respondents.*

Practice—Settlement of Issues—Remand.

Where, on the appeal, the Counsel for Appellant admitted he could not succeed on the merits, as the evidence stood on the record, and their Lordships were of opinion that substantial justice had been done, the mere omission to settle issues by the Court of first instance, which was not made a ground of appeal to the first Court of Appeal, but was noticed and commented on by that Court, was held not to constitute a fatal mis-trial of the cause so as to render a new trial necessary.

Baboo Rewan Pershad v. *Jankee Pershad* (11 Moore's I. A., 26; *ante*, p. 214) commented on.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

It has candidly been admitted by the

* 13, Moore's I. A., p. 573; 6 B. L. R., p. 148.

learned Counsel for the Appellant that in this case they would despair of inducing their Lordships to interfere with the finding of the Courts in *India* upon the questions of fact, and the conclusions which they have drawn from the evidence on the record. The question upon the appeal, therefore, is narrowed to this, has there been in this cause such a mis-trial as renders it incumbent upon their Lordships to reverse the decisions under appeal, and to remand the case for the settlement of proper issues, and a re-trial upon those issues?

Their Lordships are desirous to avoid saying anything which may have the effect of introducing any laxity in the Courts of *India* in regard to the observance of those provisions of the Civil Procedure Code which direct the settlement of issues, provisions which their Lordships regard as most important. But they do not find in the Code anything which says positively that the omission to settle those issues is fatal to the trial. With respect to the former decisions of this Court, it is to be observed that the decisions upon the Regulations which preceded the passing of this Code of Procedure were not altogether uniform. Most of them show their Lordships' desire to maintain the strictness of the obligation on the Judges of the Country Courts to record the points to be tried, but there is one which has been cited by Sir *Roundell Palmer*, which certainly shows that they did not in all cases consider the omission to be fatal. Those Regulations, moreover, contained words to the effect that no evidence should be given except upon points which had been recorded. The case of *Baboo Rewun Pershad* v. *Jankee Pershad* (11 Moore's Ind. App. Cases, 26; *ante*, p. 214,) which is a case upon the Code of Procedure, appears to have been complex, and the explanation given for what took place in that case, certainly shows that their Lordships may have been exercising a discretion which cannot now be questioned. All the cases cited, however, differ from the present case in this respect. In this case the omission to raise the issues was brought before the notice of the appellate Court; the appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret that the Principal *Sudder Ameen* had omitted to settle the issues. The Court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section of the Civil Procedure Code. At all events, it appears to their Lordships that there is nothing in the Code which made it imperative upon the appellate Court, or now makes it imperative upon their Lordships, to yield to that objection, and, therefore, fully concurring in the observations made by the appellate Court that it was the duty of the Judge to settle the issues, and that it was much to be regretted that he omitted to settle those issues, they still think that, under all the circumstances of the case, substantial justice having been done, there has not been that fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary.

Their Lordships, in coming to this conclusion, have had regard to the circumstance that no objection seems to have been taken in the Court below to dealing with the case without the settlement of the issues. If the objection had been taken, their Lordships think that the Appellant would have stood on higher grounds, and it would then have been very difficult to say that a trial proceeding in the face of the objection could be held to be regular for any purpose. They do not, however, mean to affirm that mere waiver, or rather the omission to take the objection, is in all cases sufficient to purge the irregularity. They are of opinion, that if it had appeared that substantial justice had not been done, the objection might well have been taken when it was taken before the appellate Court, and when taken ought to have prevailed. But being of opinion

that there has not in this case been a failure of justice in consequence of the omission to settle the issues, their Lordships are not prepared to send it back for further litigation, and they must, therefore, advise Her Majesty to dismiss the appeal with costs.

10th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court, North-Western Provinces, Agra.

MUSSUMAT OODEY KOOWUR,* ... ... } *Appellant*,

versus

MUSSUMAT LADOO (Widow of BULDEO BUKSH), ROSHUN ALI, and SHOOJAUT ALI, ... } *Respondents*.

Practice—Reference to a Judge of another Sudder Court—Relinquishment of a Mother's interest in favor of a Daughter-in-law and Son—Effect of Son's subsequent death.

The *Sudder* Court being equally divided, referred a case for the opinion of the High Court of *Calcutta*. The High Court at *Agra* having been established in the meanwhile, *held*, that the Chief Justice of that Court had power to hear and determine the case.

A widow, being old, presented a petition in a suit by her daughter-in-law, as guardian of the former's infant son, relinquishing all her rights in the property to the daughter-in-law herself, and as guardian of the infant. The son died, and the mother now sued her daughter-in-law for possession as heiress of her son. *Held* that, by the petition, the mother had transferred no rights to the daughter-in-law as proprietor, but that the mother, as heiress of her son, was entitled to the estate.

13, Moore's I. A., p. 585; 6 B. L. R., p. 283.

JUDGMENT was pronounced by

THE RIGHT HON. THE LORD JUSTICE MELLISH:

The first question in this case is, whether there was any jurisdiction in the Chief Justice for the *North-Western* Provinces to make the decree, from which the appeal is brought, in the Court below? Now the matter has been inquired into, their Lordships are clearly of opinion, that there was such jurisdiction. The appeal had been brought to the *Sudder Adawlut* of the *North-Western* Provinces, and the Judges of that Court had given a decision. Then an application had been made for a review, and an Order was made that the case should be heard on review. It was so heard, before four Judges, who were equally divided in opinion. By the Law, as it then stood, as appears by the Order made at the end of their judgment, they being equally divided in opinion, the case was, under the provisions of section 7, Regulation VI. of 1831, referred for the opinion of one or more Judges of the High Court of *Calcutta*. There was, however, a power, by the 24th & 25th *Vict.* c. 104, for the Crown to erect a Court in the *North-Western* Provinces, and by Letters Patent of the 17th March, 1866, the Crown did erect a High Court in the *North-Western* Provinces, which had the effect of abolishing the jurisdiction of the *Sudder Adawlut*. The consequence was, that no final decision having been given on review, that proceeding was a proceeding pending, which was, therefore, to be decided by the new High Court of the *North-Western* Provinces. The 27th section of those Letters Patent is as follows:—"We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature for the *North-Western* Provinces, in the exercise of its original or appellate jurisdiction, may be performed by any Judge;" and, accordingly, the Chief Justice, Sir *Walter Morgan*, did sit, apparently as a single Judge. He appears to have heard the parties, and given his final decision, and that was the decision of the High Court of *Agra*, which their Lordships are of opinion

had, under these circumstances, jurisdiction, and the appeal, therefore, is brought from that decision.

Now, the action itself is an action brought by one Hindoo Widow, *Mussumat Ladoo*, against another Hindoo Widow, *Mussumat Oodey*, the Widow of her eldest Son, to recover three several properties. The only question before their Lordships relates to two of those properties, because, as to the third property, all the Judges below agree that the Plaintiff was entitled to recover, and there is no appeal as to that. The Plaintiff brought the suit on the ground that the Defendant was in possession of the property, but that she, the Plaintiff, was entitled to it as heir-at-law of her Son, *Sheo Lall*, and there appears no question that she was such heir-at-law. The property had originally belonged to *Buldeo Buksh*. He had two Sons, of whom one, the Husband of the Defendant in the suit, died in the life-time of *Buldeo Buksh*. There appears to have been some attempted adoption, that is to say, *Buldeo Buksh* and *Mussumat Ladoo* appear to have attempted to give their second Son, who was an infant, as an adopted Son to the Widow of their eldest Son. But it is admitted that for various reasons that adoption, if it were ever attempted, was wholly invalid according to Hindoo law; if for no other reason at any rate for this reason, that the Husband of the Widow who made the adoption had never given any permission to the Widow to make such adoption, and it was admitted before us that the adoption was wholly invalid.

That being so, it is plain that the Son, *Sheo Lall*, on the death of *Buldeo Buksh*, became solely entitled to the property; and upon his death his Mother became entitled as his heir, and, therefore, if the matter remained there, it is admitted that she would be entitled. But it is alleged that she had done certain acts and become a party to certain documents, the effect of which was, at any rate as to these two latter portions of the property, to prevent her from recovering.

Buldeo Buksh had mortgaged these two properties in question, and a suit had been commenced, first in the name of *Sheo Lall* by his assumed Guardian, probably in the first instance on account of this invalid adoption, against the Mortgagees to redeem the mortgage, which was resisted by them on the ground, which it is now quite immaterial to consider, that the mortgage had been a real sale. Some proceedings had also taken place for the mutation of names; and it would appear that in those proceedings for the mutation of names, the Collector and the parties had wrongfully assumed that the two Widows and the Son were jointly heirs of *Buldeo Buksh*. Then it was said that the Plaintiff being old, and not wishing to interfere with the affairs, she had agreed that *Sheo Lall* and *Mussumat Oodey* should alone be entered as the owners of the property, and that her name should be omitted.

In the suit for the redemption of the mortgage, an objection was taken by the Mortgagees, that the suit was wrongly constituted, because *Mussumat Ladoo*, and not *Mussumat Oodey*, was the proper Guardian of the infant, and the proper person to bring the suit. On that occasion *Mussumat Ladoo* presented a petition, on which the matter before us principally turns, the main object of which unquestionably was to enable the suit to be carried on by *Mussumat Oodey*, either in her own name or as Guardian of the infant without joining the name of *Mussumat Ladoo*, and the entire contention on the part of the Appellant before us is, that by the proceedings which have been already described with respect to the mutation of names and by the language of this petition, *Mussumat Ladoo* in fact abandoned all her right to the property in question, so that when she became in point of law entitled to the property as heir of her Son, she could no longer avail herself of that right as against the Defendant. The petition is in these terms. [His Lordship read the petition.*]

If that is to prevent her recovering the

* "Since the date of *Kullyan Singh's* demise, *Buldeo Buksh*, my Husband, and myself gave our Son, *Sheo Lall*, to *Mussumat Oodey Koowur*, to be adopted as her Son, and since then she has been his Guardian and protectress. Moreover, owing to my old age, infirmity, and imbecility, I also caused only the names of *Oodey Koowur* and *Sheo Lall* to be entered in the proprietary column of the

property now in question, it must do so either because it operated as a conveyance or as a contract to convey the interest which she now claims, or because it operated by way of estoppel. There is no other way in which it can operate. Now, did it operate either as a conveyance or as a contract to convey the interest to which she has now become entitled as heir of her Son? Their Lordships are of opinion, that it is quite impossible that it could so operate, and that for two reasons: first, because at the time when she presented this petition she had not in fact any interest in the property at all, and certainly had not become entitled to any interest as the heir of her Son, who was at that time alive; and in the next place, there is not the least reason to suppose that in the petition she in any degree contemplated a conveyance of any such right. That was not the right which they were then considering at all. The main object of the petition was simply to enable the redemption suit to go on, and to enable the persons who had begun it as Plaintiffs—*Oodey Koowur* and *Sheo Lall*—to carry it on. There was nothing in the language and nothing in the position of the parties which could lead any one to suppose that she had any interest that she might hereafter acquire as heir of her Son, in her contemplation at all. On these grounds, it appears quite impossible that it can operate either as a conveyance or as a contract to convey her subsequently acquired interest.

Well, now, is she in any way estopped? It is very difficult to see how she can possibly be estopped. There has been a difference of opinion among the learned Judges in the Court below as to the construction of this instrument,—whether it ought to be construed solely as relating to her rights as Guardian, and to convey them, and not to relate to the property at all? The language certainly, in some parts of it, does appear to refer very strongly to an interest as Owner, and probably it may be that the meaning of the instrument rather refers to her supposed interest as Owner; but it appears to their Lordships hardly necessary conclusively to decide upon the proper construction of this instrument, because, even assuming, that it does refer to her interest as Owner, that is to say, to her present interest as Owner, and that she is assuming incorrectly that she has some interest as heir of her Husband, their Lordships are of opinion that her stating that, and professing to resign that in favour of *Oodey Koowur*, could not possibly in point of law, estop, or prevent her from setting up her real right as heir of her Son, when that right actually accrued. There is, in the first place, no consideration whatever for this conveyance of her particular interest; even if she had it, she receives nothing for it. Neither does *Oodey Koowur* act on any representation made by her, or alter her position in any way. There is no misrepresentation to *Oodey Koowur* of any sort or kind. *Oodey Koowur* was acquainted with the actual facts of the case, just as much as *Mussumat Ladoo* was. The real effect of the petition seems rather to be that they mutually agreed to represent what was not the fact, for the purpose of enabling a certain suit to be carried on. Their Lordships are of opinion that, assuming she did intend to convey a present interest in the properties, which she supposed or assumed she had, there is no principle of law or justice by which that can prevent her from setting up her real right when that right has accrued. It it true that this petition had the desired effect, and that *Mussumat Oodey* was allowed to carry on the suit, and afterwards, when *Sheo Lall* died, and *Mussumat Ladoo* immediately proceeded to present petitions to be allowed to carry on the suit instead of her, the Court, as their Lordships are disposed to think improperly, prevented her from carrying on the redemption suit, would not grant that petition, and allowed the redemption suit to go on in the name of *Mussumat Oodey*,

certificate of death of *Buldeo Buksh*, and I have no claim whatever to the proprietary rights in the two villages in question, *Oodey Koowur* herself, and as Guardian of *Sheo Lall*, being their sole owner. I have now become very old and imbecile, and have no strength to go about, look after, or understand my affairs, and *Mussumat Oodey Koowur* herself, and as Guardian to *Sheo Lall*, my Son, is in every way proprietor and owner."—13, *Moore's I. A.*, *p.* 587.

598—600

who had begun it, but that mistake cannot, as their Lordships think, possibly deprive her now of the right to which she is in law entitled, though it accounts for the judgment of the Judge in the first instance, who properly considered that it was no business of his to overrule or to differ from the judgment of the Superior Court.

On these grounds their Lordships are of opinion, that the petition cannot possibly operate either as a conveyance, or as a contract to convey, nor by way of estoppel, so as to deprive the Plaintiff of her right to recover all these properties, and their Lordships entirely agree in the judgment of Sir *Walter Morgan*, which was practically to the same effect. Their Lordships, therefore, will advise Her Majesty that this appeal ought to be dismissed, and the judgment of the High Court of *Agra* ought to be confirmed, with costs.

12th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. Sir Joseph Napier, Bart.

On Appeal from the High Court of Judicature at Fort William, Bengal.

RANEE BISTOOPRIA PUTMADAYE,* ... } *Appellant*,

versus

NUND DHUL and others, ... *Respondents*.

Practice—Infant Appellant coming of Age—Withdrawal from Appeal.

An infant Appellant, in an appeal pending in the Privy Council, having come of age, and having petitioned the High Court in *India* to be allowed to withdraw from the suit,—*Held*, that it was competent to the Respondent in *England* to have the appeal dismissed for want of prosecution, although the guardian had given security for the costs and paid the expenses of the appeal, and although the (former) infant was not served with notice of the motion, the Council being satisfied that he had in the High Court petitioned for leave to withdraw.

* 13, Moore's I. A., p. 603; 6 B. L. R., p. 190.

THE RIGHT HON. LORD CAIRNS:

IN this case we understand that the Lady represented by Mr. *Bell*, as Guardian of an infant who was represented to have been duly adopted as the Son of her late Husband, instituted a suit to recover certain property from the Respondent, who was in possession under a claim that the infant was the Son and legal heir of the deceased. The suit was heard by two Courts. It is unnecessary for us, upon this application, to consider further whether the decisions both passed against the title of the infant was right or wrong. We will assume that she may have had legitimate ground for applying in the Court below for leave to appeal to this Board.

That leave was granted in 1866, when the boy was still admittedly an infant. So far the proceedings seem to have been entirely regular. The transcript came home in 1867. The record was printed here, and the only thing which can be suggested as any irregularity may have been the lodging of the petition of appeal so late as 1870, after the infant had come of age, and was for all purposes *dominus litis*.

It appears that the proceedings which are embodied in the supplementary record, have taken place in *India*, and the effect of them is to show that upon being called into that Court the infant expressed his desire to abandon the appeal, and that the Court ultimately felt that it could not decide that question, and, the appeal having been transmitted here, sent the whole of the proceedings for the adjudication of their Lordships.

In that state of things the Respondents now apply that the appeal may be dismissed, and the application is resisted by the Lady who was originally the Guardian of the infant.

At one time it appeared to their Lordships that it might possibly be necessary to ascertain more clearly that the Son is a consenting party to this application, which could only be done by directing the Court in *India* to take further proceedings, in order to have the fact ascertained. But looking to these proceedings, and considering what the Court has done, it appears

to their Lordships unnecessary to take that step, and to put the parties to the further delay and expense which it would involve. When the suggestions were made to Mr. *Leith* their Lordships had not sufficiently adverted to the terms of the *Mookternamah*. We knew that the boy had made a clear admission to the *Moonsiff*, which had satisfied the Judge and the High Court, that he was of age, and that he had executed that *Mookternamah*; but it did not, as it appeared to us at that time, follow that he had adopted all the statements in the petition which was presented under the *Mookternamah*. But when you come to look at the *Mookternamah*, of which he has admitted the execution, it seems very clear that he knew what he was about and what his *Mookter* would do under that instrument.

He says, "Now I have attained majority, and considering that no other profit will arise by carrying on the said case than a useless expenditure of money, and with the desire of withdrawing from the said case, I do appoint *Jugmohun Doss Putto Naik*, inhabitant of *Saooda Khotee* of *Pergunnah Mayahagun*, in *Zillah Midnapore*, as *Mookter* in my behalf, in order to engage a Pleader of the High Court, and agree that the Pleader of the High Court in *Calcutta*, who will be appointed by the said *Mookter*, will file a petition of withdrawal from the said case, and the said withdrawal will be one as if filed by me, and completely valid."

Therefore, it seems to their Lordships that they have sufficient evidence before them in these proceedings, that the young man is a consenting party to this application.

The question, then, is reduced to this—whether the Lady who is represented by Mr. *Bell* has really such an interest in the appeal, or such a *locus standi* in this Court, as entitles her to resist this application and to insist that the appeal shall go on, although the party in whose name it is brought wishes to withdraw from it.

Their Lordships are of opinion that she has not; if she has incurred costs there can be no appeal for mere costs; having incurred costs on behalf of the infant in this suit, she may have a claim to be recouped from his estate, if he has any; but that does not entitle her to prosecute this appeal in his name against his will, with probably but faint chances of success.

It was thrown out that the decree had not dealt with the title of the Defendant, and that she might have a preferable title to him; but the obvious answer to that argument is this—there has been a clear adjudication that the nominal Plaintiff in this suit had no title. If the Lady herself, as Widow, has a better title, that title cannot be litigated in this suit, but must be litigated in an independent suit, in which, rejecting the adoption, she would come forward as the next heir of the deceased.

Therefore we do not see that we should be justified in keeping this appeal upon our records. But considering the peculiar nature of the application and the position of the parties, it does not seem to us that we can do anything but dismiss the appeal *simpliciter*, saying nothing about costs. There is no proof that the infant has undertaken to pay the costs; and we also think that we ought not to give to either side the costs of this petition.

12th, 13th and 14th December, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. Sir Joseph Napier, Bart.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

RANEE SURUT SOONDREE DEBEA,* ... ... } *Appellant,*

versus

BABOO PROSONNO COOMAR TAGORE, and after his death, ROMANATH TAGORE and others, ... } *Respondents.*

Accretion—Chur Lands—Local Investigation.

In a dispute as to the position of *chur* lands, where the change of the course of the river threw

* 13, Moore's I. A., p. 607; 6 B. L. R., p. 677.

doubt upon their position, the judgment of the Court of first instance, given after local investigation, was upheld against the decision of the High Court, founded on inspection of the maps and on the arguments adduced before it.

16th December, 1870.

THE consideration of their Lordships' judgment was reserved.

Judgment was now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The Appellant and the Respondents in this case are the representatives of two *Zemindars*, who, some six-and-thirty years ago, engaged in litigation concerning the title to certain *chur* land thrown up by the river *Brahmapootra*.

This litigation was begun by a suit, brought in 1834, by *Prosonno Coomar Tagore*, whom it will be convenient to describe as the Respondent, for the recovery of 5,000 *beegahs* of the land in question. In the course of that suit, and in the year 1835, a map of the land in dispute, with the land and water immediately surrounding it, was made by an *Ameen*, named *Goureepersaud Moitro*, under the authority of the Court; and in that map the different *churs* are delineated, and marked with different numbers, from 1 to 7 inclusive.

This first suit was successful; and *Prosonno Coomar Tagore* obtained a decree for about 5,000 *beegahs* of *chur* land. In 1845 he brought a second suit for 14,000 *beegahs* of like land, and obtained a decree from the Court of First Instance. The Defendants then appealed; and, pending their appeal, and in July, 1849, the parties came to a compromise, which was embodied in a decree of the *Sudder Dewanny Adawlut*, dated the 3rd of July, 1849, and was thereby directed to be carried into effect.

The effect of this compromise was, that the *churs* marked in *Goureepersaud's* map as Nos. 5 and 7, with 1,663 *beegahs* and 15 *cottahs* of *chur* No. 6, were to belong to those who are represented by the Appellant; and that the *churs* Nos. 1, 2, 3, and 4, with the rest of *chur* No. 6, were to belong to the Respondent. The boundaries, if the parties differed about them, were to be settled by arbitration; and if the parties could not agree to appoint Arbitrators, were to be fixed through the Court *Ameen* in execution of the decree.

If, then, this map, which was the basis of the compromise, had correctly described the land as it then existed, nothing remained to be done, but to measure off the 1,663 and odd *beegahs* from *chur* No. 6, and to put the parties into possession of their respective shares.

Unfortunately the land, which was the subject of the compromise, was in some sort the creation of the River *Brahmapootra*, which is said after each annual flood to be apt to shift its course, and to effect considerable changes in the alluvial deposits on either side of its channel. And thus it came to pass that as soon as the parties proceeded to carry out the compromise, a contest arose whether, either between 1835 and 1849, or at some subsequent period, the river had not so changed its course as materially to alter the configuration of some of the seven *churs*, and their bearings to its main stream. The only effect, therefore, of the compromise was to convert a dispute touching the title to lands into one touching the identification of parcels; the principal question being not how *chur* No 6 was to be divided, but where *churs* Nos. 5 and 7, which unquestionably belonged to the Appellant's *zemindary*, were to be found. And this dispute has given rise to the intermittent litigation which, after lasting for more than fifteen years, was, in 1863, closed by the decree now under appeal.

The following is a short summary of that litigation:—Some time after 1849, and before April, 1853, the Respondent was put into possession of a considerable part, if not of the whole, of so much of the land contained in the seven *churs* as then lay on the western side of the *Brahmapootra;* and the possession so taken was confirmed by an Order of the then Principal *Sudder Ameen* of *Rungpore*, dated the 19th of April, 1853. But that Order was, on the appeal of the other party, set aside by Mr. *Dunbar*, one of the Judges of the *Sudder Dewanny Adawlut*, whose Order of the 24th of September, 1853, directed the Principal *Sudder Ameen* to

re-open the inquiry, but apparently did not disturb the possession already given to the Respondent. Some delay in giving effect to this Order took place, in consequence of the Respondent's having contrived to strike the execution case off the file; but it was restored under an order of the *Sudder Dewanny Adawlut*, dated the 14th of February, 1855.

The case was then investigated by the Principal *Sudder Ameen*; each party filed a map before him; he himself held a local investigation, and made or caused to be made the map of 1855; and finally, on the 27th of June, 1856, passed an order overruling the objections made to the Record of his investigation by the Respondent in his petition, declaring the possession given to the Respondent to be null and void, and directing that possession should be given to the parties in accordance, as their Lordships understood the order, with the present contention of the Appellant. No change, however, seems ever actually to have been made in the possession of the land, of which possession was given by the *Moonsiff*. The Respondent appealed against the last-mentioned Order, and the question was again re-opened by Mr. *Torren's* order of the 30th January, 1857, which remitted the case to the Principal *Sudder Ameen*, with directions that in respect of those parcels which he had given to the then Respondent (the present Appellant,) he should again allow execution of the decree, and after that, prepare a map (better than the present map,) so that it might clearly appear for the perusal of the appellate Court, and in other respects what was the former and present course of the River *Brahmapootra* over the disputed lands, as stated in the map of *Goureepersaud Ameen*.

The execution of this Order was somewhat delayed by the rainy season, during which a local investigation was impossible, but on the 2nd of December, 1857, the Principal *Sudder Ameen* passed an order for the appointment of an *Ameen* acquainted with measurement by the compass. From one cause or another, however, nothing effectual was done under this last Order until December, 1860, when *Kalidoss Moitro* the *Ameen* proceeded to the spot, made a careful local investigation, prepared the map which bears his name, and on the 30th of April, 1861, filed the elaborate report. That report, though it did not precisely adopt the representations of either party, in the main supported the contention of the Appellant. It was adopted by the Principal *Sudder Ameen*, who, on the 1st of August, 1861, passed a decree finding that *churs* Nos. 5 and 7 were where the Appellant placed them, and not where the Respondent placed them, directing that possession should be given accordingly; and also giving the necessary directions for ascertaining and making over that part of *chur* No. 6 (as to the position of which there seems to be no controversy) which under the compromise belonged to the Appellant.

The Respondent appealed against this decree. The High Court reversed it, finding that *churs* Nos. 5 and 7 were where the Respondent placed them, and varying the Principal *Sudder Ameen's* decree accordingly. The present appeal is against that decree, and the first question for their Lordships' determination is, whether it can be supported. It rests entirely upon the assumption that *churs* Nos. 5 and 7, which unquestionably were on the west of the main stream of the River *Brahmapootra* when the map of *Goureepersaud* was made in 1835, are now by reason of the altered course of that river on the eastern side of it. If that is not made out, the reasons assigned for the judgment wholly fail.

Upon what does this assumption purport to be founded? "On an examination of the maps filed in the cause, and on the explanations and arguments of the Pleaders on both sides." What the latter may have been their Lordships are unable to say. But having given full consideration to the able argument of Mr. *Doyne* on behalf of the Respondent; and having carefully examined the maps, they are unable to see any satisfactory grounds for coming to the conclusion contrary to the finding of those who have investigated the question on the spot, that the river has, since 1835, by making for itself a new channel to the west of its former channel, so changed its course as to put either of

the *churs* described by *Gouree persaud* as Nos. 5 and 7, or whatever may remain of either of them, on its eastern instead of its western bank.

It would be strange indeed if this conclusion necessarily resulted from a mere comparison of the maps, since it is opposed to the expressed convictions of the *Ameen Kalidoss Moitro*, who made the last and most scientific of the maps, and to that of the Principal *Sudder Ameen*, who conducted the local investigation and made the map of 1855. Mr. *Doyne*, indeed, has argued that the conclusion of the High Court may have been an inference, and would have been a legitimate inference, from the application of what he treats as the known law of the formation of *churs* to certain newly-formed *chur* land appearing in parts of *Kalidoss Moitro's* map. But the High Court has not assigned this as one of the grounds of its judgment. Nor are their Lordships, considering the disturbing forces which may exist in a river of so vast a volume and of such irregular action as the *Brahmapootra*, and also the positions of the several portions of *chur* land indicated in the map, by any means satisfied that the inference is legitimate, or so certain that it ought to outweigh the positive findings of the *Ameen*.

Again, the High Court observed that the Principal *Sudder Ameen* had not, in their opinion, duly considered the landmarks by which in both maps, when duly compared, the situation of *churs* 5 and 7 may be satisfactorily identified. The Court has omitted to state specifically to what landmarks it refers as instances of this omission. The instance most pressed in argument has been that of the Tamarind trees appearing on the east side of the River in *Gungapersad's* map. But the real position of those trees, if they still exist, was also the subject of controversy; and after investigations on the spot, the *Ameen* reject the Respondent's theory concerning it. There is nothing to show that he was wrong in this. It is obviously impossible to draw that conclusion from *Gungapersad's* map, which, it is admitted, was not made by compass, or according to scale.

Another point made in the argument, though not adverted to in the judgment, is the bearing of the village of *Kompoor* to the land alleged by either party to be *chur* No. 5. It cannot be said that the *Ameen* has neglected to consider this landmark. And his explanation of the discrepancy in this respect between his map and that of *Gungapersad*, viz.: that the village, of which the position is very loosely indicated, is erroneously placed on the latter to the south instead of to the east of the River *Ghelye*, appears to their Lordships to be plausible.

Their Lordships, then, are unable to see any satisfactory grounds for the assumption which is the foundation of the judgment of the High Court. They would themselves be very slow to interfere with the judgment of an Indian Court upon a question of this nature. But they have to deal here with conflicting judgments, of which one is founded on a long and careful local investigation; and the other, overruling the former, is supported by no reasons that their Lordships can pronounce to be satisfactory. And their Lordships may observe that the considerations which make them reluctant to set their judgment against that of an Indian Court upon such a question as this, ought to influence in some degree the appellate Court in *India*, and to prevent its interference with the result of a local inquiry, except upon clearly defined and sufficient grounds. Such grounds the appellate Court may have thought it had in this case, but it has failed to express them. Against its judgment their Lordships have now to weigh the elaborate report of the *Ameen* and the judgment founded upon it. The integrity of the *Ameen* is unquestioned; his careful and laborious execution of his task is proved by his report; he has not blindly adopted the assertions of either party; and without going minutely into details, their Lordships think it sufficient to say that they see no ground for impugning the accuracy of his conclusion upon what they conceive to be the broad and cardinal issue upon which the determination of this case depends, viz.: whether the lands which represent *churs* Nos. 5 and 7 of *Gungapersad's* map are now on the east or still on the west of the main channel of the River *Brahmapootra*. On the contrary,

they believe the conclusion of the *Ameen* to be correct. And they are fortified in that conviction by the following considerations:—

It is to be observed that this controversy was by no means of recent date. The question was not, whether the change alleged had been effected by the action of the river between 1835 and 1863. It appears by the Respondent's petition and the maps that his contention was certainly as early as 1855, and possibly as early as the *Moonsiff's* proceeding, that the lands which represented the *churs* Nos. 5 and 7 of the compromise were then on the eastern side of the main course of the river. That this was in fact the case in 1849 is in the highest degree improbable. Though it is too clear that the parties by a compromise made upon loose data merely shifted the ground of contention instead of determining their disputes; it is almost inconceivable that they should have drawn and executed, as they did, the instruments of compromise upon the footing of *Gungapersad's* map, without adverting to so great a change in the position of the *churs* relatively to the main channel of the river, if such a change had then taken place. The change, then, if it ever really took place, must have taken place between 1849 and the *Moonsiff's* proceeding, or the year 1855; and in that case it might easily have been proved. It would then have been recent and notorious, yet in 1855 the Principal *Sudder Ameen*, after local investigation, decided against the Respondent.

Again, their Lordships upon the evidence see no reason to doubt that the land which the Respondent treats as *chur* No. 5, is in fact the *Pookamaree chur*, and an accretion on an estate which never belonged to the Appellant's family, and now belongs to Government,—an estate of which the *Moonshee chur*, one of the landmarks of the map of 1835, formed part. There is nothing which induces their Lordships to believe that any of those whom the Appellant represents were ever in possession of that *chur*. Yet the High Court, without adverting to this point, affirmed it to be the *chur* No. 5 of the compromise, and directed that the Respondent should be maintained in the possession of it.

Upon the whole, then, their Lordships have come to the conclusion that it is their duty to advise Her Majesty to allow this appeal, to reverse the decree of the High Court; to direct that in lieu thereof the appeal to that Court from the decree of the Principal *Sudder Ameen* be dismissed, and the last-mentioned decree affirmed with costs. The Appellant must also have her costs of this appeal.

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*16th, 18th and 19th January, 1871.**

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Calcutta.

RADANATH DOSS and others,† ... ... } *Appellants*,

versus

GISBORNE and Co., ... *Respondents*.

Mortgage by one of a Joint Hindu Family —Surrender of Equity of Redemption —Act XIV. of 1859, s. 1, cls. 13, 15; ss. 5, 10—Purchaser for valuable Consideration—Pleading.

A member of a joint Hindu family granted a usufructuary mortgage: he subsequently, without the knowledge of the co-partners, released the equity of redemption: on hearing of this the co-partners contested the validity of the release: *Held*, that the parties claiming from the person to whom the release was made took, so far as the co-partners were concerned, a title only as mortgagees.

Act XIV. of 1859, section 1, clause 13, is intended to apply to suits between members of a joint family, not to a case where a mortgage having been made by one member on behalf of all to a stranger, that member afterwards, against the will of his co-partners, releases the equity of redemption.

To entitle a purchaser to claim the benefit of Act XIV. of 1859, section 5, he must prove,—1st, that

* 6 B. L. R., p. 530, December, 1870.
† 14, Moore's I. A., p. 1; 6 B. L. R., p. 530.

he is a purchaser of what is represented to him and what he fully believes to be not a mortgage but an absolute title; 2nd, that he purchased *bonâ fide*, that is to say, without a knowledge of the title having been originally a mortgage and of a doubt existing as to the mortgage having ceased; and 3rd, that he is a purchaser for valuable consideration.

A pleading setting up as a defence a purchase for valuable consideration should aver the seisin of the vendor, and the sale of his absolute title for good consideration.

Where an estate having been originally mortgaged by K., a member of a joint Hindu family, he subsequently, without the knowledge of the other members, released the equity of redemption to R., who afterwards sold to H., the owner of a factory, who afterwards sold to G. and Co. the factory with the lands appertaining thereto, amongst which was the property so released, and proceedings had for many years been taken by the other members to assert their rights,—*Held*, reversing the decision of the High Court that G. and Co. were not purchasers entitled to the protection of Act XIV. of 1859, section 5. *Held* also, that that section 10 does not apply in such a case, although K. acted fraudulently.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. LORD CAIRNS:

The claim in this case, which led to the decision which is under appeal, was a claim, in substance, for the recovery of property at present in the possession of the Respondents, Messrs. *Gisborne* & Company. The recovery of that property was sought by the Appellants on the footing, that it had been made the subject of a conditional sale in the year 1828; and that they, the Appellants, had now the right to redeem the property,—the amount for which the property had been conditionally sold or mortgaged, having been paid off by the receipt of profits. This mortgage, made in the year 1828, was made by a person of the name of *Kunhya Lall Doss* as Mortgagor, to one *Russick Lall Doss* as Mortgagee. The Appellants say, that *Kunhya Lall Doss* was the member of a joint family, joint as regards this property, and that they were the other members of that joint family, and that the mortgage was made either with their previous approbation, or their subsequent assent. *Russick Lall Doss*, beyond doubt, was the native Agent of the firm of *Shawe* and *Hawes*, and the mortgage, beyond doubt, was made to *Russick Lall Doss*, because as the law stood at that time, Europeans could not have held immoveable property in this part of *India* in their own name (*a*.) That law having subsequently been altered, *Russick Lall Doss* assigned over to his principals, *Shawe* and *Hawes*, the property which he thus held for them in mortgage. Subsequently *Shawe* relinquished his share to *Hawes*, and finally by a Deed executed in the year 1841, the details of which will afterwards have to be referred to, *Hawes* passed over or conveyed the property to the present Respondents, Messrs. *Gisborne* & Company.

Now, the first question which arises in this state of things, is as to the right of the Plaintiffs to redeem this property? Their possession as members of a joint family is denied by the Respondents, who contend, that there is no evidence that the family was joint, or that this property belonged originally to any person other than *Kunhya Lall Doss*, the Mortgagee. Upon that question, Mr. *Madocks*, the District Judge before whom the case first came, delivered a very elaborate and careful judgment, in which he came to the conclusion, that the joint ownership of the property was made out in favour of the Appellants, and, although it was not necessary for the High Court of *Calcutta*, in the view they took of another part of the case, absolutely to decide that question, they do not appear to have disapproved of the conclusion at which Mr. *Madocks* had arrived on this point. The evidence having been so fully and satisfactorily commented upon by Mr. *Madocks*, their Lordships do not think it necessary to say more than this, that looking to the form of the Government settlement of this property, looking to the history of the family, which is in evidence, looking to the accounts going down to the year before the date of the mortgage showing the dealings of the family between themselves, looking to the *Ikrarnamah* executed between *Kunhya Lall Doss* and the other members of the family almost contemporaneously with the mortgage of 1828, looking to the dealings with the *Mouzah Ugda* which was excepted out of the mortgage of 1828, although

(*a*) See Ben. Reg. xxxviii. of 1793.

forming part of the whole estate, their Lordships are satisfied that this property was the joint property of the family, and that *Kunhya Lall Doss* was mortgaging it with the assent of and as the Manager for the whole family.

Their Lordships would add to the general description of the evidence which has satisfied them of this, a reference also to the statements which were made very shortly after the conveyance of 1841 to Messrs. *Gisborne* & Company. In 1843, a suit was brought by the present Appellants, or some of them, against Messrs. *Gisborne* & Company, making parties also *Russick Lall Doss* and *Kunhya Lall Doss*. The Plaintiffs in that suit were nonsuited upon technical grounds, but in that suit the Plaintiffs stated their title substantially in the same way that it is now stated, and in the answers to that suit their Lordships find that Mr. *Barnes*, a member of the firm of *Gisborne* & Company, and the other members of that firm, stated that the Plaintiffs' suit was totally false, and that the reasons of the falsity of the Plaintiffs' suit were stated in the answer of *Russick Lall Doss*, another Defendant, and that that answer was sufficient. They, therefore, referred their case to the answer of *Russick Lall Doss*, and were content to adopt it as the statement of their case. Now, *Russick Lall Doss*, as has been said, was the native Agent of the Indigo Factory of *Shawe* and *Howes* at the time of the mortgage in 1828. He must have known perfectly well everything connected with the title and the circumstances of the family, one member of which was making a mortgage to him; and what *Russick Lall Doss*, having these means of peculiar knowledge, said in the year 1843, was this, "Oh! admitted of justice, let your presence consider the fact, that although the Plaintiffs have no right and interest in the said *mouzahs*, yet even it is clearly evident from the contents of the former plaint that the Plaintiffs themselves have admitted that the said *Kunhya Lall Doss*, by the advice and with the concurrence of the Plaintiffs, sold the property in dispute to me"—that of course means mortgaged—"for the sum of Rs. 17,011, with the object of liquidating the money due to the said Gentleman from *Kunhya Lall Doss*, under the Deed of mortgage, dated the 25th May, 1826." *Russick Lall Doss* was, therefore, content to affirm at this time, and Messrs. *Gisborne* & Company were content to adopt his statement, that *Kunhya Lall Doss* had previously mortgaged the property by the advice and with the concurrence of the Plaintiffs,—advice and concurrence which would have been utterly useless and unmeaning unless the Plaintiffs had been joint Owners of the property.

Their Lordships, therefore, on this part of the case, have no hesitation in accepting the conclusion of the Court of First Instance, and they have the satisfaction of thinking, that in that respect, they are not differing from the opinion of the High Court of *Calcutta*, although it was not absolutely necessary for that Court to decide the question.

The next objection which was taken to the title of the Plaintiffs to redeem is this. It is said that the conditional sale having been made in the year 1828, and the condition of that sale being for liquidation of the amount of mortgage-money in eleven years, —a year afterwards, in November, 1829, the *Ikrarnamah* which contained the condition making the transaction a mortgage was returned by *Kunhya Lall Doss* and *Russick Lall Doss*, with an indorsement. The indorsement is partly defaced, but it runs thus:—"(Defaced) the said *mehal*, according to the conditions of the *Ikrar* (defaced), the Government revenue, and interest and the consideration being (defaced); therefore, I have returned this *Ikrarnamah* to *Russick Lall Doss*, the Purchaser. The *Mouzahs* stated in the *Ikrarnamah*, I have absolutely sold. Dated the 27th *Kartick*, 1237. *Kunhya Lall Doss*, *Zemindar*." It is said that the meaning of this indorsement, which was partly defaced, is, that it amounted to an assertion that the profits of the *Zemindary* were insufficient to pay the principal and interest and the Government revenue, and that, therefore, the *Ikrarnamah* was returned by *Kunhya Lall Doss* to *Russick Lall Doss*.

Now, without going further, their Lordships are compelled to say, that this is

a transaction which, upon the face of it, is almost incredible. The property was mortgaged by a usufructuary mortgage, to run over eleven years. The Mortgagee was bound, on the face of the Deed, to pay the Government duty. The mortgage created no personal liability with regard to the payment of the debt. If the debt should be paid in the course of eleven years, the land would be free, if not paid, at all events, the Mortgagor would be in no worse condition than he was at the end of the first year. There is no consideration moving to the Mortgagor for the release of the equity of redemption. It is said that the District in which the property was situate was a District which, as regards its produce, was liable to the uncertainties of dry seasons; but, although that might lead to a diminution of the produce in one year, on the other hand, the absence of drought and the presence of moisture in another season might lead to a more plentiful crop, and the uncertainty is one which might have a double bearing as regards the ultimate result of the conditional sale.

But it is further to be observed, that this allegation of the return of the *Ikrarnamah*, and the production of it with the indorsement, was never heard of, until about two years subsequently, when one *Bholanath*, having sued *Kunhya Lall Doss* upon a debt of his own due to *Bholanath*, was taking proceedings to sell this property, or to sell the equity of redemption of it, as being the property of *Kunhya Lall Doss*. Then it was that the return of the *Ikrarnamah* was set up, and that this indorsement was produced. The moment that defence was set up it was challenged,—challenged not merely by *Bholanath*, but by the other members of the joint family,—and steps were taken to dispute it. It is true that, from circumstances connected with the attempted sale of *Bholanath* going off, the question was not ultimately decided at that time, which is very much to be regretted. The Primary Judge decided against the transaction,—decided that it was not a real transaction, but a fraudulent one to defeat the Creditor. There was an appeal to the appellate Tribunal. The appellate Court thought that an investigation of the circumstances should take place, and sent it back for that purpose. The biddings at the sale not having been sufficient to lead to a sale taking place, the Primary Judge thought that it was unnecessary to pursue that investigation. But, both at the time and at every time since, when the return of the *Ikrarnamah* has been set up, the transaction has been challenged as an unreal and fictitious transaction.

Their Lordships are of opinion, that it is, on the face of it, an incredible transaction, and they cannot arrive at any other conclusion than that it was a transaction between *Russick Lall Doss* and *Kunhya Lall Doss* for the purpose of defeating the proceedings of the Creditor, *Bholanath*.

Their Lordships must add this further observation: the mortgage or conditional sale of 1828 is clear and undisputed. It lies upon those who desire to set up any title putting an end to the mortgage to establish their case by evidence which is clear and satisfactory. That *onus* certainly is not discharged in this case, and their Lordships, therefore, are of opinion, that on this point also the title of the Appellants is made out, and that, unless on some other ground yet to be considered, they are precluded from redeeming, they are not precluded by the pretended return of the *Ikrarnamah*. Upon this point also their Lordships, in substance, agree with the view of all the Judges in the High Court in *India*.

We come now to the remaining part of the case, which is this: Assuming the title of the Plaintiffs to redeem to be made out, the Respondents, Messrs. *Gisborne* and Company, claim the benefit of the Act of Limitation of suits, No. XIV. of 1859, and assert that the time during which the title of the Plaintiffs to redeem could be put in force has elapsed. In the first place, they say that the Appellants are barred by the 13th section of the Law of limitations, that is to say, the section which speaks of suits for enforcing the right to share in any property moveable or immoveable, on the ground that it is joint family property. It is not necessary to repeat that section at length, for their Lordships are of opinion, that it is a section which deals

with suits between one or some member or members of the joint family and some other member of the joint family, complaining of what we should term in this Country an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. The present case is a case by no means of that description. In the present case the foundation of the title of the Plaintiffs is a mortgage, which, as has been already said, was in its inception, in substance, the mortgage of the whole of the joint family. The circumstance that it is not the whole of the members of the joint family, but only some who now come to recover their share of the property, does not make this a dispute in any way between members of the joint family as to the question of, whether the property is joint or not. It is merely a question of the title of the Plaintiffs to redeem, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

The Respondents then allege, that they are entitled to the benefit of the 5th section of the same Act, which enacts that, "In suits for the recovery from the Purchaser, or any person claiming under him, of any property purchased *bonâ fide*, and for valuable consideration, from a Trustee, Depositary, Pawnee, or Mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase." Now, questions of very considerable importance have been raised and argued as to the meaning of this section. Their Lordships desire to say, that the provision of this section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to *India*, having regard to the circumstances of that Country. But their Lordships cannot fail to observe, that the provisions of this section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que* trust, or of a person who has deposited, pawned, or mortgaged property; they cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section, as a person who ought to be protected. Their Lordships think, that in order to claim the benefit of this section a Defendant must show three things:—First, that he is a Purchaser according to the proper meaning of that term; second, that he is a *bonâ fide* Purchaser; and third, that he is a Purchaser for valuable consideration.

Now, what is the meaning of the term "Purchaser" in this section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title.

Now, it is important in this case to consider how it is that in pleading in the first instance the transaction which here has taken place, the Respondents have put their title. In the sixth head of their statement, they express themselves:—"The Defendants, as Purchasers for a just consideration, have all along held adverse possession of the disputed property for more than twelve years without notice of any legal right as co-partners, *i. e.*, if any right had existed pertaining to the Plaintiffs as well as to those persons from whom the Defendants have acquired their right. Thus, in such a case, also, the Plaintiffs' claim is, by reason of limitation, inadmissible." There is no averment there of any fact; it is merely a statement that as Purchasers they are entitled to the benefit of the Act, but when they come to their averment of facts, their statement is this: the second head is, "On the 16th May, 1838, A. D., *Russick Lall Dass* sold the said *mouzahs* to Messrs. *William Shaw* and *William Hawes* for Rs. 17,011, and caus-

ed the names of the Messrs. *William Shawe* and *William Hawes* to be entered in the Government records, on the excision of his own name, and Mr. *William Shawe* sold his share to Mr. *William Hawes*, who after that sold it to Messrs. *Gisborne* and Co. and Mr. *C. H. Barnes*, and Mr. *C. H. Barnes* sold his 4 *annas* share to Messrs. *Gisborne* and Co., and mutation of names took place." This is a statement which puts the title of *Gisborne* and Company exactly in the same position as the title of *Shawe* and *Hawes*. It alleges, that *Russick Lall Dass* sold to *Shawe* and *Hawes*, that *Shawe* sold to *Hawes*, and then that *Hawes* sold to *Gisborne* and Company. It draws no distinction between the various transfers of the property, but puts them all exactly on the same footing. Now, an allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in such a plea are not matters of technicality,—they are matters of substance. In pleading a purchase for valuable consideration in this Country, the very first averment in the plea is, that the person selling either was seized, or alleged that he was seized, for an absolute title, and then the plea goes on to say, that being so seized, or alleging that he was so seized, he contracted to sell, and did sell and convey that absolute title, asserting it to be such, to the Purchaser, who paid his money for that which was thus sold. There is not a fragment of an averment of that kind in the whole of the pleadings in this case. The pleading is perfectly consistent with the transaction having been nothing more than the purchase, that is to say, the transfer of that which was a conditional title, or a title by way of mortgage.

We turn then from the pleadings to see what is the evidence of the transaction in the case. Now, there is no evidence at all of any negotiation for this purchase, of any specification, or schedule, or inventory of what the property was that was to be included in the general purchase of the Factory which was taking place. There is no evidence of any allegation or statement on the part of the Vendor which would lead Messrs. *Gisborne* and Company to believe that this was an absolute title which they held to the property in question. The only evidence that there were Purchasers at all is the production of the purchase Deed to which reference is now made.

The purchase Deed contains a recital of the manner in which the Vendor, the first party to the Deed, *Hawes*, had had conveyed to him the various Factories which were to be handed over to *Gisborne* and Company. It then contains this recital of the contract between *Hawes* and *Gisborne* and Company:—"And whereas the said *John Dougal*, *George Dougal*, *Charles Jones Richards*, *Matthew Gisborne*, and *John Richards* have contracted and agreed with the said *William Hawes* for the absolute purchase of the said several indigo Factories or works and premises hereinafter described, at and for the price or sum of Company's Rs. 2,10,000, and the same are intended to be conveyed and assured unto the said *John Dougal*, *George Dougal*, *Charles Jones Richards*, *Matthew Gisborne*, and *John Richards*, and their heirs in the manner hereinafter expressed." It is a contract for the absolute purchase of those premises which are afterwards described in this Deed and intended to be conveyed by it. When we turn to what these premises are, we find first an enumeration of the Indigo Factory; then this addition, "All lands cultivated and uncultivated to the said several and respective Indigo Factories or sets of works respectively belonging or in any wise appertaining;" and further on, "And all the estate, right, title, interest, use, trust, property, possession, possibility, claim, and demand whatsoever, both at law and in equity of them the said *William Hawes*, *Robert Molloy*, and *James Cullen* and each of them in, to, out of, or upon the said several and respective Indigo Factories or sets of works, lands, hereditaments, chattels, and premises, and every or any part or parcel thereof."

Now, assume that there was in this commercial House, as a part of their property in trade, a mortgage securing to them the debt which has been mentioned; assume that that was perfectly well known to every person connected with them, and to

the Purchasers. No more fit or apt Deed could have been devised than this for the purpose of conveying a title to that mortgage as the rightful title upon which the property was to be held by the Purchasers. The Deed, in other words, is perfectly consistent with it not having been the intention of any person to this transaction to do more than to hand over this along with all the other property which the commercial Firm possessed, according to whatever might be the right and true title upon which each portion of the property was held. Their Lordships can find in this Deed no evidence of a statement on the part of the Vendor or of any belief on the part of the Purchasers that the property of the *Maheeanwan* estate was a property which the Vendor claimed to hold by what we should call in this Country a fee-simple title.

Under these circumstances, their Lordships think, that the first requisite in the law of limitation is not made out, and that the Respondents here are unable to show, or at all events have not shown, that they are Purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract by the Vendor to convey the property to them as an absolute property.

This would be sufficient to decide the case; for, of course, unless the whole of the three requisites exist, the benefit of the Limitation of suits Act is not obtained. Their Lordships, however, think it right to go further, and to say that they are not satisfied that even if this objection did not exist, Messrs. *Gisborne* & Co. are able to show that they are *bonâ fide* Purchasers. It is unnecessary to impute, and their Lordships would not desire to impute, to Messrs. *Gisborne* & Co. any dishonesty whatever in the transaction, or any moral obliquity in their dealings in this matter. But what their Lordships have to observe is this: Messrs. *Gisborne* & Co. must be regarded as dealing in this case upon one of two footings. Either they were aware, in the year 1841, when they took this conveyance, of all that had passed between this native family and the predecessors in title of *Gisborne* & Co by way of allegation and averment, and claim upon the one side and upon the other, that is to say, they must either have been aware of all the contents of the papers connected with the litigation which had taken place in previous years, or if not aware of the contents of those papers, they must at all events have been aware of the original Conditional sale of 1828, and of the alleged return of the *Ikrarnamah* with its indorsement. It has not been very clear to their Lordships upon which of these two footings the Counsel for the Respondents would desire Messrs. *Gisborne* & Co. to be dealt with. At one time it rather appeared that their Counsel would wish it to be considered that they knew nothing, or should be taken as knowing nothing but the Conditional sale and the alleged return of the *Ikrarnamah*. At another time their Counsel appeared desirous to refer to certain portions, at all events, of the proceedings which had taken place between the Conditional sale and the year 1841. But assuming that they were not aware of the details of that litigation; assuming that Messrs. *Gisborne* & Co. knew nothing but what has been called the bare title to the property, the Conditional sale, the alleged indorsement upon and return of the *Ikrarnamah*, and the transfer subsequently from *Russick Lall Doss* to *Hawes* and *Shawe*; their Lordships are of opinion, that looking to the clear and undisputed mortgage in the first instance —looking to the transparent unreality of the transaction connected with the alleged return of the *Ikrarnamah*, the mere production of the indorsement upon that *Ikrarnamah* as the description of the cause for its return was amply sufficient to put any persons in the position of Messrs. *Gisborne* & Co. upon an inquiry and consideration as to whether that transaction could be a real transaction, or whether it was a transaction which could form part of the title of a Purchaser. On the other hand, if, as seems to have been rather the opinion of the learned Judges of the Court below, and certainly seems much more consistent with all the facts of the case,—if it be taken that Messrs. *Gisborne* & Co. were perfectly aware of all the accounts in the Factory and of all the details of the litigation, and of all the claims that had been made before with regard to this pro-

perty, then their Lordships consider that their attention was pointedly and distinctly called to the infirmity of title in this case, and that, with their attention so called, they could not be considered to be *bonâ fide* Purchasers.

Therefore upon both grounds, upon the ground that they are not Purchasers within the meaning of the limitation law, and upon the ground that, if they were Purchasers they are not, in the sense in which the words are used in the Act, "*bonâ fide* Purchasers," their Lordships think that Messrs. *Gisborne* & Company are not entitled to the benefit of this Act of limitation.

It would perhaps be right that their Lordships should advert also to an argument which was adduced, although not very warmly pressed, that under the 10th section of the Limitation of suits Act, Messrs. *Gisborne* & Co. might find protection. The 10th section says, "In suits in which the cause of action is founded on a fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged." This, in their Lordships' opinion, is not an action founded upon fraud in that sense. It is an action upon a title to recover the possession of property to which the Plaintiffs are entitled, which clearly they must recover, unless there be some specific protection given to those now in possession of it by virtue of the other sections of the Act to which reference has been made.

This being the opinion at which their Lordships have arrived, they will humbly recommend to Her Majesty that the decree of the High Court of *Calcutta* should be reversed, and that in place of it an Order should be made dismissing the appeal to the High Court, and dismissing it with costs. That would set up again the decree of Mr. *Madocks*, the *Zillah* Judge. Their Lordships are content to allow that decree to stand, and are unwilling to enter upon any criticism of the precise form of it, because no argument has been adduced before their Lordships upon the footing that, supposing the decree in substance to be right, any modification should be made of it in details. Their Lordships, therefore, will leave that decree to be the decree in the cause, and will only further add that the Appellants should also have the costs of this appeal.

18th January, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

LALJI SAHU and another,*... *Appellants*,

versus

The COLLECTOR of TIRHOOT, ... } *Respondent*.

Compromise and Decree thereon—Review of Judgment—Concurrent Judgments on Fact.

The manager of the Court of Wards effected a compromise with claimants on the estate; a decree was passed on the basis of that compromise, but before the parties wished the decree to be made; in the decree leave was reversed to apply for a review if the compromise was not sanctioned by the Commissioner, and was prejudicial to the parties. The compromise was sanctioned by the Commissioner, but afterwards the manager found that he had been deceived by his servants, and that the claim had been allowed erroneously. *Held*, that the Court having granted a review, and the claim being proved to be exaggerated, a decree was properly given for the true amount.

Where both the lower Courts had agreed as to the facts, the Privy Council refused to examine the evidence, the controversy being merely as to the weight to be attributed to it.

THIS was an appeal from a decree of the High Court at *Calcutta*, whereby a decision of the Principal *Sudder Ameen*, dismissing the suit of the Appellants, was affirmed save as to a sum of Rs. 12,751-13, which the Respondent admitted to be due.

The Appellants, bankers, &c., in *Tirhoot*,

* 6 B. L. R., p. 648.

had sold large quantities of cloth, &c., to the late *Maharajah* of *Durbanga*. On his death, Mr. *Forlong* being the manager, they claimed about one and a half *lacs* of Rupees, and Mr. *Forlong* wrote a letter stating that, after looking into the *Rajah's* accounts, he would pay what was justly due.

On the 31st December 1861, they brought their action to enforce payment against the Collector and two of the *Amlahs* of the *Rajah*. Mr. *Forlong*, on behalf of the Collector, disputed the amount, and witnesses were examined for the Plaintiffs.

Other parties having successfully sued for other claims, Mr. *Forlong* reported to the Collector that it would be advisable to settle amicably, and he pointed out that some of the items appeared to be supported by signed accounts in the *Maharajah's* office and some by unsigned accounts. He pointed out that some of these only should be relied upon, and that, after deducting what was due from the Plaintiffs for rents to the estate, they should be allowed to recover Rs. 48,816.

The Appellants went before the Principal *Sudder Ameen*, stating that Mr. *Forlong* had recommended a settlement for that sum as a compromise, and praying the Court to postpone the case until the Commissioner had sanctioned the compromise.

This the Principal *Sudder Ameen* refused, and passed the following order:

"It is very expedient and proper to decide this case (by adjourning which a censure from the Superior Court is apprehended) on that statement of the Plaintiffs with this instruction that hereafter in the event of this decision being contrary to the order of approval of the Commissioner and being prejudicial to either of the contending parties, they will be at liberty to present a petition for review of judgment and thus obviate the damage accruing to them."

Two months afterwards (September 1862) the Commissioner approved of Mr. *Forlong's* proposal.

In November 1862, Mr. *Forlong* wrote to the Commissioner, complaining that he had been grossly deceived by some of the servants in the office, and while taking blame to himself for trusting too implicitly to the reports made to him, he applied to the Commissioner to allow him to apply for a review of judgment, on the ground of his having been led by fraud to consent to the compromise, which leave being given, he applied to the Principal *Sudder Ameen* for a review. He also filed a cross suit for the rent due by the Appellants.

The Appellants opposed the review on the grounds of the compromise being binding and of their not being parties to any fraud.

The review being granted, they amended their plaint by striking out the credit given in their plaint for the rents.

The Principal *Sudder Ameen* directed enquiries into the accounts in the *Maharajah's* office, and decided that the documents relied on were false and fraudulent save as to Rs. 12,751, which he found to be supported by true documents, but on the ground of the suit being principally supported by false documents, he dismissed the whole claim.

On appeal to the High Court, Mr. *Forlong* did not insist on the claim as to the Rs. 12,751 being disallowed, and to that extent the High Court gave a decree.

The Plaintiffs then appealed to the Privy Council.

Sir *R. Palmer*, Q. C., and Mr. *Leith* for the Appellants.—In his letter complaining of the fraud of his servants, Mr. *Forlong* admits the high character of the Appellants in other transactions, and says that he was from this and from the fraud of his own servants led to make a mistake. We have nothing to do with his mistake. The compromise was entered into after he had a full opportunity of making enquiries, and such enquiries as he made were from his own servants. An attempt has been made to strengthen the case by putting in correspondence between the *Rani* and other relations and the manager, but that is not evidence. The Principal *Sudder Ameen* had no right to grant a review, and on the evidence taken by him the claim ought to have been considered proved. [Sir J. COLVILE.—You could not appeal against the order granting a review under the Code, I believe?] No, we could not (1.) [Sir J. COLVILE.—Do you rely on the compromise being final and binding?]

(1) Act VIII. of 1859, s. 378.

That is our contention. Besides admitting as evidence what ought not to have been admitted, the Courts below have come to a wrong conclusion on the facts. [Lord CAIRNS.—The case comes as it were from a finding of a jury. Where the Judge of first instance and the Judges of appeal, one of whom is a native, agree as to their view of the native testimony, it would surely be a strong measure to ask us to reverse those findings of fact. If there was no compromise, how can we open up this case on the facts?] If that be the opinion of the Board, we refrain from going fully into the details of the evidence.

Mr. *Field*, Q. C., and Mr. *Bell*, for the Respondents, were not called upon.

The judgment of their Lordships was then delivered as follows:

Their Lordships are clearly of opinion that there was no compromise concluded here in such a way as to prevent the character and particulars of the claim being re-considered upon the petition to review. On the contrary, provision was made in the original order to keep alive the right of either party, if dissatisfied, to have a petition of review. We then find that upon that petition of review the Court of first instance was entirely dissatisfied with the evidence in support of the Plaintiffs' claim. We find that the Court of Appeal, there being no ground of appeal on the question of rejection or reception of evidence, arrived at the same conclusion. They considered that the evidence was of a suspicious and unsatisfactory nature, and it would be quite impossible for this tribunal upon a question of fact of this kind, and where the controversy is as to the weight to be attributed to evidence, to differ from the decision of the two Courts below, unless their Lordships found that there had been some violation of the ordinary principles upon which causes ought to be tried. We do not find that there was any miscarriage of that kind in this case, and therefore we must humbly advise Her Majesty that this appeal should be dismissed with costs.

19th and 20th January, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, North-Western Provinces.

KHUGOWLEE SING and others,* ... ... } (*Defendants*) *Appellants*,

versus

HOSSEIN BUX KHAN and others, ... } (*Plaintiffs*) *Respondents*.

Res Judicata—Civil Procedure Code (Act VIII. of 1859), s. 2—Evidence weighed by Judicial Committee.

The doctrine laid down in the *Duchess of Kingston's case* (1) as to estoppel by judgment is applicable to cases tried under the Civil Procedure Code of *India*, the 2nd section of which is consistent with that rule

But the Judicial Committee, reversing the decision of the Court below, considered that the doctrine had no application in the present case, the judgment relied on not being the judgment of a Court of concurrent jurisdiction directly upon the point upon the same matter; and after an examination of the whole evidence restored the judgment of the first Court.

THEIR Lordships having taken time to consider, gave the following judgment:—

This appeal having been heard *ex parte*, their Lordships were desirous, before they determined it, carefully to read and consider the evidence in support of the case of the absent Respondents, the Plaintiffs in the suit.

The suit was in the nature of a redemption suit, and was brought to recover from the Appellants certain property, on the allegation that their title was originally that of Mortgagees by way of conditional sale;

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* 7 B. L. R., p. 673.

(1) 2 Smith's Leading Cases, 6th edition, 679.

that the mortgage debt had been satisfied; and that, accordingly, the Plaintiffs were entitled to recover possession of the land with mesne profits from the date of such satisfaction.

The case of the Appellants was that they, or those whom they represent, had been in possession of the lands for upwards of twenty years under two deeds of absolute sale, executed in consideration of Rs. 9,800 on the 12th March 1843, and confirmed by two decrees of the Civil Court passed on the confession of their Vendors, the Plaintiffs in the present suit.

The Plaintiffs, not denying that this was the ostensible title of the Appellants, insists that the true transaction was a mortgage by conditional sale for securing the sum of Rs. 4,000 with interest, and that this was effected by the *Ikrarnamah* of even date with the deeds of sale.

It was therefore essential to the Plaintiffs' case to establish the validity of this *Ikrarnamah*.

The *Zillah* Judge who tried the cause in the first instance decided that it was not a genuine instrument, and dismissed the suit. But the High Court of *Agra*, on appeal, reversed his decision, and decided in favour of the Plaintiffs, upon the ground which their Lordships will next consider.

This judgment of the High Court does not profess to proceed upon a review of the general and conflicting evidence given in the cause. It is founded solely upon the omission of the Judge below to give due weight to the fact that the *Ikrarnamah* had been declared to be valid and genuine by the Deputy Collector of *Futtehpore* in proceedings which will be afterwards considered, and it treats that finding as *res judicata* between the parties.

Those proceedings are referred to on the face of the plaint, and their Lordships will therefore assume that the point, though not made the subject of a formal issue, was sufficiently raised on the pleadings.

Their Lordships, however, are of opinion that the judgment of the High Court reversing that of the *Zillah* Judge cannot be supported on this ground.

In the course of the argument, one of their Lordships quoted from the opinion delivered by the Judges in the *Duchess of Kingston's case* the following passage:—"From the cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a Court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive, between the same parties upon the same matter directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."(1)

There is nothing technical or peculiar to the law of *England* in the rule as so stated. It was recognized by the civil law, and it is perfectly consistent with the second section of the Code of Procedure under which this case was tried, which says,—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

Now, what were the proceedings which in this case were assumed to afford evidence in favour of the validity of the *Ikrarnamah* which the Appellants were not at liberty to dispute? They are set out in the record. It appears from them that the Appellants, in March 1863, brought a summary suit for arrears of rent before the Deputy Collector against one of the Plaintiffs in the present suit. They alleged that he was an occupier of a small portion of land not exceeding 37 *beegahs*, being part of the land in question, under a *pottah* and *kabuliat*. The Defendant in that summary suit denied the case of the

(1) 2 Smith's Leading Cases, 680.

Plaintiffs (the present Appellants), alleged that the transaction of 1843 was a conditional sale, produced the *Ikrarnamah*, and contended that under a particular stipulation in it he and the other Vendor or Mortgagor were entitled to hold 75 *beegahs* rent-free. The Appellants then, as now, denied the validity of this *Ikrarnamah*. Evidence was taken on both sides; and the Collector, holding that the Appellants had failed to prove their case, and that the Defendant in the summary suit had proved the *Ikrarnamah*, dismissed the claim. On appeal to the *Zillah* Judge this dismissal was confirmed, but on the ground that the Appellants had failed to prove that the Defendant was a cultivator paying rent, and that their claim was barred by limitation; and the Judge remarked that the Deputy Collector had made a lengthy inquiry with reference to the papers filed by both parties which had no connection with the present claim.

On special appeal to the *Sudder* Court the dismissal of the claim was again confirmed, the Court observing that the question whether the Plaintiffs (the Appellants) were out-and-out Purchasers, or only conditional Purchasers, under the deeds of the 12th March 1843, did not arise in the case.

From this statement it appears that the ultimate decision of this claim for rent did not turn upon the validity of the *Ikrarnamah*. But if the judgment of the Collector had been final in the matter before him, his incidental finding that the *Ikrarnamah* was a valid instrument would not be conclusive between the parties in the present litigation. For the question before him was not the issue now raised between the parties; and his decision was not that a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent.

The *eadem causa petendi*, and judgment of a Court of competent or concurrent jurisdiction, are both wanting here. Their Lordships, therefore, being of opinion that the decree under appeal cannot be supported on the only ground which the Judges of the High Court have assigned for it, will proceed to consider whether the evidence in the cause, taken as a whole, affords any sufficient reason for disturbing the decree of the *Zillah* Judge.

It is not denied that on the 12th of March 1843 the deeds of absolute sale were executed; that on the 14th of March they were produced in the Civil Court, where decrees were passed upon them; and that on the 1st of May 1843 the proceeding for the mutation of names took place. The last was not without opposition. One *Furzund Hossein Khan* put in objections founded on the right of pre-emption under the Mahomedan law, and on a claim to a small portion of the property sold. The former objection was overruled; but it could only have been made to an absolute sale; and the fact that it was made is an additional proof that the transaction was then treated as, and understood to be, an absolute sale. In the plaint, indeed, it is alleged that the transaction was represented to be an absolute sale, and not what it really was, a mortgage, in order to avoid any claim founded on the right of pre-emption. But this statement appears to their Lordships to be founded on a misconception of the law of pre-emption, and therefore to afford an argument against the truth of the Plaintiffs' case. Three years later, in September 1846, part of the property was seized by a judgment-creditor of the Vendors. The Appellants came in as objectors, claiming as absolute owners; and their objection prevailed, though the *Ikrarnamah*, according to the Plaintiffs' case, had then been registered, and, if a valid document, would have left in them an interest capable of being taken in execution.

The Plaintiffs have given no explanation whatever why they consented to the decrees. Although, in 1846, there was this execution against them, there is no suggestion that in 1843 they had any interest for making that which was in fact a mortgage appear to be an absolute sale. The probabilities of the case, therefore, resulting from the history of the *res gestæ* are all against the validity of the *Ikrarnamah*.

But what is the direct evidence of the execution of that instrument? The evidence of the two first witnesses, *Jhu Khan* and *Khadir Bux*, who are not subscribing

witnesses, appears to their Lordships to be worthless. The evidence of the attesting witnesses who are called is not consistent. *Sheadan Putwarri*, who from his position might have been a more trustworthy witness, is not called. In addition to the discrepancies and other circumstances tending to cast suspicion on the testimony for the Plaintiffs which have been stated by the *Zillah* Judge, their Lordships have to observe that the document impeached purports to have been executed on the same day as the undisputed deeds of sale; that by several witnesses it is sworn to have been executed at the house of Mahomed *Sidiq*, the writer of the bills of sale; yet all these witnesses say that they saw no instrument but the *Ikrarnamah* executed. It is difficult to see why, if the *Ikrarnamah* was really executed on the 12th of March 1843, and in the house of the Appellants' agent, it was not executed with the deeds of sale, and attested by the same witnesses. Again, as the Judge has observed, the witnesses for the Plaintiffs fail to prove the payment of the Rs. 4,000 which they allege to have been the consideration for the mortgage; whilst the witnesses for the Appellants have proved, to the satisfaction of the Judge, the payment of the Rs. 9,800 which they allege to have been the consideration for the sale. It lay on the Plaintiffs to prove the validity of the instrument on which they rely. The oral evidence was conflicting, and the *Zillah* Judge came to a clear conclusion that the witnesses for the Plaintiffs were not to be believed, and that the witnesses for the Appellants were trustworthy. Their Lordships would, for obvious reasons, be slow, in any case, to overrule the opinion expressed by the Judges in whose presence the testimony was given touching the credibility of native witnesses. In the present case, their own conclusion, formed upon a perusal of all the evidence in the cause, is substantially in accordance with that of the *Zillah* Judge. They are of opinion that he was right in holding that the Plaintiffs had failed to establish the validity of the *Ikrarnamah*, which was the foundation of their case, and in dismissing their suit. Their Lordships will accordingly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and to direct that in lieu thereof a decree be made dismissing the appeal against the decree of the *Zillah* Judge with costs. If the Appellants have paid any costs under the order reversed, those costs must be refunded, and they must also have their costs of this appeal.

20th January, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bombay.

MANTAPPA NADGOWDA,* ... *Appellant*,

versus

BASWUNTRAO NADGOWDA, *Respondent*.

Deed of Family Arrangement followed by enjoyment and possession for 10 years, not to be disturbed—Insufficient stamp, objection of, not taken in the Court of First Instance, cannot justify the Court of last appeal to reject the document in toto—A document on insufficient stamp should be either rejected in toto, or admitted on payment of proper stamp and penalty; and not medium course left.

A deed held to be the expression of a valid family contract between two brothers, acted upon by both of them, and which ought not to be disturbed.

The Court will be slow to fail to give effect to a family arrangement of the kind expressed in such a deed, followed, as it had been, by enjoyment and possession for a period of ten years.

The Respondent in settlement of family differences, executed in favour of the Appellant, his elder brother, a deed of release as to certain family property—which release was subsequently held to be a valid famly contract between the two brothers—written upon unstamped paper, and containing an

* 14, Moore's I. A., p. 24.

agreement for subsequent stamping, and which was afterwards stamped with an insufficient stamp of two annas. In a subsequent suit by the Respondent against the Appellant in which it was desired to use the document in evidence, the Respondent in the Court of First Instance disputed the deed of release on the ground of genuineness only, but, in the Appellate Court, he also objected to its admissibility in evidence as being insufficiently stamped, and his objection was overruled. On appeal to the High Court of *Bombay*, that Court ruled, that, the deed of release was valid only to the extent of the value covered by the two annas stamp, and that to this extent it operated to reduce the Respondent's claim. *Held*, that, admitting the stamp was insufficient, there were two courses which ought to have been taken by the High Court. The Court might have refused to admit the document for want of a proper stamp. That it was not said that that would have been a correct course, but that it would have been a possible course; or, they might, under the Acts and Regulations for that purpose have required the document to be properly stamped, and the penalty paid. That, as to rejecting the document *in toto*, there was the serious difficulty, that there did not appear to have been any objection raised to its admission in the Court of First Instance, and that it was difficult to see, how, that being the case, it would have been a just course to have rejected *in toto* the document in the Court of last appeal. That the Court of last appeal in *India*, did not take either of these courses. It did not reject the document, nor did it do, what obviously would have been the correct course, require the deed to be properly stamped, and the penalty paid, but left the deed as part of the evidence in the suit, just in the way in which it had been placed among the evidence by the Court of First Instance, and it qualified its effect, and the extent of its operation, by making it a deed of release, releasing so much of that which the Plaintiff might otherwise claim, as would be covered by the insufficient stamp of two annas, a course apparently entirely without precedent, without principle, and without authority.

JUDGMENT was delivered by

THE RIGHT HON. LORD CAIRNS:

The first question raised in this case is as to the existence of a custom in the *Nad Gowdki* family by which, on descent, where there was more than one Son, it is alleged, that the younger Brothers did not, according to the ordinary Hindoo law, share with the eldest Son in a division of the property, but received maintenance, or an allotment of property in lieu of maintenance, in place of sharing in the whole property. Their Lordships feel a difficulty in knowing exactly what the precise terms of the custom are which the Appellant desires to rely upon. But further than that, after considering the evidence, their Lordships find no sufficient evidence of a special custom of the kind urged at the Bar to have prevailed in this family. They, therefore, think it unnecessary to consider the question raised by the High Court, as to whether, in that part of *India*, a custom of the kind suggested might or might not be valid. That is a question which would properly arise for determination as soon as it was ascertained that in point of fact such a custom prevailed. Their Lordships, however, find sufficient materials which will enable them to dispose of this case from the dealings that have taken place between the Appellant and the Respondent.

It appears that there were three Brothers, the Appellant being the eldest, the Respondent the second, and another Brother, not a party to this suit, who was the third. It appears that upon the descent of the family property, the third Brother received an allotment of land in lieu of maintenance, and did not claim to be, and was not allowed to be, a sharer in the family property. It appears further, that the Respondent, on the 17th of October, 1852, entered into an engagement, evidenced by a Deed of that date, between himself and the Appellant, his elder Brother, to this effect. [His Lordship read the Deed.*]

* The Appellant put in evidence the Deed of release executed in his favour by the Respondent, which was in these terms:—

"I, *Baswuntrao*, Son of *Kidiganappa*, resident at *Kasba Kelur*, execute a Deed of release to the following effect. As differences arose in the family between you and me, I live separate, my continuance in the House being impossible. As it was customary from the time of our ancestors for grants for maintenance to be allowed, I asked for land for the support and maintenance of my family, and accordingly you have given me for maintenance the land and Houses described below" (which were described, and proceeded): "You have thus made me a grant of land and a House. I shall have no connection with the payment of the debts contracted both by ancestors and by yourself. Whatever debts there may be you will pay or receive payment. You, as being born in the elder line, will in the same manner as the first-born descendant used to do from the time of our ancestors,

Now, if that is a valid Deed, if it is not impeachable on the ground of fraud or any other ground, it appears to their Lordships that there is a clear and distinct contract between the Appellant and the Respondent, by which the Respondent accepts an allotment of specific land and a House; obtains certain benefits by being relieved from the family debts, and makes stipulations with his Brother which are binding and enforceable,—which would be binding and enforceable probably in any case, but are still more so when the transaction is one in the nature of a family arrangement. It is true that the arrangement is made upon the expression of belief on the part of the Respondent that he was acting in accordance with the custom of the family. It is very probable that that belief was founded upon fact, and the existence of that belief on his part does not in any way detract from, but rather adds to, the stringency and the effect of the family arrangement. It ought to be added that this Deed having been executed on the 17th of October, 1852, the Respondent appears to have entered into possession of the allotted property, and to have remained in possession until the year 1861, when the suit was instituted, without any complaint on his part except that the portion allotted to him by way of maintenance was too small, which complaint appears to have been met by a further portion being allotted to him for the purpose of increased maintenance.

Therefore, if this be a valid document, and not open to challenge on the ground of fraud, or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed, as it has been, by enjoyment and possession for a period of ten years.

Well, then, is there any ground for impeaching this document? Now, in the first place, it is to be observed, that in the plaint filed by the Respondent there is no challenge of this document whatever. The plaint does not seek to set aside the Deed on the ground that he was misled, that he had not sufficient advice, or that he was ignorant of his rights at the time he executed the release. But when the document was presented as a defence on the part of the Appellant, then the Respondent challenged it, not upon the ground of fraud or ignorance of his rights, but upon the allegation that the document never had existed at all, and that he never had signed such a document. Upon that issue, evidence was entered into on both sides. The two Courts before whom the case was first heard, the Court of First Instance and the Court of first appeal, weighing that evidence, considering it very fully and very carefully, disbelieved the evidence of the Respondent, and held that the Deed was beyond doubt a genuine document executed by him. The second Court of appeal did not differ from the conclusion arrived at by the first two Courts, but the second Court of appeal made this objection to the document. It appeared that in the first instance it had

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enjoy the *Nad Gowdki Wuttun*, the *Bodihall* and *Kadapaty* estate, the *Halli Chasrat* and the *Chasrat* of this *Kusba*, the land of *Gowdki Wuttun* and whatever else may be, together with the *rasoom* (cash allowance or fees). *Hak Bab*, and the rights and privileges (of the hereditary office). I have no right to claim them. You will continue to pay as heretofore the *Nad Gowdki*, *Mahal Joodee*, and the *Gowdki Joodee*, and enjoy the whole of the *Wuttun* for yourself. You will allow no dispute to be raised about the land and House now granted to me. I shall enjoy the said House and land, and live in peace: with the exception of the two, namely the fields and the House. I have no right over the rest of the *Wutnee* land and property; you will not be liable for the payment of any debts, &c., which I may contract. As there was no stamp available for the occasion, I have drawn this up on plain paper. I promise to get the stamp within eight days from this date, and write the Deed upon it, and take this paper back. In case I should fail to procure the stamp, and give the Deed written upon it, I agree to pay all the expenses and the penalty which may be incurred for getting this paper stamped. To this effect I deliver and sign this Deed of release of my own free will and in my sound mind. The date this *Ashwig Sooda*, 5 *Paridhavi Sumoussoar Shuke*, 1774 (October 17th, 1852)." To this document a mark was affixed, after which was the following:—"This mark affixed by *Baswuntrao*." Signed, *Nursing Rao Despande*, *Hoongoond*.—14 *Moore's I. A., pp.* 26, 27.

not been stamped at all: indeed, on the face of it, it professed to be a document written on plain paper, the stamp for which was afterwards to be supplied by the Respondent. After it was first produced it appears to have had a stamp of two *annas* impressed upon it, and the High Court took notice that that was an insufficient sum to cover the amount of the property comprised in the Deed. Now, admitting that the stamp was insufficient, which may be assumed, it appears to their Lordships, that there were two courses which ought to have been taken by the High Court. The Court might have refused to admit the document for want of a proper stamp. Their Lordships do not say that that would have been a correct course, but it would have been a possible course; or they might under the Acts and Regulations for that purpose, have required the document to be properly stamped, and the penalty paid into Court for the purposes of the revenue. As to rejecting the document *in toto* for want of a stamp, there would have been this serious difficulty, that there does not appear to have been any objection raised to its admission in the Court of First Instance, and it is difficult to see how, that being the case, it would have been a just course to have rejected *in toto* the document in the Court of last appeal. However, the Court of last appeal in *India* did not take either of those courses. It did not reject the document. It did not do what obviously would have been the more correct course, require the Deed to be properly stamped and the penalty to be paid, but it left the Deed as part of the evidence in the case, just in the way in which it had been placed among the evidence by the Court of First Instance, and it qualified its effect, and the extent of its operation, by making it a Deed of release, releasing so much of that which the Plaintiff might otherwise claim, as would be covered by the insufficient stamp of two *annas*. Their Lordships cannot do otherwise than express their surprise at the course thus taken, which appears to them to be entirely without precedent, without principle, and without authority.

Their Lordships, therefore, find the Deed as part of the evidence in the suit. They are prepared to say that, being evidence in the case, they think the full and natural weight should be given to it as part of the evidence in the cause; and being of that opinion, they have already said that the Deed not being challenged on the ground of fraud, or on the ground of any ignorance of rights, is the expression of a valid family contract between the two Brothers, acted upon by both of them and ought not now to be disturbed.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, that the decision of the High Court should be reversed, and the first decision which dismissed the suit of the Respondent, be restored, and that the Appellant should have his costs of this appeal as well as of the hearing in the Court of second appeal in *India*.

SECRETARIAT LIBRARY.

21st January, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

NILKAMAL LAHURI and others,* ... ... } *Appellants*,

versus

SRI GUNOMANI DEBI and SRI BARODASUNDARI DEBI, ... } *Respondents*.

Mesne Profits—Default caused by act of other party—Limitation in Suits for Mesne Profits—Act XIV. of 1859—Assam.

Where a purchaser of a forfeited share was kept out of possession of a portion of the property sold, and having recovered judgment in a suit brought

* 7 B. L. R., p. 113.

for possession and mesne profits against the vendor, an arrangement was come to pending appeal, that within a year the parties should appoint an arbitrator to fix on the shares and make a division, and in default of such appointment an application should be made to the *hakim*, but that if no such application was made within the year, and a suit should be subsequently brought, the party suing should lose his right to mesne profits.—*Held* that, under the circumstances, the Defendant having prevented the Plaintiff from making the necessary application within the year, and proceedings having gone on for years to carry out the partition, the Plaintiff was, on the termination of those proceedings, entitled to sue for mesne profits.

Where proceedings were going on to effect a partition, the right to particular properties being in dispute,—*Held* that the right to mesne profits accrued at the termination of those proceedings, and that the party improperly kept out of possession was entitled to sue for all mesne profits during the period of his non-possession, subject to any ground which the Defendant could show which would entitle a Court of Equity to deprive the Plaintiff of his rights.

In a suit brought in January 1862 respecting property situated in *Assam*, mesne profits for twenty-eight years prior to 1854 were decreed subject to any equitable claims for deducting any portion; Act XIV. of 1859 not applying to *Assam* previous to July 1862.

Where, in a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor, though liable for mesne profits, was not in the position of trustee of the rents for the party kept out of possession.

THEIR Lordships delivered the following judgment:—

THE RIGHT HON. LORD CAIRNS:

There is some obscurity and difficulty in this case, arising chiefly from the length of time during which the litigation has unfortunately continued, and from some of the proceedings in the course of that litigation not having been conducted with the perfect regularity which would have been desirable. But disembarrassing the case as far as possible from those difficulties, the facts appear on examination to be simple, and the law applicable to them to be without doubt.

Now what their Lordships find is this. So long ago as the year 1828, there was a controversy between the two persons whom I will term the Appellant and Respondent, although there has been a change of interest since that time, and there are now more Appellants than one, and more Respondents than one. The Appellant apparently have become possessed by purchase of the *zemindary* in question, and had sold a four-*anna* share of it to the Respondent. The Respondent appears to have desired the fulfilment of that bargain, to be let in to possession and to have the *wasilat* or mesne profits of the four-*anna* share during the time he had been kept out of possession, and he instituted a suit for that purpose, and obtained a decree from the Court of first instance. He was ordered to be put into possession. The owner of the larger share appealed to the *Sudder* Court, and pending the appeal the possession of the Respondent was suspended, and the Appellant was left in possession of the whole. In that state of things, the parties, apprehending the delay and expense of the prosecution of the case in the *Sudder* Court, and the owner of the smaller share being anxious to get into possession of his property, came to an agreement which is upon record. The substance of that agreement was this. The facts that I have stated were recited. The agreement provided that there should be an immediate possession given to the Appellant and to the Respondent of portions at all events of cultivated land—an immediate separate possession of portions of the cultivated land which were taken provisionally, and only provisionally, to be as near as then could be ascertained the proper proportion to which each was entitled, viz., a share of twelve-*anna*, and a share of four-*anna*. Those proportions were mentioned by some general names and descriptions which need not now be specified. But then, as it was apparently obvious to both parties that that division and that possession would not be accurate with regard to the real rights of the parties, it was carefully stipulated that it should be only provisional, and that it should be subject to rectification. The parties, therefore, proposed that the rectification should take place in this way. If either desired it in the course of the ensuing twelve months, he was to have an arbitrator appointed, that is to say, he was to propose some person who would be acceptable to the other person concerned, and the rectification was to take place by the award of the arbitrator, but if the arbitrator was not appointed, then the person who was injured by his not being appointed, was to

have liberty to appeal to what is termed the *Hakim*, which has been very properly considered to be the proper tribunal whatever it might be—to appeal to the proper tribunal for the purpose of having effect given to this agreement as to the rectification of shares. There was a provision that the appeal in the *Sudder* Court was not to be proceeded with, and that an application was to be made to the *Sudder* Court to have that appeal dismissed, and this instrument of compromise put upon record in place of the decree. Then the agreement contained this clause. It is a clause relating to *wasilat*, but it is a clause which, as their Lordships think, is not a clause to be read as giving a right in certain cases to *wasilat* but as defeating a right to *wasilat* which it is assumed would exist if it is not taken away. It was natural to suppose, and it would naturally follow, that if upon the rectification of the provisional arrangement made by this agreement, it should appear that one or other had been for a time in possession of a larger share of the *zemindary* than his proper proportion, the person so in possession of the larger share would have to pay *wasilat* or back rents—mesne profits—to him who had had the share which was not adequate to that to which he was entitled. It was provided, therefore, in these words, —"Should any one amongst us both, through negligence, fail to appoint an arbitrator, then he who should think this injurious to his right, shall, within the said period, apply to the Judges of Court" —that is, the *Hakim*—"for determination of the matters above-mentioned, if by not doing this within the said limited period, any one should bring a suit for the excess after the expiration of the limited period, then he shall have no claim for *wasilat*, of the same which had accrued during the period of dispossession; if the claim for *wasilat* be made, that will not be valid."

I repeat that their Lordships think this is clearly a clause of defeasance, of forfeiture of that which otherwise would plainly be the right of the person in possession of the share less than he was entitled to. It is obvious that an arrangement of a different kind might have been made. The rents might have been impounded, they might have been kept *in medio* or in the hands of some third party until it was ascertained what was the true proportion which each should be put in possession of. That would have been clearly inconvenient to both parties; that was the very thing they wanted to avoid. Both parties, therefore, were put into possession of that which was the nearest estimate that could be made of their respective rights, in order that they might enjoy the advantages and the profits of the land, but that was all subject to rectification as to the quantity, and therefore subject also to making good to the party injured any excess of profit which the other might have derived.

That being the agreement made in 1826, we have next to consider what took place in the twelve months which followed the date of the agreement. The agreement was dated the 22nd September 1826. What followed was this: on the 26th June 1827, both parties applied by petition to the Commissioner of the district in which they both lived, putting before him this deed of compromise and asking him to send it to the *Sudder* Court. The Judge to whom the application was made thought this was an irregular proceeding, that they ought themselves to forward it to the *Sudder* Court, if they desired it. But two days afterwards, on the 28th June 1827, the Respondent presented a petition in his own name to the same Commissioner, the local Judge, asking that effect might be given to this arrangement, and that proceedings might be taken in substance to rectify in his favour the division that had been made of the land by the agreement. The Commissioner gave in substance the same answer which he had given to the former petition, that the suit was before the *Sudder* Court, and that the application should be made to the *Sudder* Court.

Now at this point of the case [illegible] Lordships must express their opinion that the application of the Respondent being in the nature of an original [illegible] on the former cause of action, but upon the agreement made in 1826 and the special terms of that agreement, the application to the original Judge, might well

have been entertained by him, and at all events they are not prepared to say that that application was made so improperly, so irregularly, to a person so entirely devoid of jurisdiction, as to lead to a forfeiture under the clause to which reference has been made, on the score that the Respondent had not applied within twelve months to the proper *Hakim* on the subject. Their Lordships are of opinion that the Commissioner to whom the application was made might well either have entertained the application himself as an original suit, or at all events might have kept possession of it until a petition had been presented to the *Sudder* Court to make this agreement entered into in 1826 a proceeding of that Court, and to have an order giving effect to it by way of compromise. However, the Commissioner to take a different view; but that in their Lordships' opinion cannot, if the proceeding was a proper proceeding on the part of the Respondent, have the effect of subjecting the Respondent to forfeiture under the clause of the agreement.

On the 13th September 1827, it appears that application was made to the *Sudder* Court by the Appellant to make the compromise a proceeding or record of that Court and to give directions for carrying it into effect, which the *Sudder* Court on the 28th February 1828, ordered accordingly. That of course was after the expiration of the twelve months.

Their Lordships, therefore, are of opinion on this part of the case that the decision of the High Court from which the present appeal is brought was a correct decision, and that the High Court were warranted in holding that there had been no forfeiture of the right to *wasilat* under this clause in the agreement, by reason of the Respondent not taking the proceedings within the twelve months.

It is necessary now to refer to the subsequent proceedings in order to dispose of the second part of the case as to the statute of limitations. On the 28th August 1828, the Respondent applied to the local Collector for a rectification of partition of the *zemindary*. That was not in the form of a plaint or of an original action, but in the form of a petition. The Collector thought that the *Sudder* having had seisin of the appeal in the original cause, he had not jurisdiction to entertain this petition, and accordingly an application was made in the year 1832 to the *Sudder* Court by the Respondent to rectify the division of the land. It is somewhat difficult to understand whether this is to be looked upon as an original proceeding or as a proceeding carrying out and continuing the chain of the former proceedings in the case. Their Lordships are disposed to think that it is in the latter point of view that it ought to be looked at. There was the original suit in 1826, to which I have already referred; there was the compromise, there was the petition in the *Sudder* Court to have effect given to the compromise, and there was then this further proceeding in the *Sudder* Court to give that particular effect to the compromise which consisted in the rectification of the division of the *zemindary*. On the 28th July 1853, that is, after a lapse of twenty-one years, a scheme for the rectification of the partition was submitted to the *Sudder* Court by the officer who had been assigned for the purpose, and on the 25th April 1854, the *Sudder* Court confirmed that scheme. On the 25th July 1854, the Respondent, who had been found by that scheme to be entitled to a very considerably larger share of the *zemindary* than he had been in possession of, was put into possession of the additional portion to which he thus was found to be entitled.

Now I have stated already that their Lordships are of opinion that, consequential upon the agreement of 1826, there would be right of claim for *wasilat* or mesne profits, if it should be ascertained that either party had not, according to the provisional partition then made, been put into possession of the share to which he was rightfully entitled. Whether either party was in possession of a larger share than his proper share could not be ascertained, and was not ascertained, until the rightful and proper partition was finally made. Until that period it was a matter of doubt and uncertainty whether there would be any claim for mesne profits or *wasilat* at all, and of still greater uncertainty, necessarily, what the amount of that claim might possibly be. On the

other hand, when once it was ascertained that either party had been in possession of a share smaller than his own, his right to *wasilat* would follow as a matter of course, unless barred by some special impediment which at present does not appear in the case. Therefore in the year 1854, when possession was given to the Respondent of the additional share to which he had thus become entitled, his right *primâ facie* would be also to receive from the Appellant that proportion of the mesne profits of the land which would represent the excess, in possession of which the Appellant had been, and out of possession of which the Respondent had been kept. Their Lordships are not prepared to say that, without any substantive or original proceeding, and merely by means of an application to carry into effect the compromise in the suit, this right to *wasilat* might not have been asserted and enforced. But the course which was taken by the Respondent was this:—He did not apply by petition, or in the original claim of proceedings, but he commenced, on the 28th January 1862, a separate and original suit to recover this *wasilat*, but to recover it as a claim which flowed out of the former proceedings. Now, putting aside for a moment the lapse of time between July 1854 and January 1862, their Lordships, although they do not affirm the regularity or the necessity for the plaint of 1862 as an original proceeding, are, notwithstanding, of opinion that if there is any irregularity, there is not such an irregularity in originating that separate proceeding as should disentitle the Respondent to his claim for *wasilat*, if he otherwise was entitled to it, and that he was otherwise entitled to it their Lordships have already expressed to be their opinion.

Is, then, the claim of the Respondent limited in any, and what way, by any statute of limitation? Their Lordships are of opinion that it is impossible to show that the statute of limitations, the Act of 1859, which cuts down a right in cases of this kind to six years, was in force in *Assam* at a period which would make it applicable to this suit, and that therefore may be put aside. The other period of limitation is the limitation of twelve years. If the law of limitation on that score is applicable at all, it could only be by analogy, and not by any positive words of the law. But when their Lordships consider all the circumstances of this case, they are of opinion that it would be contrary to the spirit and object of the statute of limitations to apply that law, even by analogy, in the present case. Their Lordships do not desire to treat this case as a case of trust, as it appears to have been viewed by the High Court from whom the appeal comes. Their Lordships are unable to see that the Appellant and Respondent stood to each other in the position of trustee and *cestui que trust*. But their Lordships consider, as they have already said, that the right to *wasilat* was a right distinctly flowing out of and consequential upon the right to the rectification of the partition, that the right could not have been ascertained or enforced until the rightful partition was completed,—that is to say, in the year 1854,—and that it is to the year 1854 they must look as the period when the right to *wasilat* would accrue. If that is so, their Lordships do not think the lapse of time between 1826 and 1854 should disentitle the Respondent to that which he otherwise would be entitled to. In saying this their Lordships do not mean to affirm that it may not be in the power of the Appellant to show any special circumstances which he may be able to show which should limit, as a matter of equity on the part of the Court, the claim of the Respondent to mesne profits to some period short of the whole number of years between 1826 and 1854, during which the Respondent was kept out of possession of the larger share to which he was entitled. They desire to leave that question open. It will be open to the Appellant, in taking the account for which the case has been remitted to the Court of first instance by the High Court, to show any special case (if he is able to show it), by way of appeal to the equity of the Court to shorten the account which otherwise would have to be taken of the mesne profits. Their Lordships leave that view of the case, if it can be presented by the Appellant, entirely untouched by what has now been said.

On the whole, therefore, their Lordships

are of opinion that in substance the decision of the High Court is correct; they think that the present appeal ought not to succeed, and they will humbly advise Her Majesty that it should be dismissed with costs.

3rd February, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

On Appeal from the Judicial Commissioner of Oude.

SYUD TUFFUZZOOL HOSSEIN KHAN,* ... } *Appellant,*

versus

RUGHOONATH PERSHAD and LADLEE PERSHAD, } *Respondents.*

Act VIII. of 1859, s. 205—Execution—Attachment—Property, Definition of.

Under section 205 of the Civil Procedure Code, sums to be attached must be not inchoate but existing and definite, and although liquidated demands in their nature definite and certain though *sub lite* and unproved may be seized, a mere expectancy or a mere right of suit cannot be attached: the attachment must operate at the time of attachment and not be anticipatory so as to fasten on some future state of property in which the suit may result.

A claim which may accrue under a pending award cannot be sold in execution.

20th February, 1871.

THE case stood over for consideration.

Their Lordships' judgment was now delivered by

THE RIGHT HON. THE LORD JUSTICE JAMES:

This is an appeal from a decision of Sir George Couper, the Judicial Commissioner of *Oude*, reversing a decree of Mr. *Fraser*, the Judge of the Civil Court at *Lucknow*, given in favour of the Appellant, the Plaintiff in a suit which he had brought to set aside an alleged illegal Order of Mr. *Smith*, the officiating Civil Judge of that City. The Order in question cancelled a judicial sale in execution of a decree for a money demand made in a suit in which one *Sah Banarsee Doss* was Plaintiff, and *Ramnath*, the Father of the first Respondent, was the Defendant; in which suit the Plaintiff recovered the sum of Rs. 683. 3 *annas*. The Decree-holder, *Sah Banarsee Doss*, unable to obtain payment of this demand, attached as the property of his Debtor a certain claim in a pending arbitration between *Ramnath*, the Judgment-debtor, and *Sheonath*, his former partner. He proceeded, as if in the regular course of such executions, to its sale in satisfaction of his decree. It was sold accordingly by auction by the *Nazir* of the Court, and the Appellant became the Purchaser of it for the sum of Rs. 1,350.

The claim was thus described in the notice of sale:—

"The claim of *Ramnath* v. *Sheonath*, which was remanded by the Lords of the Privy Council for the settlement of accounts, and has been referred to Arbitrators."

The sale took place on the 25th of October, 1866, and on the following day the Arbitrators made their Award, and awarded to the first Respondent, as the Son and representative of *Ramnath*, then deceased, the partner of *Sheonath*, the sum of Rs. 34,000, and the outstanding debts they awarded to *Sheonath*. These outstandings were partnership debts due to the late Firm, in respect of which neither partner, however, had incurred any special liability to the other. The submission, which was in the most general terms, and conferred the most ample discretionary powers on the Arbitrators, contained the following expressions:—"The case has been made over to you for your decision. We, the parties concerned, agree to have our cause decided among ourselves, and are willing to abide by an amicable adjustment. We, therefore, of our own free will and accord declare and do state in

* 14, Moore's I. A., p. 40; 7 B. L. R., p. 186.

writing that in any way whatsoever our case may be decided by you, the same will be accepted and recognized by us."

The Appellant claims to be entitled to the sum of Rs. 34,000, as Purchaser of the same at the auction sale for the sum of Rs. 1,350. The sum so claimed, however, had no existence at the time of the attachment; it was not a debt nor liability at that time from *Sheonath* to *Ramnath's* Son; it was a debt created by the Award, and not the liquidation of a preceding unliquidated demand *ex contractu*. It was (amongst other matters) an Award of an extinguished share of debts which were till then debts due to the Partners jointly, and became, under the Award, the sole property of *Sheonath*. It was quite competent for the Arbitrators to award money to be paid by, instead of to, the Judgment-debtor, and to give him the outstanding debts. The attachment was not of a several share of the outstanding debts; had such a claim as that been made it should have been asserted by a different notice, directed also to the original Debtors. On its effect, if so made, it is not necessary to decide.

Mr. *Smith* set aside the Order directing the sale. He made his annulling Order *ex parte*, without any notice to the Appellant, who was in ignorance of, and had no opportunity of opposing it. The Appellant, on becoming aware of the Order, petitioned Mr. *Smith* against it. His petition was received; it stated in detail all his objections to the Order, which were fully considered; Mr. *Smith*, however, adhered to his opinion, and sustained his Order.

In consequence of this decision by Mr. *Smith*, the Appellant brought a regular suit to set aside the Order annulling the purchase, and to enfore his rights as Purchaser. Mr. *Fraser* decreed the suit in his favour; but, on appeal to the Judicial Commissioner, that decree was reversed. From this last decree the present appeal has been brought.

The decision of this appeal depends on the true construction of section 205 of Act, No. VIII. of 1859; but before their Lordships enter upon the consideration of the effect of that section they will dispose of some other objections which were urged against Mr. *Smith's* Order.

The Judge proceeded, it is said, in reversing the sale, on the ground of irregularity alone. The real objection, however, to this sale, if sustainable in law, is not one of irregularity; it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a Purchaser under a strictly regular sale.

Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncancelled.

This answer substantially disposes of another objection which was directed against the propriety of Mr. *Smith's* act in cancelling the sale. The act itself may have been right, though he erred in his mode of doing it.

Mr. *Fraser* appears to have supposed a Judge of that Court unable to correct his own error, in sending forth, *per incuriam*, an invalid Order which he would not have made it duly informed.

To proceed, so far as the practice of his Court will allow him, to recall and cancel an invalid Order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the Suitor. It would be a serious injury to the Suitor himself to suffer him to attempt to execute an inoperative Order.

If, then, the decision appealed from be correct, no other objection can reasonably be urged against the course adopted by Mr. *Smith* than this, that he did irregularly without notice, that which it was his duty by a more regular course to do.

Their Lordships are satisfied, however, that no harm or wrong was done by Mr. *Smith's* suspending *ex mero motu* an Order which appeared to him *ex facie* improper —and this was, in effect and substance, what he did.

The section on the true construction of which the decision of this appeal depends is the 205 of Act, No. VIII. of 1859. After an enumeration of many specific subjects of attachment of [illegible] the section, at its close, employs very general words, as if to include all property not enumerated. These words, "and all

other property whatsoever, moveable or immoveable," are, in substance, the same with the words in the old Writ of sequestration pending a suit under the old procedure of the Company's Courts in *India*. See the form in *Macpherson's* Civil Procedure, p. 196 [3rd Ed.] This Writ issued pending a suit to restrain an alienation commenced, or supposed to be about to be made, on the part of a Defendant in fraud of his Creditor.

Of this Writ and the ordinary Writ in execution, the Author says, that scarcely any kind of property is exempt from its operation. The old Writ of seizure in the same Courts has words less extensive in their import than those in the former Writ; and it is obvious, that the former, which more resembles an assignment than an ordinary Writ of execution, may have had, by reason of the apprehended danger of waste of inchoate demands which might result in debts, a wider effect than the Writ of actual execution.

The process now under consideration is one differing from both. It is similar to the seizure of effects in the lands of a Garnishee. The question is on what property that proceeding operates, and not what is the widest reach of any execution, including the appointment of a Receiver, which these Courts may issue.

The judgment under appeal refers to a late authority in support of it, which appears fully to bear out the position for which it was cited, viz., that the sums attached must be not inchoate, but existing and definite. No case was quoted in opposition to it.

The 205th section uses the word "property," not claim or right. A mere right of suit is not property, but a title to recover future property.

A debt or property, which is seizable, or may be attached, does not lose those qualities merely by being the subject of a pending suit. The Judicial Commissioner refers to a passage relating to unproved assets which proceeded from a Directory Order of the late *Sadder Dewanny Adawlut*.

It is certainly said in Mr. *Macpherson's* Work before referred to, that unproved assets may be seized by attachment; but it is also said, in a passage where he is plainly referring to the said Order in the same work, that mere rights of suit cannot be attached. These two apparently, but not really, conflicting positions, may be reconciled by reading the direction as applying to liquidated demands in their nature definite and certain, though *sub lite* and unproved. Various passages from Mr. *Macpherson's* Work on Civil Procedure hereinafter referred to, show that future property cannot be attached. It appears plainly from these passages that a mere expectancy, or a mere right of suit, cannot be attached, that the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. Thus, if the land of A. be held by A. subject to an option in B. to take it at a definite price or sum, the attachment must be of the land and not of the price. An existing debt, though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due, may not: and it is added, that if a Creditor desires to have a security on the receipts of a salary as they accrue, that can be effected only by contract with the Debtor and arrangement with him, and not by an attachment by the act of the Court; see pp. 432—434 [3rd Ed.] Mr. *Leith* referred in his argument to the family property of Hindoos, and urged that such a share in such property may be attached and sold in execution. No doubt can be entertained that such a share is property and that a Decree-holder can reach it. It is specific, existing, and definite; but it is not properly the subject of seizure under this particular process, but rather by process direct against the Owner of it, whether by seizure or sequestration, or appointment of a Receiver.

In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future Award, as to which it is wholly uncertain, until the Award be made, to what the Debtor will be entitled. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum;* it was wholly uncertain, as Sir *George Couper*

has correctly explained in his judgment, in what the arbitration might terminate.

Their Lordships think, that this very case affords a clear proof of the wisdom of that construction which the judgment under appeal has put upon the words of this Act. The Courts have power to secure at once the rights of Creditors and those of Debtors by a judicious application of the powers of the Act; but their Lordships feel that it would be a cruel wrong and injustice if under colour of an execution, a thing described as a "claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to Arbitrators" could be put up to judicial sale: a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning, a description as if it had been "all the claims of *Ramnath* against all his Debtors." It is obvious, moreover, what a door of fraud would be opened if, pending a reference, the Award of the Arbitrators could be put up for sale.

Their Lordships throw no kind of doubt on the power of the Court, by sequestration or direct seizure, notice to Debtors or otherwise, to sell or administer, in execution of a Decree-creditor's claim all that the former law allowed him. They do not find in the Act, which apparently regulates rather than extinguishes any prior right of a Creditor, any evidence of intention to exempt property from executions, but they agree in the observation of the Judge that the Code of Procedure is a new starting point, and must be construed on its own terms, and worked in the mode which it prescribes. Sections 236, 241, and 243 of the Code provide sufficiently what debts due to the Judgment-debtor may be received and applied in satisfaction of the judgment debt without the sacrifice consequent on a judicial sale. And their Lordships are satisfied, that there is nothing in that Code to authorize such a sale as has been professed to be made in this case, and which would require for its justification words too plain to be mistaken and too inflexible to be controlled.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed.

4th February, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Judicial Commissioner of Oude.

IFTIKARUNISSA BEGUM,* { (*Defendant*) *Appellant*,

versus

NAWAB AMJAD ALI KHAN and others, ... { (*Plaintiffs*) *Respondents*.

Mahomedan Law—Dower—Transfer to the Wife of Securities—Presumption of Payment—Gift—Question of Fact.

Where a husband granted a dower of five *lakhs* of *Lucknow* rupees, and subsequently directed *sicca* rupees 4,50,000 Company's Paper to be set aside for her,—*Held*, under the circumstances, that this was to be presumed to be a payment on account of dower, and not a gift.

THEIR Lordships delivered the following judgment:—

This is an appeal from the decision of the Judicial Commissioner of *Oude*, affirming the decision of the Civil Judge of *Oude* disallowing the claim of the Appellant, the widow of an *Oude* nobleman of considerable estates, to a sum of five *lakhs* of the old rupees as dower. The lady, beyond all question, was entitled by her marriage contract to that sum as dower. The defence is that the dower has in fact been paid by the transfer—begun partly in the life-time of the husband, and completed after his death—of Government Paper to the extent of four *lakhs* and 50,000 *sicca* rupees, being substantially the equivalent in point of value of the five *lakhs* of old rupees payable under the con-

* 7 B. L. R., p. 643.

tract of dower. The four and a half *lakhs* are alleged by the lady to have been a gift to her, and she alleges that they are not to be taken by way of satisfaction of the obligation of debt in respect of dower Her case is this that, by certain letters written by the husband in the year 1844, addressed by him to the Government Agent, who had possession of a very large amount of Government Paper for him, he constituted himself a trustee of a portion of that Government Paper to the extent of four and a half *lakhs* in her favor; that a complete trust was created, and that the subsequent transfer to her of the instruments themselves, or of the instrument itself, after the death, was a mere execution of the trust so created by him by way of gift for her. Whether those letters would or would not amount to a sufficient execution of a trust under the circumstances of the case, their Lordships do not think it necessary to consider. They are of opinion that the case cannot be put higher, at all events, for her, than if the transaction had been completed at the moment by an actual transfer by the husband to the wife (or to a trustee for the wife, if that were requisite), by an actual transfer of the notes for four and a half *lakhs*. Now, if that transfer had actually been so completed at the time, it would have resolved itself simply into this. There is a debt to a very large amount. There is a delivery or transfer of something which is substantially in amount and character the equivalent of that which the debtor ought to have provided for the creditor. In that state of things the presumption of law, and the presumption which their Lordships think any jury would draw from the circumstances is, that the thing given by the debtor to the creditor is given by way of payment and satisfaction, and not by way of additional gift, leaving the original debt unsettled. That being the presumption of law, the *onus* is thrown on the person who alleges that there is a gift, in addition to the debt, to give sufficient and satisfactory evidence; and, in their Lordships' judgment, no such evidence whatever has been given in this case. Therefore, if it were a matter not affected by any previous decision, their Lordships would have come to the same conclusion, nearly upon the same grounds as the Judicial Commissioner of *Oude*. But they think it right to add, that the case comes within the rule which their Lordships have upon more than one occasion laid down, as to not disturbing decisions on mere questions of fact. The question was a question of fact, or of inference from facts whether the thing done was done by way of gift, or by way of payment, and the two Courts below having decided the question of fact substantially in the same way, though upon somewhat different grounds, their Lordships would not have disturbed the finding of the Judicial Commissioner, unless they were clearly satisfied that he was wrong.

Their Lordships will therefore recommend that this appeal be dismissed with costs.

4th and 6th February, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William in Bengal.

CHARLES SETON GUTHRIE and others,* ... } *Appellants,*

versus

ABDOOL MOZUFFER and others, ... } *Respondents.*

Duress—Bill of Sale—Concurrent Judgments on Facts.

Where the High Court affirmed the judgment of the Court below on the facts without giving reasons for such affirmance, the Judicial Committee reviewed the facts, and reversed the decree.

* 14, Moore's I. A., p. 53; 7 B. L. R., p. 630.

Where one seeks to set aside a deed on account of duress, and such duress does not amount to personal duress, but merely to pressure by threats as of injury to property, the Plaintiff must offer to restore any benefit accruing to him under the deed.

20th February, 1871.

At the conclusion of the argument the further consideration of the case was adjourned.

Judgment was now pronounced by

The Right Hon. Sir James William Colvile :—

This appeal is against two decrees which have been made in a suit instituted in December, 1862, by one *Cazee Nusseerooollah*, to recover possession of certain lands with mesne profits, and to set aside a Deed of sale purporting to have been executed by him on the 11th of October, 1855, to one *Inglis*, in consideration of Rs. 4,000.

The suit was brought against the Widow and representative of *Inglis*, who died about the beginning of the year 1861. The Judge (Mr. *M. Shaw*) of *Zillah Sylhet* made a decree in favour of the Plaintiff on the 13th of December, 1862, and his decree was affirmed by the Chief Justice of the High Court of *Calcutta*, Sir *Barnes Peacock*, and *Shumboo Nath Pundit*, one of the Puisne Judges, on the 30th of November, 1863. Both the Plaintiff and the Defendant have since died, and they are represented—the former by the Respondents, the latter by the Appellants on the record.

The issues settled in the cause are thus stated :—

First, did the Plaintiff voluntarily and on receipt of the sum set forth in the *Kaballah*, referred to in the plaint, execute to Mr. *Inglis* the Deed in question, or was the same forciboly taken from him by the latter ?

Second, in the event of the *Kaballah* being proved to be *bonâ fide* executed for value received, in that case, is the Defendant in possession of only the *Talooks* therein specified, or has she in addition taken possession of other *Seegga* lands in addition to that appertaining to the *Talooks ?*

It appears, therefore, that besides the principal question as to the validity of the conveyance impeached, there was a subsidiary question as to the extent and description of the lands held by the Defendant under colour of it.

It will be convenient, in the first instance, shortly to consider what, in September, 1855, was the position of the parties to the transaction, and their relation to each other.

The *Cazee* was a native landholder, and also a Mahomedan holding an office in the Court of the Judge of *Sylhet*. He had acquired this property in 1844. Mr. *Inglis* was a European, resident at *Cherra-Poonjee*, and engaged in various mercantile speculations, some of which, it may be presumed, rendered the possession of this particular land desirable to him. He had been in possession of it under a *Peishgee* lease granted to him by the *Cazee*, which in terms expired in August, 1855 ; but he contended that, by virtue of an instrument subsequently executed by the *Cazee* for securing a further advance of Rs. 200, he was entitled to retain possession until the whole of what was due to him had been paid off. The *Cazee*, on the other hand, treating the interest of Mr. *Inglis* as determined, had on the 16th of August, 1855, granted a lease of the lands for four years to one Mr. *Sweetland*, as Agent for *Moran* & Co., a European firm, which seems to have been rivals in trade of Mr. *Inglis*. The result was probably a state of things not infrequent in *India*—viz., that in which two European speculators are striving in competition with each other to obtain land from a native proprietor, and the native is playing fast and loose with both of them. On the 10th of *Assin*, 1262, B. S., corresponding with the 24th September, 1855, Mr. *Inglis's* Agent presented a petition in the Magistrate's Court, stating his principal's title to the land, and the lease to *Sweetland*, and praying for the intervention of the Magistrate on the ground of an apprehended affray. And, on the preceding day, the *Cazee* filed a petition in the Judge's Court, stating the loss of his Boat containing his official and private seals, his Register Book, and other property ; and insinuating that they had

been abstracted and concealed by the contrivance and machinations of the *Amlah* of *Inglis*, resident at a place called *Chattuck*. This petition did not conclude with any prayer for relief, but ends with this statement:—"I, by way of precaution, submit this petition reporting the matter as stated, and am engaged in search of the property. I will submit a detailed account of whatever may come to light hereafter." So stood things immediately before the execution of the Deed of sale. In speaking of what next occurred it will be convenient, when a date is mentioned, to use the Hindoo month *Assin*, which covers the whole of the transactions.

The Deed of sale was executed on the 26th of *Assin* at *Chattuck*, in the House of one *Brijomohun*, the *Dewan* or native Manager of Mr. *Inglis* at that place.

On the following day, the 27th of *Assin*, the *Cazee* filed a petition in the Magistrate's Court, which contained the following statement of the circumstances under which, as he alleged, the Deed had been extorted from him.

That on the 3rd of *Assin* he left *Sylhet* in a Boat, taking with him his official and private seals, his Registry Book, two gold mohurs, &c. On the way he received information of the loss of an Elephant from his *zemindary* at *Pharrar Poonjee*, and, in order to seek for and trace out the Elephant, he went to that place, which he reached on the 6th of *Assin*. He met there one *Dhuneeram Doss*, an Agent of Mr. *Inglis*, who, after welcoming him with news of the recovery of the Elephant, took him to his lodgings and gave him Betel and Tobacco. On his return to the *Ghaut* he found his Boat and property gone. On this *Dhuneeram Doss* took him back to his lodgings, and promised to find the Boat, but returned in the evening with 40 or 50 armed *Khasheas*, who ultimately were reinforced by 400 or 500 clubmen. His companions were arrested, imprisoned, beaten, and oppressed. He himself was told that Mr. *Inglis* was very angry with him for having granted the lease to Mr. *Sweetland*, and that there was no chance of his saving his life unless he would sell the property to Mr *Inglis*. On the next day *Dhuneeram Doss* again visited him, and told him that, unless he agreed to sell the property, he would not get back his Boat and property, nor would he be able to save his honour. Under this pressure he promised that after his return home he would "in some way or another get back the lease to *Sweetland* and sell to Mr. *Harry*." He then returned home in another Boat, and presented his petition of the 9th *Assin* in the Judge's Court. Some days afterwards he again left *Sylhet* in the company of *Biddyanund Rai*, the *Mookhter* of *Inglis*, went to *Chattuck*, where he fell into the hands of *Dhuneeram Doss* and *Brijomohun Dewanjee* and others, who told him that unless he would sell the *mehal* to Mr. *Harry* and receive back his property he would not be able to recover the latter or return home without risking his life and honour. They kept him under restraint for four on five days, and, finally, on the 26th of *Assin*, compelled him to put his signature to the Deed of sale, on which they had already put the impression of his private seal. They then returned his property, with some slight exceptions, and released him from confinement. After detailing all these outrages, the petition prayed the Magistrate to cause a local investigation to be held; to have the Houses of the parties implicated searched for the property said to be missing; to call for and consider the forged Deed of sale which they had thus forcibly got signed, and to issue an Order suspending its registration. The Magistrate, on the 19th of October, 1855, made an order for a local investigation by the *Darogahs* therein named.

In the other proceedings which followed on the execution of the Deed there seems to have been some delay, which is probably to be accounted for by the fact, that at that season all the offices were closed for the *Doorga Pooja* holidays.

On the 14th of November, 1855, the Deed was registered on the appearance of *Biddyanund Rai*, describing himself as the *Mookhter* of the party executing and on the usual evidence of execution. By a petition presented on the following day the *Cazee* protested against the registration.

On the 18th of December, 1855, the Magistrate, pronouncing it to be one of the grossest cases that had ever come be-

fore him, dismissed the *Cazee's* complaint, and by another and substantive proceeding fined him Rs. 200 for having brought a false charge. The first of these Orders was affirmed; the latter was reversed on appeal by the *Zillah* Judge on the 23rd of January, 1856.

That the *Cazee* should, after this, have delayed to bring the present suit for nearly six years, is a circumstance which, if unaccounted for, would raise a strong inference against the truth of his case. But this delay is in some measure explained by the intermediate litigation which took place touching the lease to Mr. *Sweetland*, and which lasted until May, 1861. In the course of that litigation to which the *Cazee*, seeking to get the benefit of an alleged *Ikrar*, in which *Inglis* and the persons claiming under *Sweetland* were parties, the validity of the Deed of sale of the 11th of October, 1855, came incidentally in question, and was affirmed by the decree of the Principal *Sudder Ameen* of the 14th of May, 1861.

Their Lordships now proceed to consider the case made by the *Cazee* in the present suit, and the evidence by which it is supported. He has discarded the whole story of the violence to which, as he alleged before the Magistrate, he was subjected on the 6th and 7th of *Assin*. It was, indeed, incredible that one on whom such outrages had been perpetrated should return a few days afterwards to perform the promise which had been extorted from him, and place himself again in the power of those who had maltreated him. Moreover, the fact that personal violence was offered to him on that occasion was inconsistent with the statements in his petition of the 9th of *Assin*. He does not, however, recommend himself to credit by throwing over the more improbable portions of a story which had been judicially declared to be false, in order to make the rest more plausible. His case in this suit is, that the adherents of *Inglis* led astray the Elephant; that having thereby brought him to *Pharrar Poonjee*, they (about the 6th of *Assin*) concealed his Boat and the property therein; that afterwards, and in order to get his chattels returned, he was induced to go to *Chittuck*, where, on the 26th of *Assin*, the creatures of *Inglis* shut him up, and fraudulently having got a Deed of sale drawn up in respect of the *Talooks*, desired him to sign it; that although he had refused to do so, yet being well aware that there was no chance of saving his life and reputation unless he attached his signature thereto, he signed and left it, and, proceeding to the Criminal Court, lodged a complaint, which had been dismissed. The gist of his case, therefore, is still duress not only of goods but of person,—personal restraint, and danger to his life and reputation. And, accordingly, the latter part of the first of the settled issues was as above stated, was the Deed forcibly taken from him by Mr. *Inglis?*

The decrees under appeal must be taken to find this issue in favour of the Plaintiff; and either to rule that in consequence of the violence done to him he was entitled to treat the Deed as a nullity and to recover the lands without returning the consideration-money, or to negative the fact that the alleged consideration of Rs. 4,000, was paid to him. They do not, in terms, find whether he did, or did not, receive that sum.

That the money was in fact paid by *Inglis's* people, and received by the *Cazee*, their Lordships on the evidence have no doubt. The payment is sworn to by the Defendant's Witnesses, and they are confirmed by at least three of the Plaintiff's Witnesses, viz., *Gazee Buksh*, *Gholam Hossein*, and *Kumuruddee*, who all admit that the money reached the *Cazee's* Boat. In his earlier deposition before the Magistrate, *Gholam Hossein* admits this fact even more explicitly, and also his own participation in counting the money. Nor does the *Cazee* anywhere expressly deny that he received the money. From the Magistrate's Order it appears, that on the investigation of his complaint he did not dispute, if indeed he did not expressly admit, the payment of the Rs. 4,000.

Again, their Lordships are of opinion, not only that the evidence in the cause falls very far short of proof that the *Cazee* was subjected to personal violence of the nature and degree stated in the plaint, but that it is insufficient to warrant the general conclusion that the Deed was forcibly

taken from him. It appears from the testimony of the more credible Witnesses produced by him, viz., *Gholam Hossein* and *Kumuruddee*, that so far from being "shut up," he lived two days or more during which the negotiation was going on on board his Boat, which was lying off the *Ghaut* at *Chattuck*; that he passed freely from his Boat to and from the House of *Brijomohun* the *Dewan*; and that he was in communication with a *Jemadar* of police, who would doubtless have protected him had his liberty been threatened. These Witnesses further admit that on the first day of the negotiation, and before there was any show of personal violence, he agreed to grant to Mr. *Inglis* a permanent lease of the land, though he refused to grant a *putnee* one. The earlier deposition of *Gholam Mahomed*, which, as made *recente facto*, is far more trustworthy than the testimony given by him in this suit, contains an admission, that after two days' negotiations, and before going to the House of *Brijomohun* for the last time, on the 26th of *Assin*, the *Cazee* had agreed "to dispose of the *mehal* for the sum of Rs. 4,000." It further admits that he signed the Deed and handed it to *Kumuruddee* to be sealed. The only pressure to which this deposition, if taken to be true throughout, shows that the *Cazee* yielded, was the fear that unless he signed he would not get back his missing property. The statement, that though he had told the Witness that he would not have been able to save his reputation unless he affixed his signature is indeed thrown in at the end of the deposition. But no fact which renders that statement probable is proved. Against this testimony, the evidence of the Witnesses from the *Bazaar* is worthless. But even their testimony does not amount to proof of the allegations in the plaint. Their Lordships are, therefore, of opinion, that the Plaintiff in the suit altogether failed to establish the case alleged; and that the evidence in the suit was insufficient to warrant the decrees under appeal.

Their Lordships need hardly remark that, in coming to this conclusion, they have not been insensible to the difficulty which they always feel in disturbing the concurrent judgments of two Indian Courts upon an issue of fact. They observe, however, that they have not here to deal with a consistent case deposed to by the Witnesses for the Plaintiff, and contradicted by the Witnesses for the Defendant, a case of which the determination depends on the credit to be given to the Witnesses on one side or the other. In this case their Lordships' conclusion is very much founded on the inconsistencies and imperfections of the Plaintiff's proofs. Moreover, the finding of the Courts below is inconsistent with the result of the investigation of the Magistrate, held immediately after the transaction, and with the finding of the Principal *Sudder Ameen*, already adverted to, in favour of the validity of the Deed. The judgment of the *Zillah* Judge contains several inferences which do not appear to their Lordships to have been warranted by the facts before him, and it treats the Order of the Magistrate dismissing the complaint of the *Cazee* as reversed, whereas it was confirmed, on appeal. The judgment of the High Court is a mere statement that the Judges of that Court saw no reason to differ from the finding of the *Zillah* Judge.

Their Lordships, however, regret to say, that they are by no means prepared to affirm, upon the evidence before them, that the conduct of *Inglis* and his Agents throughout these transactions was fair, honest, and straightforward. The Defendant allowed her defence to be conducted so as to leave her case open to grave suspicions. She has failed to explain what the negotiation really was which induced the *Cazee*, who a few days before was in a state of hostility, to make the sale *Brijomohun*, *Dhuneeram*, and *Biddyanund*, *Mookhter*, were all subject to the gravest imputations, yet not one of them was called as a Witness to deny the charges against him. They are not shown to have been dead when the cause was tried; it is pretty clear that *Brijomohun* at least was then alive.

They had to meet not merely the charge of violence, but the imputation of having contrived, by means of the abstraction of the *Cazee's* goods, to trick him into coming to *Chattuck*, where he would be under their

influence, and of having made the detention of his goods the means of pressure upon him. From the latter imputation they have certainly not relieved themselves. Nor has *Biddyanund* shown by what authority he represented himself to be the *Mookhter* of the *Cazee* when he procured the registration of the Deed. The non-delivery of the title-deeds, upon which stress was laid at the *Zillah* Court, seems to their Lordships to be a circumstance of no moment, since it is consistent with either view of the transaction; for those documents are not likely to have been with the *Cazee* at *Chattuck*; and his repudiation of the Deed followed immediately on its execution. Nor are their Lordships disposed to think, that the consideration for the purchase was at the date of the transaction inadequate. The lands, whatever be now their value, were then recently settled; and the *Peishgee* leases afford some criterion of their then annual value.

Let it, however, be assumed that *Inglis's Amlah* entered into the alleged plot to bring the *Cazee* to *Chattuck*; that they caused his goods to be abstractad and made the execution of the Deed of sale the condition of their restoration; and that, on his side, he agreed to sell, and executed the conveyance in order to get back his goods, but with a mental reservation that he would take the earliest opportunity of impeaching the transaction. The testimony of his most trustworthy Witness scarcely carries the case beyond this. What, on such a case, would be his rights? The contract was complete, and he could only be relieved from it in a suit properly framed for that purpose upon proof of facts entitling him to that relief, and upon the terms of accounting for the Rs. 4,000, with interest. Whatever be the law applied to such a transaction, whether it be the law of *England*, which, in this case, was the law of the Defendant, or the Mahomedan law, which was the law of the Plaintiff, or the general rule of equity and good conscience, which was the law of the *Forum*, these consequences would equally follow. The Plaintiff could not insist that he was subjected to such personal duress as destroyed his free agency, and entitled him to treat his Deed as a mere nullity. He could not both avoid the contract and retain the money. For the law of *England* it is sufficient to cite *Skeate* v. *Beale* (11 Ad. & El., p. 983), or *Sheppard's* Touchstone, ch. IV. p. 61. The Mahomedan law on the point is to be found in the 3rd volume of The *Hedáya* (by *Hamilton*), pp. 454—458. The *Cazee*, however, did not take this course. He sought to gain an advantage over his Opponents by making the transaction the groundwork of false charges which would bring them within the scope of the Criminal law. Whether he might have succeeded in establishing a case for such equitable relief as is above suggested, their Lordships are not in a position to say, since no such case has been alleged or proved before them. In this appeal they can only say, that he has failed to prove the case made, and that his suit ought to have been dismissed. To such a case the rule laid down in *Hickson* v. *Lombard* (Law Rep. 1, H. L., 324), clearly applies.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, that the decrees under appeal be reversed, and that, in lieu thereof, a decree be made dismissing the suit with costs in both the Courts below. Their Lordships would, however, further recommend that this dismissal be without prejudice to any question as to the lands alleged not to have been comprised in the purchase-deed, or to the title of any person other than the *Cazee*, or those claiming as his representatives. They deem this reservation to be necessary, inasmuch as the evidence as to any lands being held by Mrs. *Inglis* in excess of those conveyed by the Deed is altogether unsatisfactory; and a claim appears to have been advanced by certain members of the *Cazee's* family under a title alleged to be prior to that conveyed by the Deed, which was not tried, and could not have been tried between them and the Defendant.

7th and 8th February, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

RAJENDRO NATH HOLDAR,* *Appellant*,

versus

JOGENDRO NATH BANERJEE and others, ... *Respondents.*

Will—Power to adopt, Proof of—Weight of Testimony—Handwriting.

By Will dated in 1837, a testator directed his property to be held in a particular way, and gave his widow power to adopt. In 1848, she adopted a son under the Will, with the knowledge of the members of the family, and the Will was, for a period of twenty-seven years, generally recognized and acted on by the testator's family. The Judicial Committee held (reversing the decree of the High Court,) in accordance with the finding of the Principal *Sudder Ameen*, that the Will was proved.

Where a Will was executed by the testator signing with the Bengali letter "M.," and it was argued that the testator being in very weak health, the firm way in which the "M." was written threw discredit upon it, the Judicial Committee preferred the decision of the native Judge on this point to that of the English Judges of the High Court, and expressed doubt as to the value of the style of such writing as evidence in favour of the Will being forged.

THIS was a suit brought by the Respondent *Jogendro Nath Banerjee*,† against the Appellant and the other Respondents, to recover property at *Kalighat*, and the right of worship in the temples there, on the ground that he was the heir of *Kalli Prosad Holdar* on the death of *Kalli Prosad's* widow, which happened in 1864. The plaint was filed in December 1864.

The case set up by the Appellant was that in July 1848, the widow had adopted him in pursuance of leave contained in her husband's Will.

Jogendro Nath (who will be hereafter referred to as the Respondent) impeached the Will as a forgery, and alleged that the widow had had possession of the property until her death, and he called several witnesses to prove that case.

The Appellant's case was that the Will had been acted upon throughout. In order to understand the facts, it is necessary to set out the Will and the proceedings as proved. *Kalli Prosad's* Will was addressed to his wife, and was as follows:—

"Whereas I, the only son of my father deceased, am ill and have no issue of my own, so I, in consideration of the future, do execute this deed of gift and permission to the effect that, out of the entire sixteen-*anna* share of my property, both real and personal, as well as the *palas* of the goddess *Kali*, I make a gift of the seven-*anna* share to my four sisters, and give you permission to adopt, with the consent of my mother, *Jeomoney Dabea*, who, as long as she shall be alive, shall be in possession of the entire sixteen-*anna* share of my property as *malik* and *mooktear* (proprietor and agent), with which you, or my four sisters, or the adopted son on attaining majority, shall not be able to interfere, or to divide the property among yourselves. That I hereby make my mother *malik* and *mooktear* of all my real and personal properties, as well as the *palas* of the goddess *Kali*, with powers to manage the *palas*, and collect and liquidate all debts due to and by me, that, should there arise any necessity for sale or gift, on account of debts to and by me, the same should be made from the nine-*anna* share, and the signature that shall be affixed thereto by my mother, shall be deemed as if the same had been made by myself, which no one shall be able to set aside. The daily household expenses, the expenses of the religious ceremonies, and of religious acts of my mother, and the expense of your maintenance and that of my sisters, shall be defrayed from the profits of the said sixteen-*anna* share of the property; that on the death of the mother, my four sisters shall, in the manner above mentioned, get by dividing a seven-*anna*

* 14, Moore's I. A., p. 67; 7 B. L. R., p. 216.
† 7 Bengal Law Reports, p. 216—Holdar.

share in the property, as well as the *palas* of goddess *Kali*, and enjoy possession thereof, and receipt of profits, and on performance of the service of goddess *Kali* and other religious ceremonies, that such of my sisters as shall have no children shall have only a life-interest in the property, and on their death such sisters as shall have children of their own shall equally divide the property between themselves; the heirs of childless sisters shall not be entitled thereto, nor shall those childless sisters have power to make any sale or gift thereof. As long as you shall be alive, you shall remain as *malik* and *mooktear* of the nine-*anna* share of the property even after the adopted son have attained his majority; but you shall have no power to make any sale or gift thereof. On your death (which God forbid!), the adopted son shall become the *malik* and *mooktear* as aforesaid; should the son adopted by you die, and should the adopted son die without issue, then the said nine-*anna* share of the property would devolve on my sisters, of whom such as shall have children of their own shall divide the property between themselves in equal shares. Should my mother and you die before adoption, then my four sisters would become the *maliks* and *mooktears* of the entire sixteen-*anna* property, *i. e.*, your nine-*anna* share and the seven-*anna* share of the sisters, and divide the shares between themselves in the manner specified above. To this effect I execute this deed of gift and permission, dated 16th *Aswin* 1244 B. S. (1st October 1837)."

Kalli Prosad died soon after, leaving his Mother, *Jeomoney Dabea*, his Widow *Matunginee Dabea*, and his four Sisters, *Jagadamba*, *Bhabasundari Dabea*, *Khudi*, and *Dayamayi* him surviving.

In August 1838 the Widow filed a petition in a suit pending in Court, recognizing the Will, and praying that her Mother-in-law should be recognized as the executrix for the purpose of carrying on that suit.

This petition was signed by all the male members of the family, including the Respondent *Kasipati Banerjee*, the Father of the Respondent *Jogendro Nath Banerjee*.

Witnesses were examined in support of that petition.

On the 17th December 1838, *Jeomoney Dabea* and *Matunginee Dabea* made an application to the Principal *Sudder Ameen* to allow the former to represent the estate of the deceased in a suit which he had brought against a debtor, and upon the said Will being produced and proved by witnesses after due publication and no objection by other parties, the order was made.

On the 17th August 1840, *Jeomoney* having revived an old family suit between *Kalli Prosad* and his cousin *Kalli Chandra*, obtained a decree, she being recognized as the executrix under the said Will.

In July 1844, *Matunginee Dabea*, while living at her Father's house, was induced to take proceedings against her Mother-in-law, setting up another document giving power to adopt, dated two days previous, and disputing her Mother-in-law's rights to possession; but on the 31st *Jaisti* 1252 (June 1845), she withdrew that case, and admitted the validity of the Will, and cross-petitions of compromise were duly filed.

Upon this compromise, *Jeomoney* withdrew from the executrixship, and the property was made over to the Widow and Sisters of the deceased, including the Mother of the first Respondent, according to the shares as specified in the Will, the shares of each being duly allotted as specified in a schedule.

On the 18th May 1847, in a suit brought by one *Bissamber Banerjee*, *Khudi Dabea*, one of the Sisters (the Respondent's Mother,) and one of her Sisters, put in an answer in which they relied on the Will and on their possession under it.

On the 21st *Assar* 1255 (4th July 1848,) according to the case set up by the Appellant, the Widow in pursuance of the leave given in the Will duly adopted the Appellant as Son to her deceased Husband, the Respondent's Father and other members of the family being present, and the ceremonies of investiture and marriage were performed by the Widow after the adoption.

In March 1858 the Respondent's Mother in a plaint filed by her again relied on the Will.

In 1856, 1857, and 1862, several proceedings were taken in Courts of Justice

by the Widow as the Guardian of the Appellant, and in a suit decided in November 1859, where the Widow so sued, the Respondent's Mother supported her case.

In 1855, *Jeomoney Dabea* died.

In July 1864, the Widow died, whereby according to the terms of the Will of *Kalli Prosad Holdar*, if it and the adoption were good the Appellant became entitled to the nine-*anna* share of the property left to him.

In December 1864, this suit was commenced as stated above, and the Principal *Sudder Ameen* settled as issues—

1st,—Whether the suit was barred by the Law of Limitation.

2nd,—Whether the Will and adoption thereunder were valid.

3rd,—If not, whether the first Respondent was entitled, and if so, to what share.

The Principal *Sudder Ameen* decided against the Plaintiff, Respondent, on all the issues. In deciding upon the validity of the Will and the adoption, he went at great length into the facts, pointing out his reason for believing in both of these.

On appeal to the High Court (*Trevor* and *Glover*, JJ.), that decision was reversed. The judgment of the Court on the issue of limitations is reported in 7 Weekly Reporter, page 357.

In deciding against the Will, their Lordships particularly commented upon the way in which the Will was executed, it being not signed, but marked with the Bengali letter "M" (*munjur*), on which point the judgment proceeded as follows:—

"What then remains to be considered in the weight which the Court attaches to the direct evidence as to the execution of the deed by *Kalli Prosad Holdar?* The Court has inspected the deed itself, and has no hesitation in saying that the letter *m* for *munjur*, or *confirmed*, could not have been written by a person in the last stage of sickness such as *Kalli Prosad* is represented to have been. He was weak and spoke with difficulty even, if the witnesses are credited; but the *m* is written with the bold and firm hand of a man in perfect health. This is so striking that alone it induces us totally to discredit the statement of *Shibram Chatterjee*, who, alone of the witnesses, says that he saw *Kalli Prosad* write the *m*; but it may be that although the witnesses did not see this, they heard from *Kalli Prosad* that he had signed it shortly before they came in. We do not believe the statement of *Denonath Holdar* and *Kaylas Chandra Banerjee* on this point. They were both boys: no intelligible reason is given for their being at *Kalli Prosad's* at such a time, and the evidence before us, as to the duration of *Kalli Prosad's* sickness, as to his state two days before his death, and as to his state on the day of his death, even if it be credited, does not admit of our believing at the same time that he entered into those explanatory conversations with the witness which in their depositions they detail."

Their Lordships having thus decided against the Will, refrained from enquiring into the fact of the adoption.

The Defendant having appealed to *England*, the case now came on for hearing.

Mr. *Bell* for the Appellant.—It is admitted that the decision of the High Court on the law of limitation is sound in law. On the facts, however, it is submitted that the High Court has decided on an erroneous idea as to the formation of the letter "M."

This point was brought to the notice of the native Judge, and considered by him, and he was the best Judge on such a point. The learned Counsel then proceeded to compare the judgments of the Court below with that of the High Court, submitting that the former was more consistent with the probabilities, and being the judgment of a *Brahmin* Judge, deciding on the probabilities in a case where the parties were *Brahmins*, it was entitled to weight as compared with the view taken by English Judges.

Mr. *Doyne* for the Respondent.—The arguments in support of the Will are founded principally on the subsequent way in which the property was enjoyed; but this is quite consistent with arrangements made by the family wholly independent of the Will. So long as the Widow lived, no one had an interest in disputing those arrangements. Evidence was kept back that would have been given if the Will were true. The Judges of the High Court

have not only closely analysed the evidence, but they examined all the witnesses for the Will themselves in the High Court. The peculiar way in which the "M." was made is a much stronger piece of evidence than mere real testimony.

Judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This case had been extremely well argued on both sides; but their Lordships having had time to examine the evidence, and having now weighed the arguments on both sides, have come to a clear conclusion, that this appeal ought to be allowed, and the grounds of that conclusion I am now instructed to state.

The question is one touching the right of succession to the estate of one *Kalli Prosad Holdar*, a *Brahmin*, who seems to have been possessed of a considerable estate, including certain spiritual rights and privileges connected with the worship of the Goddess *Kalee*, in the well-known Temple in the vicinity of *Calcutta*. *Kalli Prosad Holdar* died on the 16th *Assin*, 1244, a day which corresponds with some day in September, 1837. He left a Widow, a Mother, and four Sisters. The Mother pre-deceased the Widow, and died in 1855; the Widow died in July, 1864. Of the four Sisters, two are dead; one of them without issue, the other leaving a Daughter. And of the two surviving Sisters, one is childless, and the fourth only has male issue, namely, the Respondent, *Jogendro Nath Banerjee*, and the infant Respondent, *Kameeka Nath Banerjee*, and these two persons, if *Kalli Prosad Holdar* died intestate, are the persons who, according to Hindoo law, would be entitled to inherit the estate in succession to the Widow.

Shortly after the Widow's death, in 1844, the Respondent, *Jogendro Nath Banerjee*, suing *in formâ pauperis*, commenced this suit, in which he claims to recover an eight *annas* share of the estate from the Appellant, who claims under an adoption by the Widow, alleged to have been made by virtue of a testamentary disposition of her Husband, and from the other persons claiming interests in the estate under that testamentary disposition. The infant Brother is made a Defendant *pro formâ* on the record, and is represented by his Father and Guardian, *Kasseeputtee Banerjee*.

The appeal, however, has been argued as if the litigation were confined to the adopted Son of the Widow, who is in possession, that is, the Appellant, and the Respondent, *Jogendro Nath Banerjee*; and in that point of view it will be convenient to consider it.

The issues are these,—"Whether or not the suit is barred by the Statute of Limitations? Whether or not the Will, the *Dan Unnoomottee Puttro*, of the 6th *Assin*, 1244 B. S., alluded to in the written statement filed by the Defendant, *Rajendro Nath Holdar*, was a genuine document? if so, whether the Defendant had been, according to the *Shastras*, adopted by *Matunginee Dabea*, Widow of *Kalli Prosad Holdar*, deceased?" The next, whether, in the event of the aforesaid Deed of gift being not proved, the Plaintiff is entitled, under the Hindoo law, to succeed to the estate or property included in the suit? and if so, whether he is entitled to possess the whole estate or not?

Of these issues, the second alone, and perhaps only part of the second, is material. The first issue, that upon the Statute of Limitations, was originally determined by the Principal *Sudder Ameen* (*Baboo Koonjoo Lall Banerjee*), the Judge of the Court of First Instance, in favour of the Defendant. His decision was reversed on appeal, and it has been candidly and fairly admitted at the Bar by Mr. *Bell* that it is impossible to impeach that decision; that, according to the authorities in *India*, time would only begin to run against the first Respondent from the date of the Widow's death.

Again, the third issue, it may be assumed, would, if it were necessary to try it, be necessarily found in favour of the first Respondent, the Plaintiff in the suit, to the extent of the interest claimed by him in the estate, namely, a moiety, or eight *annas*.

With respect to the second issue, it has been suggested by Mr. *Doyne* that it may admit of the contention on his part, that the adoption of the Appellant was invalid, because it was not made with the consent of the Testator's Mother, which the Will made a condition precedent to an adoption. But their Lordships, as they have already intimated, do not consider that that point is in terms open upon the issue, the latter part of the issue being "whether the Defendant had been, according to the *Shastras*, adopted by *Matunginee Dabea*, Widow of *Kalli Prosad Holdar*, deceased." Those words really raise only the question, whether all the ceremonies, and whatever other requisites the Hindoo law has made essential to an adoption, had been complied with. Their Lordships would not have held the parties strictly bound to the terms of the issue, if they had seen any trace that it had been understood in any other sense in the Court below. But they cannot find that that was the case, that it ever was raised in the Court below that the Testator's Mother had not given her consent to that adoption; and they are confirmed in this by looking at the grounds of appeal which were filed by the first Respondent in the High Court in which he takes these two points with reference to the adoption: "The Lower Court has failed to consider that *Matunginee Dabea* had no right to adopt under the existing Hindoo law of adoption. There is no proof to show that the ceremonies and formalities prescribed by the Hindoo law were legally performed, and the Defendant's adoption ought to have been cancelled on that score." There is not a word suggesting that the Testator's Mother's consent had not been given. Under these circumstances, if the Mother's consent were necessary under the Will, as to which their Lordships give no opinion, it must be presumed that that consent was given.

That part of the issue which relates to the validity of the adoption according to the *Shastras* was found by the Court of First Instance in favour of the Appellant. The High Court has intimated no opinion, as it was not necessary for them to decide that point, whether the judgment in that respect was right or not; but their Lordships have heard no reason whatever, and no grounds have been shown before them at the Bar, for impugning that part of the decision of the Principal *Sudder Ameen*.

The sole question, therefore, on which the determination of this appeal depends, is the validity of the *Dan Unnoomottee Puttro*, which it will be convenient, as it is in its nature testamentary, to call in the observations which I shall hereafter make, "the Will." This Will purports on the face of it to have been executed on the day of the Testator's death. The effect of it, so far as it is necessary to read the passage, is correctly stated in the judgment of the High Court. The Judges say, "This Deed" (as they call it), "it will be observed, gives his Wife, *Matunginee Dabea*, permisson, with the consent of his Mother, *Jeomoney*, to adopt one Son. It makes a present division of his property into seven *annas* and nine *annas*, but postpones the enjoyment of it by the parties for whom the several shares are intended, until the death of his Mother, who, during her life-time, is to be the proprietor and Manager of the whole sixteen *annas* of his property, and to pay his debts out of the nine *annas* share and other expenses of maintenance, etc., out of the sixteen *annas*. On the death of his Mother, his four Sisters are to take possession of their seven *annas* share, and, in case of any one of them dying childless, her share is to descend to the children of the other Sisters. The nine *annas* share is to be the property, without power of alienation, of *Matunginee Dabea* during her life, and after her death it is to descend to her adopted Son." I stop there, because I am not clear that the Judges have really given the true construction of the concluding clauses of the Will in what follows, and it is unnecessary to consider, whether that construction is right or not.

The earliest production of the document was within ten months of the Testator's death, in August, 1838. In that month *Jeomoney*, the Mother of the deceased, came forward as Executrix, as we should say, under this Will, claiming to be substituted as Decree-holder in a suit in which her Son had recovered a decree in his life-time. The Widow appeared on

that occasion by her *Mookhter* to support her Mother-in-law's application. The Judge seems to have required, or the parties to have tendered, proof of this instrument. The Writer of the instrument was examined, and one, if not two, of the attesting Witnesses were also examined. The evidence, such as it was, seems to have satisfied the Judge, at all events for the purposes of the application, that the document was to be treated as a true document, and, accordingly, the Mother was substituted as the Decree-holder.

So far, therefore, the Widow, who was the heiress-at-law of the alleged Testator, was supporting the alleged testacy. In 1844, however, there seems to have been some change in her disposition in that respect, and some disagreement in the family, and she then made the application to sue *in formâ pauperis*, in order to assert her rights as heiress-at-law. She appears from that document to have left her Husband's House at that time, and to be residing in her Father's House, where, of course, she would be under the influence of parties who would urge her to assert her extreme rights, and if they considered it necessary for her rights to do so, to dispute the Will. Whatever she may have actually done after that in the suit, does not appear, but it is clear that in 1845 that litigation was compromised, and she reverted to her original position of a person supporting the Will and taking under it. The effect of the compromise was, that the Will was admitted as the foundation of the rights of the family, but the Mother retired from that position in which the Will placed her, of being *Mookhter* of the whole estate,—the person managing the estate with whatever beneficial interest that management might give her, and supporting the whole family out of the proceeds of the whole estate;—and that she thenceforward agreed to be entitled to receive maintenance only, and to put the Widow in the possession of that which the Will gave to her and the Sisters in immediate possession of that which the Will gave to them. Now, that compromise has been very much relied upon by Mr. *Doyne* as affording an argument against the validity of the Will. Their Lordships are unable to accede to the argument which he has laid before them. His contention is, that it must be presumed that the Mother would not have agreed to those terms unless she knew that the Will was a false document, and was afraid of its validity being contested in open Court. But, on the other hand, it may equally be said that the Widow would not have agreed to relinquish her claim to the whole estate if she had known that the document could not be proved in open Court, and that she had every chance of gaining her suit. Without imputing such a motive to the Mother, it seems not wholly unnatural to suppose that she might be guided in that by the advice of members of the family,—that they might have put before her that the estate would very likely be wasted in litigation,—that the proof of a Hindoo Will, when a true document, is always an uncertain thing, and that being advanced in years, and having her Daughters put in possession of seven *annas* of the property, her position would not be materially worse, and that she might fairly agree for the sake of peace to make the sacrifice which she did make. On the whole, their Lordships think, that it is impossible to draw any conclusion from that compromise which militates strongly against the evidence in favour of the Will.

From that time forth, with perhaps one exception, the family appear to have acted consistently upon the Will. This compromise was filed in the year 1845. The adoption was, I think, in 1848; but, intermediately, there are several proceedings both before and after the adoption in which all the family put forward this Will, claiming under the Will; and, in fact, there is nothing except the document to which I am now about to refer which shows that the Will was questioned by any of the immediate family of *Kalli Prosad Holdar*. That document is the one filed on the part of the Respondents. It is the petition of the Widow when a party, a relation of the family who had recovered a decree for costs against the Mother, was seeking, after the Mother's death, to get these costs from the Widow; and she, after stating that she had no connection with the Widow as heir, that the heirs of the Mother were her Daughters,

no doubt does in the second paragraph of her petition speak of having been induced to consent to a division of the whole sixteen *annas* by collusion. But this document is filed in the Court by her *Mookhter*; it does not seem to have been signed by her, and their Lordships, considering that in this very document she describes herself as the Mother and Guardian of the Son adopted under the Will, cannot ascribe any importance to it, or suppose that this statement is anything but one of those statements which a native *Mookhter* is so apt to put in without much regard to the truth of what is alleged in it, in order to gain some immediate object in the suit in which it is filed. The adoption took place with great publicity and formality, was known to all the members of the family, and must be presumed to have been made under the Will.

We, therefore, find that for a period of twenty-seven years this Will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of *Kalli Prosad Holdar*, and that the legal *status* of the Appellant was acquired under it with the knowledge of all the members of the family. If the document had been a fabrication, and if there were persons who might have intervened and have contested the Will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting Respondent, might have come forward in one way or another and contested the Will. Therefore, there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the Will. No doubt these circumstances, as the law stands, are not conclusive against the first Respondent. He has the right to call upon the Appellant, the Defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by death or otherwise—every allowance which can account for any imperfection in the evidence—ought to be made; and, on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the Will and to the acts done by them under the Will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the Defendant, in order to defend his *status*, should be allowed to invoke against the Claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindoo claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

With these observations, their Lordships proceed to consider the direct evidence as to the validity of this Will. They do not propose to go into it at any great detail. It was fully considered in the first instance by the Principal *Sudder Ameen*, himself a *Brahmin*, who has embodied his conclusions in a judgment, the careful preparation and expression of which seem to their Lordships to be highly creditable to that native Judge. He came to a clear conclusion, that the Witnesses who were called by the first Respondent to show that *Kalli Prosad Holdar* was in such a state of body that it was impossible that he could have executed this Will, were persons of no credit, and not to be believed. He, also weighing all the circumstances, giving weight to the probabilities of the case, and considering the positive testimony which had been adduced before him, came to a clear conclusion that the Will was genuine and ought to have been affirmed. Upon appeal to the High Court,

the learned Judges of that Court, Messrs. *C. Trevor* and *F. A. Glover*, for reasons which they have not recorded, but which may easily be presumed to have been a desire to examine the subscribing Witnesses for themselves, and also to examine the subscribing Witness who had not been called in the Court below, the Father of the Respondent, re-examined the three Witnesses who had been examined, and examined for the first time *Kasseeputtee Banerjee*. Of the evidence then taken, it may be said that the Witnesses who were re-examined do not appear to have been in any degree shaken, and the cross-examination of one of them, *Shiboram Chatterjee*, elicited some fuller account of the preparation of the Will, which is not altogether immaterial, if true, to the Appellant's case. Of the evidence of *Kasseeputtee Banerjee* it is sufficient to say that it amounted only to this, that though his name did appear upon the document, it had been added some twenty days after the death of the Testator at the instigation of the Mother, who told him that the arrangement was for the benefit of his future Son, and that her consent was necessary to any adoption. He does not venture to express a conviction one way or the other as to the truth or falsehood of the Will, and it is obvious that his statement, taking it in the most favourable sense, that he merely put his signature at that time to a document of which he had not witnessed the execution, on that persuasion, does not entitle him to very much credit. If, on the other hand, he did it believing the document to be a forgery, he would, of course, be entitled to much less credit, and, therefore, his evidence is, not that upon which any reliance can be placed, and the Judges of the High Court do not appear to have grounded their judgment upon it. All they say as to the evidence of *Kasseeputtee Banerjee* is, "We think it better to form our opinion on the merits of this case irrespective of anything contained in it. Although, notwithstanding the equivocal position in which he stands on his own showing, we are inclined to think that there is some truth in what is stated as to the origin of the Deed now before the Court." That, therefore, may be left out of consideration.

Now, if the two judgments are looked at in opposition to each other, it would appear that the learned Judges of the High Court have, in the first place, differed somewhat from the Principal *Sudder Ameen* in his appreciation of the probability that such a document as this should have been executed. They say,—"As the Principal *Sudder Ameen* has remarked, it is contended by the Plaintiff that that Deed was a concoction of *Kalli Prosad Holdar's* Mother, *Jeomoney*, who fabricated it to provide for her Daughters, for whom a Hindoo Mother has greater affection than for male children, and that it was only to quiet the Wife that nine *annas* of the property was allotted to her: whereas by the Defendant it is urged, that *Kalli Prosad Holdar's* four Sisters were, according to the custom of the family, married to *Koolin Brahmins*, who never take their Wives to their home or otherwise maintain them; that, mindful of their helpless situation and of his own salvation, he made a provision for the former at the same time that he provided for the maintenance of the latter; and that as a dutiful Hindoo Son, he made the Mother Manager and proprietor; that, moreover, *Kalli Prosad Holdar's* income was about Rs. 800 a year, and that one-quarter of seven *annas* of that sum, viz. Rs. 85 *per annum*, was not an out-of-the-way sum for each of his Sisters. There is no doubt that this Deed is for the benefit of the Sisters of *Kalli Prosad Holdar*, and that it is only in case his adopted Son has issue that nine *annas* of the property can remain away from the Sisters or their heirs eventually. Without going so far as saying that there is an antecedent improbability in this distribution of the Testator's property, the Court has no hesitation in saying that that distribution is unusual. A permission is not given to the Wife to adopt more than one Son, and the adopted Son's patrimony is cut down, and it does not become vested in him until after his Mother's death, and if he dies issueless the property goes to the Testator's Sisters and their heirs. As to the necessity of *Kalli Prosad Holdar* providing for his Sisters married to *Koolins* by a Deed of that sort, that is not so apparent; whilst they live

in the family house the obligation would remain on *Kalli Prosad Holdar* and his heirs to maintain them and their children, but to divide his estate in this way is to go beyond the obligation which the Hindoo law imposed on *Kalli Prosad Holdar*. Again, the Court does not see the justice of considering the adopted Son a stranger, and of contrasting him in the position of a stranger with that of the Testator's Sisters. After the adoption, the adopted Son is no longer a stranger; he is the person who procures the salvation of his adopting Father, and, therefore, in the face of so great a benefit accruing to the Testator from the Son adopted, any permanent diminution of the property left to him, even to the amount of four times Rs. 85, equal to Rs. 340 a year, bears the semblance of injustice."

On this it is to be observed, that the principal point upon which they differ from the *Sudder Ameen* is, the probability of the provision made for the Sisters, by giving them specific shares in the property, instead of giving them mere allowances for maintenance; and, it may be very true, as the learned Judges say, that these Sisters being married to *Koolin Brahmins*, there would remain the obligation on *Kalli Prosad Holdar*, or his successors, to maintain them. The whole question was, however, raised before the Principal *Sudder Ameen*, who, as a *Brahmin*, is at least as likely as the Judges of the High Court to know what a *Brahmin* would be likely to do in those circumstances, and he has expressed an opinion, that the provision was not an unnatural one for the Testator to make in those circumstances. Again, it is no doubt true that greater power is given to the Mother than she would have naturally under the Hindoo law, and that the interest of the adopted Son is postponed, and that the disposition is altogether different from that which might have been made by a man who had in his mind the single object of leaving an adopted Son.

It is possible, and it has occurred to their Lordships, considering that as there is evidence which points to the provisions of the Will having been discussed a day or two before its actual execution, and to the relations subsisting between the members of this family, there may have been something like a compromise in the Testator's mind, namely, that there may have been some pressure upon him on the part of his Mother to make a larger provision for his Sisters: while on the other hand, that he was anxious to carry out the principle, dear to every Hindoo, of having an adopted Son, and that the actual disposition may have been the result of some such a compromise. But their Lordships have to observe, that they are not dealing here with a question, whether a disposition has been obtained by any undue influence or under any pressure, but upon the issue, whether this document is a forgery or is the Will of the Testator.

Another point upon which the learned Judges of the High Court have intimated some dissent from the Principal *Sudder Ameen* was the credit to be given to two of the Witnesses examined, namely, the two young men, *Denonath Holdar* and *Koylas Chunder Banerjee*. The Court observes, "We do not believe the statement of *Denonath Holdar* and *Koylas Chunder Banerjee* on this point. They were both Boys: no intelligible reason is given for their being at *Kalli Prosad Holdar's* House at such a time, and the evidence before us as to the duration of *Kalli Prosad Holdar's* sickness, as to his state two days before his death, and as to his state on the day of his death, even if it be credited, does not admit of our believing at the same time that he entered into those explanatory conversations with the Witnesses, which in their depositions they detail." The observation that is founded upon the age of these two Witnesses might have some force if this document were now produced for the first time and their names were found upon it as subscribing Witnesses. But the argument is all the other way, when it is considered that the document was beyond all question produced in 1838; because it is in the highest degree improbable that, if persons were concocting a forgery, they would call into their councils two Boys sixteen or seventeen years old, who would be manifestly, from their youth, not likely persons to be entrusted with the secret. They have given an explanation which seemed

plausible to the Principal *Sudder Ameen*, and seems plausible to their Lordships, for their presence on that occasion. The explanation is, that a message came to the Father of one of them to go to the House, that he was prevented by business from going to the House, and he said to his Son, "Will you go?" The Son met a companion, also apparently a relation of the family, and they went together. There may be some little exaggeration as to the amount of explanation given, but their Lordships see no reason, as the Principal *Sudder Ameen* saw no reason, why their statement that the Testator did actually acknowledge before them that the document was his Will, should be discredited.

Therefore, going through the whole of these two judgments, it appears to their Lordships that really the *ratio decidendi*, or at least the turning-point in the minds of the learned Judges, was the impression which they derived from the inspection of the letter "M" (for *Munzoor*, or confirmed). Now, that point was not taken for the first time before the High Court. The suggestion seems also to have been made in the Court of the Principal *Sudder Ameen*, and he, as we understand his judgment, thought that there was nothing in it. Now, with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengalee language, their Lordships cannot but think that upon such a point as that, the native Judge, examining a letter in his own alphabet, is more likely to be a competent Judge than the two European Judges. But independently of that, it appears to their Lordships to be a very unsafe ground of decision. The evidence as to the absolute prostration and insensibility of the Testator at the time has been discredited. No doubt the Appellant's own Witnesses state, that he put this letter, feeling too weak to write his name at full. But it is impossible, from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of certainty or accuracy, that he was too weak to make the impression with his pen which he is said to have made. It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that; and, therefore, their Lordships are unable to give to that, which is after all merely the impression of these two Judges derived from actual inspection, the weight which has been given to it. They cannot but think (considering that the evidence, supported as it is by the presumptions to which reference has been made), on the whole greatly preponderates in favour of the genuineness of this instrument; that the mere appearance to the eyes of those Judges of that letter is sufficient to outweight it; and, therefore, their Lordships, however great their respect for the judgment of the High Court, feel that it is their duty in the present case to advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and to direct that in lieu thereof an Order be made dismissing the appeal to the High Court. The party having sued *in formâ pauperis*, their Lordships will further recommend, that an Order be made dismissing the appeal to the High Court, with such costs, if any, as according to the practice of that Court are given to an Appellant suing *in formâ pauperis*, and the repayment of any costs that have been paid by the Appellant; and their Lordships, considering that they are dealing with an heir-at-law questioning this Will, and supporting a judgment which has really been in his favour, setting aside the Will, are not disposed to make any Order as to the costs of this appeal.

20th January, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MAHARAJ KUMAR BABOO GANESWAR SINGH,* ... } *Appellant*,

versus

DURGA DUTT and others, *Respondents*.

Practice—Concurrent Findings on Fact.

Where there are concurrent decisions on a question of fact, the Judicial Committee will not (especially in a question of fact as to boundaries) reverse the decision unless there was no evidence, or there has been in the conduct of the trial, or in the mode in which evidence was adduced, or in the course of deciding the case, a clear departure from the ordinary principles which regulate judicial proceedings.

THIS was an appeal from a decision of the High Court, dated 11th November 1862, affirming a decision of the Principal *Sudder Ameen* of *Tirhoot*, dated 31st December 1861.

The question in dispute was what property formed the boundary line between the Appellant's and Respondents' estates of *Pudri* and *Murthua*. The action was brought by the Appellant for a declaration of right and a decree for possession of land which the Defendants contended was south of his boundary line.

The question was one simply of fact, save as to a point raised whether the Plaintiff ought not to have sued within three years to set aside an order of the Survey Superintendent, and arguments were adduced before the Judicial Committee as to that order not being one within Act XIII. of 1848, but on this point it was unnecessary to give any decision.

Sir *R. Palmer*, Q. C., and Mr. *Leith* for the Appellant.

Mr. *Doyne* for the Respondents.

Their Lordships delivered the following judgment:—

If it could be shown us in this case that there was a clear miscarriage of justice, that is to say, that there was no evidence whatever which would have warranted the conclusion at which the Court below has arrived, or that in the conduct of the trial, in the mode in which the evidence was adduced, in the course that was pursued as to holding the balance of justice between the parties in the course of the trial, there was a clear departure from the ordinary principles which regulate judicial proceedings, then their Lordships, notwithstanding the decision of the two Courts below, would have entertained and considered the appeal. But their Lordships are clearly of opinion that when the question is one simply of fact, and when above all things, that question of fact is a question of fact as to boundaries, where the local knowledge of local Judges and the observation of the local witnesses are all important, they would be departing from what has been the practice of this tribunal if they were to act in opposition to the well-considered judgment of the two Courts from whom the appeal comes. It is admitted, and could not be otherwise than admitted, that there is evidence which, if believed, would have justified those judgments. Their Lordships are of opinion that the Courts below were the best tribunal for deciding the question whether the evidence was credible or not, and they would be entirely unwilling to disturb their judgments.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be dismissed with costs. In the view which has been expressed of the case, it is unnecessary to consider or to express any opinion upon the point as to the statute of limitations.

* 7 B. L. R., p. 651.

16th and 17th June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RANEE KHUJOOROONISSA,* ... *Appellant,*

versus

SYUD AHMED REZAH, ... *Respondent,*

AND THE CROSS APPEAL OF

SYUD AHMED REZAH, ... *Appellant,*

versus

RANEE KHUJOOROONISSA, ... *Respondent.*

Joint Tenants—Receipts by—Accountability—Law of Limitations—Liability of Purchaser of Share for Rents received by Vendor.

Where persons jointly interested in an estate arranged that the rents should be received by an agent, and they themselves sometimes collected direct from the tenants, such collection being treated as a receipt by the agent or by some one on his behalf, and not as a collection antagonistic to the rights of the other joint tenants, the law of limitation is no bar to taking the back accounts. Where one tenant in common receives rents, and then relinquishes his interest in the estate to another, that other is not answerable to the third tenant in common for any claim he may have against the first for having received more than his share.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. LORD JUSTICE JAMES:

These are appeals from two judgments of the High Court of Judicature of *Calcutta*, in two suits which were instituted in the *Zillah* Court of *Purneah*. They may be described as a suit and a cross-suit respectively, by the owner of a joint estate against the other owner or owners of the estate. The High Court dismissed both suits as having been misconceived, their reasons being shortly stated in the judgment before us. One suit was instituted covering a period of twelve years, and treating anything anterior to that as barred by the Statute of Limitations. The other was a suit that sought, by way of cross account, to take the account from a period long anterior to the commencement of the twelve years. The Court in its judgment says—"The first Court was of opinion that the Statute of Limitations did apply to a portion of the claim of *Ahmed Rezah*, and that the Court could not enter into transactions or revive accounts relating to a period of more than twelve years before the institution of the present suit, and that as the suit was instituted in April 1857, the accounts to be settled by the Court would be those subsequent to 1845, and those only. After examining the accounts, the Judge dismissed the claim of *Ahmed Rezah*, and passed a decree in favor of *Enayet Hossein*, whose whole claim was subsequent to 1845, for rupees 34,630-2-10½ pie, with interest at twelve per cent., and costs in proportion. From these decisions two appeals have been preferred to this Court, and the first point to which our attention was called was the applicability or otherwise of the Statute of Limitations to any portion of the claim of *Rajah Ahmed Rezah*. There can be no doubt that mutual accounts, if they contain some item, or even any one claim within twelve years, would not be barred by the Statute of Limitations, though the rest of the claim were beyond that term. But this rule is strictly confined to accounts between two parties which show a reciprocity of dealings, or, in other words, to transactions in which there is a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. Is, then, the present claim of *Syud Ahmed Rezah*, as against *Enayet Hossein*, a claim of this nature? The parties are 8-*annas* proprietors of the same estate. They have held their shares separate. They have by tacit, if not by express, agreement collected their yearly shares of the rents by their separate endeavours; and, in short, by their acts have taken up a position altogether unconnected with and antagonistic

* 8 B. L. R., p. 93.

to each other. This mode of action, no doubt, gives the party who has received less than half the yearly net rents of the estate, an action against the party who has collected more than his rightful share of those rents; but his right to these surplus rents arises in consequence of a wrongful act of the other party, and at the end of each year a wrongful act of this nature is a cause of action from the commencement of the year following that in which the surplus collection was made; it follows that these yearly claims are in the nature of separate and distinct demands, against which the Statute of Limitations runs, and that they can by no process of reasoning be brought within those special and particular accounts as against which limitation will not turn. Turning, then, to the remarks which have been addressed to us by the learned Counsel on the part of both the Plaintiffs, and to the accounts filed, and the case made by each of them against the other, they appear to us that they are founded on a mistaken view of the case, as between the parties before us. The contention before us has been, that each party, as against the other, is entitled to one-half of the actual collections made; but in our view this is not the case. Considering the independent and antagonistic position which each party has taken up against the other, and the tacit, if not express, agreement entered into between them as to the mode of collection, it seems clear that neither party has a claim against the other on account of superior diligence exercised by him in the collection of the yearly rents, but that the only ground on which a right of action accrues to either party, is the realization by the other side of a sum larger in extent than one-half of the yearly rents, that is, of a sum beyond that to which he is of right entitled. That such has been the case—that *Ahmed Rezah* and *Enayet Hossein* have, during any of the years covered by these suits, collected a sum beyond their legal right, that is, one-half of the net rental of the estate, has not been attempted to be shown to us; but the learned Counsel have only entered into elaborate calculations, founded upon very infirm data, of collections actually made, and have thereupon asserted the right of their respective clients to one-half of the net actual collections. Such a view of the case, as we have above observed, is altogether inadmissible."

Proceeding upon that footing they find that neither has received more than his half, and they proceed to dismiss both suits. Now in this view of the case, as stated by the Court, their Lordships are unable to concur. Their Lordships are not satisfied either upon the case as stated by the pleadings, or upon the facts as proved in evidence, that the position of the parties was that of parties unconnected with, and antagonistic to, each other—each collecting only that which he could by his diligence collect of the rents of the estate.

The material circumstances are these: The parties having had quarrels with one another had first of all a collector appointed by superior authority. They then, having got rid of the official collector or manager, appointed an agent of their own; they then again were obliged to be placed under the control of the Court, who appointed an official manager. The duty of the agent and the manager was to receive all the rents and to divide them between the parties. Both parties, however, appear to have collected and received sums in the Mofussil from the local agent of the collector, and sometimes from the tenants. The whole of the circumstances, however, show to their Lordships that their receipts were not receipts which can be alleged to be receipts by a tenant in common antagonistic to his other tenant in common, but that they were all part and parcel of a common arrangement by which the whole of the rents were to be received by the agent, or by the party acting under the authority or with the tacit assent of the agent, so that the whole was to be treated as a sum received by the agent, or on his behalf, the separate collections of each party having to be dealt with as if received from the agent or collector. That being so, it seems also to their Lordships that it would be impossible to apply the Statute of Limitations to the claim, because, if the account was a continuing account—one party having received more one year, and having received less the pre-

vious year—it appears to their Lordships impossible to say, "We will cut the account short at the twelve years, and not allow your receipts during the twelfth year, *ante litem*, to go to pay that which was due to you in the thirteenth year, *ante litem*." It would be absolutely necessary in taking the accounts from any date to see what the state of things was between them at that date.

That being so, their Lordships have to consider what really was the decree which the High Court ought to have made upon the appeal in *Enayet Hossein's* suit, which is the one now substantially before us, because it is stated by the other Appellant that if that appeal is decided in his favour, so that nothing is decreed against him, he is not minded to prosecute any claim on his part further.

It resolved itself, therefore, into this, whether the decree awarding rupees 34,000 and interest to *Enayet Hossein*, was well founded, and whether the appeal ought to have been allowed. The accounts were, in the first instance, referred to Mr. *De Courcy*. Mr. *De Courcy* took those accounts. The result was complained of by both parties. Their Lordships have before them the objections which were taken by the respective parties to the accounts of Mr. *De Courcy*, which objections were really the matters for decision before the Court of first instance. Of course it would be impossible to ask any Court to go and retake an account, which, by reason of its complicated character, had been referred to an expert to take between the parties, and therefore it was quite right for the Court not to go through all the items of the account, but to require and obtain from either party the objections which he took to the account as so taken. Both parties thereupon do present their objections to the account. Mr. *Simson*, the Judge of the Court below, proceeds to deal with these objections; and it is in respect to the mode in which he has dealt with these objections that it appears to their Lordships that they are able to come to a conclusion which will dispose of the appeals to-day. The balance found due is rupees 34,000. There is one item alone of rupees 56,000 to which an objection was taken, which would more than cover that balance, if the objection were well founded and ought to have been allowed by Mr. *Simson*. That objection arises with respect to rupees 56,000, which, by the admission of both parties, was not received by *Ahmed Reah*, the Defendant, but was actually received by his half-brother. But that receipt by the half-brother of the rupees 56,000 was treated by Mr. *Simson* as a receipt by *Ahmed;* and it has been contended before us that that was rightly so treated, at least that we have not got the materials for saying that it was not rightly so treated, and that we ought, therefore, if we differ from, or doubted the truth of, the conclusion arrived at by Mr. *Simson*, to send it back again for further investigation. But it appears to their Lordships that the case with regard to the receipt by *Ahmed's* half-brother does appear sufficiently before them to enable them now to arrive at a conclusion without referring it back to take any further evidence, or to enter again into the account.

Now, Mr. *Simson* has treated *Meeran*—and it has been suggested before us that he has rightly treated him—as being a mere name, and a mere sham; as a person who really was receiving for *Ahmed*, and that his receipts were to be treated as *Ahmed's* receipts. But it appears that *Meeran* had really obtained a decree entitling him to a certain portion of this estate, as an ancestral estate. He was a half-brother of *Ahmed*, and was therefore *primâ facie* entitled to share in the estate. He had obtained that decree, and after obtaining that decree, he did receive the amount of collections which have been brought into this account. There is nothing to satisfy their Lordships, and nothing apparently to justify the assumption of Mr. *Simson*, that he could treat the whole of that as a mere sham and collusion between *Ahmed* and his half-brother, for the purpose of preventing *Ahmed* being responsible for these receipts.

But it does not rest merely upon that. It is important to see in what way the plaint itself in the original suit treats *Meeran's* position. The plaint in the original suit does not treat *Meeran* as being a mere sham, as being a person who was

not entitled to receive the rents, but says that *Meeran* was a shareholder, and was made a Defendant in the first instance, as one of the parties to account. The plaint says this: "The share of *Meeran* in the *zemindary* is in the possession of *Syud Ahmed Rezah*, and *Syud Ahmed Rezah* knowingly, notwithstanding this extent of appropriation by *Meeran*, has granted *Meeran* certain *mehals* under *putnee pottah*, in the name of *Moosah Rezah*, his son, in proportion to his share in the *malikanah* profits, and got a deed relinquishing claim on the *zemindary* executed by *Meeran*. Hence the responsibility for this money collected by *Meeran* which appertained to the *zemindary* devolves upon *Ahmed Rezah* personally. Whatever *Meeran* received under the denomination of his own *malikanah* from the *Moostajirs* and *Malgoozars* of the *Pergunnah*, *Ahmed Rezah*, after he had the deed of relinquishment executed, not having given to the *Moostajirs* and *Malgoozars* credit for such money collected and appropriated by *Meeran*, has realized it over again, proofs as to which are forthcoming. *Meeran* and *Ahmed Rezah* are both step-brothers, and the estate of *Meeran* is included in the said 8 *annas* in the possession of *Ahmed Rezah*. Thus, whoever of the partners of that 8 *annas* appropriates, responsibility thereof devolves upon *Ahmed Rezah*, the occupant of the entire 8 *annas* of the *zemindary*. Still, it is considered expedient to make *Meeran pro formâ* Defendant. That is the case which is made there: that is to say, a charge is made as to the receipt, the only ground for it being that there was an actual receipt by *Meeran*. "We charge you with the receipt of money for our use because *Meeran* received it." The ground upon which they put it is—"*Meeran* is your brother. You are the joint owners of the one-half which is divided between you. There has been some deed by which subsequent to the receipt, *Meeran* has relinquished his share in favor of *Ahmed* for a valuable consideration. Therefore, we will treat the receipts in respect of the whole of that half which was divided between *Meeran* and *Ahmed*, as being receipts for which they are jointly and severally liable." That seems to their Lordships to be the foundation of the claim in respect of the receipts of *Meeran*. In point of law, it is to their Lordships quite clear that no such claim can be sustained; that it is not because a man who was tenant in common has received something, and has then sold it to another tenant in common, that a third tenant in common can make the purchaser answerable personally for that which was received by the person who has relinquished in his favor. That is the case made; and there is no case whatever made, and no evidence before their Lordships, to show, as has been suggested, that *Meeran* was merely a name and a sham, receiving everything he did receive on behalf of *Ahmed*.

It appears to their Lordships clear that *Ahmed* ought not to be made, and could not legally be made, personally responsible for the rupees 56,000 in a suit which, in their Lordships' view, was sustainable only as a suit for adjusting the account between the parties in respect of their respective receipts from the common agent, or which they had intercepted on the way to the agent. That being so, it entirely turns the balance against the Plaintiff. The Plaintiff did not, therefore, in the Court below, make out the proper proof to his right to any balance at all as due to him, and the suit in the Court below ought to have been dismissed,—their Lordships agreeing in the result with the High Court, although compelled to dissent from their grounds of decision.

The one suit is thus disposed of, and the Plaintiff in the other suit is satisfied with things remaining as they are, and does not seek to have any further accounts, or to proceed with his appeal. Under the circumstances of the case, and both appeals having come on together, their Lordships do not think it right to give any costs of either appeal.

Their Lordships therefore agree humbly to report to Her Majesty, as their opinion, that both the decrees of the High Court should be affirmed, and that both appeals should be dismissed, each party bearing his own costs therein.

21st June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RANEE SARAT SUNDARI DEBI and others, heirs of BHAIRABNATH SANDYAL, Deceased,* ... } *Appellants*,

versus

KUMAR PARESNARAYAN ROY, ... } *Respondent*.

Concurrent Decisions on Fact—Practice.

Where the decision of the first Court upon a question of fact has been affirmed on appeal, their Lordships will not reverse such finding on a mere balance of testimony; there must be so strong a preponderance of testimony that they can confidently pronounce it to be wrong.

THE following judgment was delivered by Sir James William Colvile:—

This suit was brought by the Respondent *Paresnarayan Roy*, against *Bhairabnath Sandyal*, to impeach as a false and invalid *jote* the tenure of certain lands which were held by *Bhairabnath Sandyal* under several leases, granting perpetual leases at a fixed *jumma*. The original leases are said to have been granted by one *Ranee Surjamoni*. The history of the Plaintiff's family is shortly this. The *zemindari*, in the year 1798, belonged to one *Rajah Rajendranarayan*. He died without issue, leaving as his heiress his widow, *Ranee Surjamoni*; but he also left an *anumatiputro* or direction to adopt, under which, in the year 1813, she adopted a person of the name of *Bhupendranarayan*. *Bhupendranarayan* died in the year 1845, and he left three sons, of whom the Plaintiff in the action was one. The two other sons died, and their shares vested in their mothers, the widows of *Bhupendranarayan*. It is not necessary to consider their interests, because the final decree gave to the Plaintiff in the suit only that one-third of the property to which he would have been entitled, if a co-sharer with his two deceased brothers. Therefore, for the purposes of this appeal, it may be considered as if the litigation were between the Plaintiff in the suit as *Zemindar*, and the *jotedar*, who was represented by the Defendants.

It is admitted that this title commenced, if it commenced at all, by grants of these tenures from *Ranee Surjamoni*, and that the date of the earliest of those grants was posterior to the date of the adoption. It follows, therefore, that at the time when she made that grant she was no longer heiress, in the possession of the estate, whatever her rights as a *Hindu* female and heiress might have been previously, but that the whole interest in the estate had vested in the adopted son. *Bhupendranarayan* appears to have come of age some time about the year 1840. He brought a suit to recover the estate from his adopted mother, and a decree was made in his favor in July 1844. He sought to execute that decree; and after he had sued out execution, a compromise took place between them. Disputes afterwards again arose between them, and he renewed his application for execution; and it is clear, upon that proceeding in which the rights of the Court of Wards with the widow were afterwards discussed, that, when he died, that second application for execution was then pending, and that no writ of execution had in fact issued from the Court. In the Court below, the principal issue was as to the validity of the *jote*, which of course involved the question whether the *jote* had ever been created by the leases and grants of the *Ranee*, and if they had been so granted, whether those leases were valid as against the Plaintiff, and if not valid as against the Plaintiff, whether they had been confirmed by his

* 8 B. L. R., p. 113.

father *Bhupendranarayan*, in which case, of course, he would be bound by them. The Principal *Sudder Ameen* seems to have held that the leases were not proved, but it will be, perhaps, the simplest and most favorable way to the Appellants to assume that those leases were really granted by the *Ranee*. It is, however, admitted that, if not afterwards confirmed by *Bhupendranarayan*, they would not be binding on the Plaintiff in this suit. If it were necessary for us to decide the question of the original grant of the leases, a good deal might turn on the fact of possession, because it is perfectly clear that those parties were found in possession as *Ijaradars* on the death of *Bhupendranarayan*, when the estate passed into the custody of the Court of Wards, and that they were, for a considerable number of years, in possession under it.

As the real turning-point of the case is this question of confirmation by *Bhupendranarayan*, it is necessary to consider what the case, made by the Appellants in that respect, is. Their title rests entirely upon two documents in the record and the evidence which they have given in support of those documents. Now the first of those documents has been sometimes spoken of as a *dakhilla*, but it seems really to be what Mr. *Field* described it, not a mere ordinary *dakhilla*, or receipt, by a Collector of rent, but a statement by *Bhupendranarayan* that 300 rupees had been paid as rent. It is in the form of a letter to the then *jotedar*, importing that the writer had received that rent, and that the *jotedar* would receive, in the ordinary way at *Putia*, the ordinary *dakhilla*. Still it no doubt implies that this money had been paid as rent to and received by the *Rajah* in person, and that, not at *Putia*, but at *Rampura* to which he is said to have gone, and the date of the document is the 10th *Aswin*, (24th September), fifteen days before the *Rajah* died at *Putia*. The other document is in the nature of a proclamation, addressed to the *gomasta*, *mandals*, *ryots*, &c., of all the lands comprised in the *jote*, and it assumes that there was an attachment affecting that property, and directed the attachment to be removed, and that the *ryots* upon those lands should be allowed to pay their rents to the *jotedars*. It is upon these two documents that the title of the Defendants in the action depended.

It is no doubt true that these documents which are now impeached, did exist immediately after the death of *Bhupendranarayan*, because they are referred to in the proceeding of the Court of Wards, which is in the record. The proceeding is addressed to the tenants of the *jote*, and after stating that not only the documents which purported to be original leases from the *Ranee*, but those granted under the signature or seal of *Bhupendranarayan Roy* in the year 1252 (1845) had been brought into the office, it says "you will, until you receive a second order from the Court of Wards, pay the rents to the said permanent *jotedar*, and *ijaradar*, and will take receipts thereof." But still, even supposing that the Court of Wards had the power, which their Lordships are not prepared to say they had, of binding the Respondent, then an infant, by a recognition of this *jote*, that proceeding is not more than an *ad interim* recognition of the title because it makes the direction to pay the rents subject to any second order of the Court of Wards. Therefore there seems to be no ground for contending that the Defendants were relieved by that order, or by the subsequent possession and enjoyment by the *jotedars*, which certainly continued so long as the Court of Wards was in possession of the estate, from giving that proof against the Plaintiff in this suit, which otherwise they would be bound to give. Their case is this, that these documents were executed by the *Rajah*, at *Rampura*, that they were executed in pursuance of some arrangement, the particulars of which are nowhere very clearly stated, which had previously taken place at *Putia*, and that they were executed within fifteen days of his death. On the other side, it is said, that the *Rajah* did not go to *Rampura*; that he was incapable of going there; that he was in the last stage of consumption; that he died fifteen days after this document is said to have been executed at *Putia*, and therefore that the documents are fabrications.

It is impossible to conceive a case which

more completely turns on a pure issue of fact. Both the Courts below have decided that there is a failure of proof, and that the documents are no genuine; and their Lordships are bound to see not merely that there is a mere balance of testimony, but that there is so strong a preponderance of testimony against that finding, that they can confidently pronounce it to be wrong. They are unable to do so. They think that the observations of the Court as to the improbability of such a transaction taking place with the *Rajah*, and at the place at which it is said to have taken place, are extremely cogent. The circumstances in which the estate is said to have been at that time, in order to account for the form of the documents, which purport to take off an attachment, are not made out. So far as their Lordships can see, no attachment had thus issued by way of execution in the suit between the *Rajah* and his mother. A suggestion has been made of some other possible attachment, but there is really no evidence of any such proceeding. The testimony of the last two witnesses read by Mr. *Bell*, points to an attachment in the nature of an execution of that decree, which the *Rajah* had obtained against the *Ranee*.

Their Lordships, therefore, are unable to see that the Courts have in any way miscarried in coming to the conclusion to which they have come, and, adhering to their rule, they must humbly advise Her Majesty to dismiss this appeal with costs.

22nd June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

PAHALWAN SINGH and others,* ... ... } *Appellants*,

versus

MAHARAJAH MUHESSUR BUKHSH SINGH BAHADOOR, ... } *Respondent*,

AND

MAHARAJAH MUHESSUR BUKHSH SINGH BAHADOOR, ... } *Appellant*,

versus

MEGHBURN SINGH and others, ... } *Respondents*.

Accretion—Evidence—Civil Procedure Code (Act VIII. of 1859,) s. 7.

The question whether land is formed by gradual accretion depends on evidence, but it would be an error in law to consider it as conclusive of that fact that the surface of the land all been changed, and the marks all obliterated, so that no old houses, or trees, or mounds, or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river.

Lopez v. *Maddan Thakur* (1) commented on.

Suing for new accretions after a former suit is not a splitting of action within the meaning of s. 7 of the Civil Procedure Code.

THEIR Lordships delivered the following judgment:—

This was a suit in the nature of an ac-

* 9 B. L. R., p. 150.
(1) 5 B. L. R., p. 521.

tion of ejectment, brought to recover a considerable quantity of land which was alleged to belong to the Plaintiff, on account of its having been gained by accretion to four *Mouzahs* which had been previously his property. Besides certain defences in point of law which have all been abandoned before us, there were two substantial defences in point of fact on the merits, which were raised by the Defendants. First, they said, in substance, that the land was not gained gradually by accretion, as alleged by the Plaintiff, but was what is called a *chuckee;* and after stating the facts as they alleged them to be, they assumed up by saying:—"In consequence of the route thus described by the river, the *chuckee* in suit stood firm, retaining all the traces of numbers and boundaries, and continued without opposition on part of any one in the occupancy of your petitioners." Then they raised a second defence on the merits, by which they said:—"The land in the south and north of the disputed land is in the possession of your petitioners, hence, were it even admitted according to the Plaintiff's false plea that the diluvion was by *dhooee,* still, considering the land in suit to be a part and parcel of the land Nos. 447 and 912 in the occupancy of your petitioners, none but your petitioners, under the provisions of the very law quoted by the Plaintiff, could be entitled to its possession." Issues were formed on those pleadings. Both parties were allowed to present their issues, and then the Judge, out of the issues presented, formed those which were to be tried. The material issue was this:—"Whether the disputed lands have been gradually washed away, and have accreted to the estate of the Plaintiff by obliteration of its former marks, or whether by the sudden change of the Ganges, they have accreted with a continuance of the former marks?" This issue a little confuses the matter by bringing in the marks, as if they were necessarily conclusive of the question:—"Whether the disputed lands have been gradually washed away, and have accreted to the estate of the Plaintiff;" as if it followed that, because the marks were obliterated, therefore the land had gradually accreted. The other alternative is put in the same way:—"Whether, by the sudden change of the Ganges, they have accreted with a continuance of the former marks?" Then there are further issue:—"Even if gradually washed away, whether on the ground of the same being intermixed up with other lands in the possession of the Defendants on the south and north of the disputed lands, the Defendants are entitled to the same or not? Whether the Plaintiff, after being in possession of the disputed lands, has been ousted by the Defendants or not, and whether any land, adjacent to the disputed land, amongst the accreted lands, is still in the possession of the Plaintiff, or whether the Plaintiff was never in possession of the contested lands?" A great mass of evidence was given. The Judge in the Court below, the *Sudder Ameen* himself, inspected the ground on several occasions, and most careful inquiries were made on the spot as to whether the land had gradually accreted, or whether it had been a *chuckee* suddenly formed? It was then ordered that an *Ameen* should draw a plan, and survey the land and present a report to the Court. That accordingly was done. He framed the plan in the suit which is before their Lordships, which shows by distinctive colors—yellow, pink, and green—the land sought to be recovered in the action, the *chuckee* which is admitted still to belong to the Defendants, and land which is in the possession of the Plaintiffs, but is claimed by the Defendants.

Now, the questions which really arise are two: first, whether the land has gradually accreted, and how that issue ought properly to be determined; and, secondly, whether the Defendants, by reason of their *chuckee,* are entitled to any portion of the land, even assuming that it has accreted?

As respects the first question, it is necessary to consider, have the Courts below been wrong in point of law, or have they committed any error in fact? Now, no doubt their Lordships at one period of the argument had considerable doubt whether there might not have been a mistake in point of law; because, looking at the nature of the report of the *Ameen,* and of the judgment of the first Judge, and even

at the form of issues, there appeared reason to doubt whether it had not been supposed that, if the surface of the land had all been changed, and the marks had all been obliterated, so that no houses, or trees, or mounds, or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river,—that was conclusive of the question. Now, if the Court below had meant to say that was conclusive in point of law, so that the land was to be considered as land gradually accreted, even although the channel of the river had changed, and had gone from one bed and course to another—if the Court below had meant to say that, if the marks of the old channel were obliterated, and if the marks of the land between the old channel and the new channel had also been obliterated, by reason of the water having flowed over the surface and washed off the old land, and brought new sand and mud down upon it, notwithstanding there was land left between the two channels which had not, in fact, fallen into the river, and been entirely sunk into the channel itself,—if they meant to say that was conclusive, their Lordships would have thought they would clearly have been wrong in point of law. But upon the whole of the case it does not, in fact, appear that the Defendants ever substantially raised that question before the Court below at all. In their arguments they appear to have assented to the framing of the issues in the way in which they were framed, and they appear to have assented to resting their case on the question whether the land which is sought to be recovered did or did not on its surface appear to be entirely new and fresh-formed, with no marks of the old cultivation and habitation upon it, or whether it had, as they seem to have alleged it had, houses and trees, and boundaries and marks of the old cultivation upon it. Certainly, when parties before their Lordships allege that a mistake has been made in point of law, if they have not raised that question in the Court below, although it is certainly open to them to raise it here, yet their Lordships ought to be very certain, indeed, that the Judge really has made the mistake imputed to him, and that the decision in fact is attributable to such mistake. It may well be that the Judges made no such mistake at all; that they perfectly understood what gradual accretion is, and what the true rule of law on that subject is, and that they meant merely to say that, as matter of fact, which no doubt was a material fact to ascertain, there were none of the marks of the old cultivation upon it which the Defendants had alleged. If any marks of the old channels, or of the old houses and of the trees, and of the old mounds, could have been found, that would have been conclusive against the Plaintiff, and therefore it was a matter very material to be inquired into. It did not necessarily follow, nevertheless, that because no marks were found, therefore the Plaintiff had proved his case. But it does not appear that that objection was ever taken. The parties were content to rest upon the issues as framed, and it may be that they all thought, and possibly thought rightly, that, under the circumstances, the condition of the land would be the best evidence which could be given as to whether the land really had gradually accreted, or whether there had been a sudden change in the course of the river. Therefore their Lordships think that it is impossible to say that either of the Courts below came to any wrong conclusion in point of law on the question of accretion.

Did they then make any mistake in point of fact? And certainly, looking at the great extent of the changes, and particularly at the maps, and some portion of the evidence, there might be some reason to doubt whether the whole of it had really accrued by gradual accretion as alleged. But their Lordships are of opinion that the case clearly comes within the rule which they have so often laid down, where the dispute turns upon matters of fact, and where the Courts below have agreed on the conclusion which they have come to respecting that fact. This was a case where a careful examination on the spot was most material towards coming to a proper conclusion on the fact. That examination was held, and apparently very carefully held, and it was after that examination that the first Court came to a conclusion in favor of

the Plaintiff on that part of the case. The High Court came to the same conclusion, and their Lordships are of opinion that there is certainly no such error shown in that conclusion as would enable them, or make it right and proper, to reverse or alter that decision. It may be added that the map of 1851 appears to their Lordships to show that, as respects one great change that took place in the course of the river, the effect of it was that the Plaintiff got a large acquisition to his *mouzahs*, and that what he so got, which contains a large part of that colored green, and probably a small part of that colored yellow, was gained by the gradual accretion. Therefore, on the whole, their Lordships think that they ought to come to the conclusion that the first material issue was properly proved and decided in favor of the Plaintiff.

The case of *Lopez* v. *Maddan Thakur* (1) was very strongly urged upon their Lordships; but their Lordships do not think that this case is at all governed by the decision in *Lopez'* case. That was a case where the river first went forward, and then, after a certain number of years, came back again, and brought to the surface the ground which had been sunk. It was held that that went back to the old owner. Here the sole question is, has the land, by gradual accretion, accreted to the estate of the Plaintiff, the Defendants not having at all raised the issue that it was their old ascertainable land, swallowed up and then rested? As their Lordships are not conceived that the Courts below have erred in point of law, and as they have taken very careful means to go right, and there is nothing to satisfy their Lordships that they went wrong in point of fact, their Lordships are of opinion that their judgment on that part of the case ought to be confirmed.

But there is a second very material portion of the case, namely whether the whole of the lands have really accreted on to the Plaintiff's land; and certainly the map itself to the eyes of everybody who looks at it, appears to show that it is a very extraordinary conclusion that these lands have wholly accreted to the Plaintiff's. Here we have on the south the *chuckee*, admitted to belong still to the Defendants; the land on the other side of the river belongs to the Defendants: and yet it is supposed that many hundred acres of land, in fact directly situated between the Defendants' land and the river, and their land on the other side of the river, somehow or other, have accreted to some body else's estate, and not to theirs!

The Judge in the Court below, dealing with this question, deals with it very shortly, and says they cannot claim any portion of disputed land as having accreted or belonging to their land, because the river Ganges flows between them. That is in itself unquestionably an inaccurate statement. The river Ganges does not flow, at least did not flow at the commencement of the suit, or for some time previously, between them. What had happened was this. The river Ganges had originally flowed, as is admitted on all hands, at the bottom of the undisputed *chuckee*. Then, by what is admitted to have been a sudden change, a portion of the Ganges began to run above the *chuckee*, and between what is now the *chuckee* and the disputed land which is colored yellow. Now it seems quite clear, from the description of the premises, that the whole of that portion of the stream which so flowed between the *chuckee* and the land colored yellow, and in fact much of the land colored yellow itself, was then the property of the Defendants. Therefore, the whole that was there before the Ganges came was the property of the Defendants. Well, then the Ganges comes there. It is not necessary, perhaps, to say what exactly the effect of that might have been on the soil covered with water. Their Lordships must not be supposed to say that that was taken away from the Defendants. But, at any rate, the moment that the Ganges left that stream which it had so formed—and it certainly does not appear to have remained there above a year or two, as far as their Lordships can discover—the moment that course became a *nalla*, dry in the dry season, it appears to their Lordships quite clear (and

(a) 13, Moore's I. A., p. 467; *Ante*, p. 591; 5 B. L. R., p. 521.

indeed *Lopez* v. *Maddan Thakur* (1) would be for that a direct authority) that that land which had been covered with water, when it ceased to be covered with water, became the property of the Defendants. The consequence is, that the Defendants were themselves the owners of the land to which the greater part of the new land accreted. It appears to their Lordships quite clear that that portion of the yellow which is *ex adverso* the *chuckee* must be taken as accreted to the *chuckee*.

As to the other portion, their Lordships think that the Plaintiffs have shown that the land colored green was in their possession, and that that portion which is *ex adverso* the land colored green, has accreted to that land. The High Court on this part of the case took a view which certainly appears rather surprising, that because the Defendants had mainly no doubt, and principally denied that the land had accreted at all, and had said that it had been caused by a sudden change in the river, and had not been caused by gradual accretion—that because they said that and failed, they were not entitled to rely on their second defence, which is most clearly stated in their pleadings, is most clearly stated in the issue, and is also stated in the judgment of the first Judge in the Court below. It is to their Lordships perfectly clear that the mere fact of their having relied on their first defence could not possibly prevent them also relying on their second defence if the first defence failed. The final result is that there must be a division of the disputed land, each estate taking that which is *ex adverso* its own frontage. The carefully prepared map of the *Ameen* (1) shows, with sufficient accuracy, how this division is to be made. Their Lordships think that, taking the point where the extreme left of the yellow at the bottom of the *nalla* intersects with the land colored white in the map directly below the green, a line must be drawn from that point, as nearly as may perpendicular, to the course of the Ganges until it meets the river, and that the land which lies to the right of that, that is to say, to the south-east of it, will belong to the Defendants, and that the land which lies to the north-west of it will be the only land which the Plaintiff is entitled to recover in this suit.

With reference to the second suit, their Lordships think that the point on which the High Court decided that suit does not arise, because they say that the Plaintiff has not recovered the whole of the lands which he might have recovered in the first suit. Now, they arrived at that conclusion from this consideration: the Plaintiff, in his plaint in the first suit, specified the boundaries of the lands which he sought to recover, and he must clearly specified the boundaries towards the Ganges as being the river Ganges itself; and there can be no doubt that he sought to recover the whole of the land which he said he was entitled to up to the Ganges, but he stated also the number of *bigas* that there were in his plaint, according to his measurement, as 2,967. When the *Ameen* of the Court came to measure it, he found that there were more *bigas* than the Plaintiff had estimated, and therefore the High Court came to the conclusion that he had only recovered the 2,967 *bigas*. They did not alter the judgment of the lower Court at all, but simply affirmed the judgment with costs. The High Court then comes to the conclusion that, having recovered only that quantity, he had failed to recover the excess, which is therefore not his, and that the subsequent accretion is to that excess. It is not easy to see, if he was not to recover the whole of the land between the boundaries which he had stated in his plaint, what portion of the land stated within those boundaries he was not to recover; and it is not very easy to see why that portion has been taken from the land next the river rather than from any other portion. But their Lordships are of opinion that that is really a misconception of the true legal effect of the decree of the Court below. That decree is this:—"That a decree be given to the Plaintiff, that the Plaintiff obtain possession of 2,967 *bigas* 10 *katas* of disputed land mentioned in the plaint, and in the map of the Court *Ameen*, according to the boundaries given in the plaint." Well, now, the judgment

(1) *Ante*, p. 594; 5 B. L. R., 521.
(1) 9 B. L. R., p. 150.

is, that he is to recover it according to the boundaries given in the plaint. It is true it goes on to specify the quantities, but it turns out that those quantities are not strictly accurate. Then the question is, which is he to recover, the quantities, or according to the boundaries given in the plaint? Their Lordships think that it must be interpreted as if it were a conveyance of land stating the boundaries, and then saying that it contains so many acres; of course, the real conveyance would be of the land within the boundaries, and it would be a mere false description that there was some slight mistake in the quantities. Their Lordships think that that principle ought to be applied to this case, because they find among the rules which prevail in the Courts in *India*, it is stated:—"Where the boundaries of the property in suit are required by the Code to be specified, they ought to be stated with as much precision as possible, a map being, if necessary, annexed to the plaint, or some map which has the character of a public document being referred to; but if the boundaries be set forth, the land may be decreed to the Plaintiff, even though the quantity be somewhat more than that stated in the plaint"(2). Now, that is the very thing that happened here. The quantity was somewhat more than that stated in the plaint; but their Lordships think that the true construction of the decree in the first suit was, that it was a judgment for all the land contained within the boundaries stated in the plaint. That being so, the ground on which the High Court relied in the second suit, namely that there was a spliting of the suit, did not arise at all, because he has recovered in the first suit all the land which he could recover. In the result, as arrived at by their Lordships, he has not in fact recovered anything like what he has claimed. At any rate that point does not arise, because it was not correct to say that it was not necessary to bring a second suit. There was a continual fresh accretion going on during the two years which elapsed between the time when the first suit was commenced and when the second was brought. It appears to their Lordships that the second suit is substantially brought for that newly accreted land, and the decision in the second suit ought simply to follow the decision of the first. To avoid any possible misconception, their Lordships have had the line drawn on one of the copies of the *Ameen's* map which is to be annexed to their report, and so much of the land claimed in the second suit as lies to the north-west of the line which has been already specified, their Lordships think the Plaintiff is entitled to recover in the second suit.

There will, of course, be some further question about the mesne profits; and it appears that the cases must go back to the Court below, for the purpose, first of all, of fixing the boundaries as described in the line which has been specified; and next, of finding out what are the real mesne profits according to these boundaries. There is no information before their Lordships by which it is possible that they could specify what those mesne profits should be.

As to the costs, their Lordships are of opinion that, as respects the costs in the first Court, they should be given according to what is the ordinary practice of the Courts in *India* as to giving costs in cases where a Plaintiff recovers a portion only of the land which he claims, and there is a successful defence as respects the other portion. Their Lordships are further of opinion that, under all the circumstances, there should be no costs at all to either party, either of the appeals to the High Court, or of the appeals that have been brought to the Queen.

Their Lordships will, therefore, recommend to Her Majesty that an order be drawn up in accordance with these terms.

Their Lordships' recommendation to Her Majesty on these appeals will be that she would allow both appeals, and declare that the Plaintiff in the suits (the *Maharajah*) is entitled to so much of the accreted land as lies on the north-west of the line drawn on the map annexed to this report, and that the Defendants are entitled to so much of the accreted land as lies on the south-east of that line; and that she should remit the causes to the

(2) Macpherson's Civil Procedure, 3rd ed., p. 147; 5th ed., p. 79.

High Court, with a direction to put the parties in possession, and to settle the amount of *wasilat* payable and receivable by either, in conformity with the above declaration. And declare further, that the costs of both the suits in the *Zillah* Court should be paid and received by the parties according to the practice of the High Court, in the proportion which the amount recovered by the Plaintiff bears to the amount claimed by him, and that each party should bear his own costs in the High Court; credit to be given for any costs which have been already paid; and that there should be no costs of either appeal.

24th, 26th and 27th June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut at Agra, North-West Provinces.

LALLA BUNSEEDHUR, ... *Appellant*,

versus

THE GOVERNMENT OF BENGAL,... ... *Respondents*.

Novation of Bond—Principal and Surety—Evidence.

B became surety under bond to Government for the Treasurer of a Collectorate. The Collector yearly examined the accounts, and struck a balance which he certified to be correct. *B* on each such occasion, executed a new bond, but the old bonds were not cancelled or given up. On subsequent enquiry, the Treasurer was discovered to have embezzled moneys during each year, *Held* that, on such discoveries being made, *B* was still liable under the old bonds, there having been no novation.

Where the Courts below had admitted evidence not properly admissible, the Judicial Committee examined the whole evidence, and being satisfied that there was, independent of that inadmissible evidence, sufficient to justify the decision of those Courts, dismissed the appeal.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. THE LORD JUSTICE MELLISH:

This was an action brought on the part of the Government of *Bengal* against *Lalla Bunseedhur*, who was a surety for *Sreekishen Chowby* the Treasurer of the *Mirzapore* Collectorate; and it was brought to recover a sum, with interest, of upwards of Rs. 60,000. The case on the part of the Government was, that between the years 1843 and 1848 the Treasurer had been a party to the embezzlement of the sums of money in question. Now, the first defence that was relied upon was a defence in point of law. It appears that the surety Bonds were three times renewed. The Treasurer occupied that position for a period of eight years. The Bonds were not renewed every year,—they were three times renewed, and in the other years the Government did not renew the Bonds, but they made an inquiry into the sufficiency of the security. The first point that was argued on the part of the Appellant was, that by the renewal of the Bonds, each Bond, as it was renewed, was in fact a novation, so that no action could any longer be maintained upon the old Bond, but it must be taken that by an examination of the accounts, the Government had satisfied themselves that no fraud or embezzlement had been committed up to that time; and that though they did not give up the old Bond, yet, practically, the new Bond was to be taken in lieu and satisfaction of the old Bond; so that the surety only became responsible for the deficiencies which might take place subsequently to the giving of the new Bond. If that defence was correct, the consequence would be that there would be a defence to all except any deficiencies which might be proved subse-

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14, Moore's I. A., p. 86; 9 B. L. R., p. 364.

quently to the giving of the last Bond. Their Lordships are of opinion that that defence cannot be maintained. It rests entirely upon this, that we are to infer that each new Bond was given in substitution for the old one. The *Sudder* Court (consisting of Messrs. *M. R. Gubbins* and *E. M. Wylly*) say that, in their judgment, the new Bond was given probably under a misapprehension of what was the proper construction of the Orders of Government, which require that, from time to time—in fact, annually—there should be an examination into the sufficiency of the securities. They seem to have thought that made it necessary, or, at any rate, desirable, that new Bonds should be given; but, however that may be, the question simply is—are we to infer that it was intended to discharge the old Bond, if, after the giving of the new Bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old Bond was in existence? If, indeed, the Government had known of the frauds, that would raise a totally different question, for then, of course, they ought to have warned the surety, and not allowed him to go on by giving a new Bond. But that is not contended. It is not suggested that until the year 1848, when the discovery was made by one of the parties in the office making a statement to the Government, the Government had any suspicion whatever that any frauds were going on. The old Bonds were never given up. The surety did not ask for the old Bonds. There is nothing to show that he had any idea that he was discharged, or that he had a right to the old Bonds, and their Lordships think that the explanation given by the *Sudder* Court is the correct one; but whether it is correct or not, there is nothing to show that the Government intended to give up or abandon any claim that they had upon any of the Bonds. Then it was argued that, at any rate, the Government having satisfied themselves, by their Collector, and by the examination which they made of the accounts, that no fraud had been committed, and that the accounts were correct, the new Bonds were given upon the faith of the accounts being correct, and that they are to be estopped from saying that the accounts were incorrect. There does not appear to their Lordships to be any ground for that argument. There must be such gross negligence as almost to amount to a participation in the fraud, before the fact of the Government examining into the accounts and not discovering the frauds sooner could operate as a discharge. The object of having securities is, that if secret embezzlements take place, the Government may have a security upon which they can rely.

Then with respect to the case itself. The mode in which the alleged frauds were committed is stated very clearly in the judgment of the *Zillah* Judge (Mr. *James Lean*). He puts it thus:—"The Government asserts, that the embezzlement occurred in this way, viz.,—the Treasurer received sums of money on account, revenue of villages, etc., which he did not pay into the Government Treasury, or enter into his *Hindee Siaha*; but, in connivance with the *Siaha Navees* and others, entered in the Persian *Siaha* as received by transfer, although there were no deposits on account of the said villages, etc., from which payments by transfer could be made, at the same time referring in the said *Siaha*, and also in the receipts he gave for the said sums to orders issued for payment by transfer from *bonâ fide* deposits relating to other villages, etc., which payments again were made up from moneys paid into the Government Treasury in advance on account of other villages, etc., which will be adverted to below. *Lalla Bunseedhur*, in his answer, does not positively deny that the sum sued for has not been embezzled; but he insists that *Sreekishen Chowby* never received the items forming that sum, or they would be in his *Hindee Siaha*; and, moreover, *Irasals* have not been adduced to show that the sums were sent to him to take charge of; and that, in short, the Persian *Umlah* and *Tehseeldars* are the Embezzlers, and not *Sreekishen Chowby*. I consider that the statement of the Government proved as to the amount embezzled."

Now, that being the sort of charge that was made, it was strongly argued on the part of the Appellant, that it was proved

only by inadmissible evidence; and, indeed, it is on account of this allegation, that the charge was only supported by inadmissible evidence, that their Lordships have been induced to hear this case at such considerable length as they have done, because, if it had simply an ordinary case in which it was a pure question of fact, which both the Courts below had agreed on, it would have been governed by the ordinary rule, that unless it could be clearly shown that the Courts below had made some plain mistake, the judgment ought to be affirmed. Now, it is alleged that they made a plain mistake in this way. That there was a great deal of inadmissible evidence, to which both the Courts below gave weight—not only evidence which was inadmissible by the law of *England*, but evidence which ought not, in fairness and justice, to be allowed to have any weight.

That alleged improper evidence consisted principally of this: When the alleged frauds were in the first instance discovered, the first thing which was done was that the Collector went down to examine into the matter, and to examine everybody who could give any information upon the subject, to find out what the truth of the matter really was, and he took a great number of depositions, and no doubt examined those persons from whom he thought he could get information privately, when neither *Sreekishen Chowby* nor *Lalla Bunseedhur* were present. Now, certainly, if any substantial reliance had been placed upon those depositions—if this case could not be proved independently of them, their Lordships would have been disposed to think it would certainly have been wrong to place any weight upon their evidence. If they were alive (and there is nothing to show that any of them, except *Sreekishen Chowby* himself, were dead,) they ought to have been called at the trial; and to rely upon an *ex parte* deposition of a Witness who might have been called and cross-examined at the trial, would not be a practice that their Lordships would at all agree with, or think that any weight should be given to their depositions. But, as respects *Sreekishen Chowby* himself, he was frequently examined; first he was examined by the Collector, and subsequently he was examined by the Magistrate, and then afterwards he was tried and found guilty; and subsequently an action being brought (the details of which it is unnecessary to go into at present), he was examined again, and then alleged that he was innocent. Now, their Lordships do not consider that his evidence ought necessarily to be entirely rejected, —it probably would not be satisfactory to support a case upon an admission made by him alone, if the other evidence was not sufficient to amount to strong evidence against him; but if there is strong evidence against him, then probably the examinations (at any rate the examinations before the Collector) might be referred to for the purpose, at least, to see if he could give any satisfactory explanation of the charges which were made against him.

Then, as respects those depositions which their Lordships think inadmissible, they do not find, on carefully considering the judgments both of the *Zillah* Court and of the *Sudder* Court (certainly of the *Sudder* Court), and their Lordships are disposed to think of the *Zillah* Court also, that any reliance was placed upon them, and, therefore, they may be rejected. The real question is, therefore, first of all, taking the evidence which must be and everybody says is admissible, how does the matter stand? There are three things to be made out: first, that there was an embezzlement; second, that the sum embezzled amounted to the sum claimed; and third, that *Sreekishen Chowby*, the Treasurer, had a guilty knowledge of, and was a party to those embezzlements. Now, was there an embezzlement of the amount claimed? Upon that question there really was no serious dispute in the Courts below. It is charged plainly in the plaint, —the answer does not in plain terms state that there was no embezzlement at all. On the contrary, in the very first answer, the substantial defence is, that if there was an embezzlement, *Sreekishen Chowby* was not a party to it. But it did not rest there. All the voluminous documents with which the Government supported their case, the Bill of discovery having

been filed previously, were open to examination on the part of the Defendant.

Then Accountants were called, and they stated what the result of all the documents was; they stated that they did show a deficiency in the accounts to the amount claimed,—that is the only possible way in which a fraud of that kind can be proved, because it is quite impossible for the Court itself to go into every single item of such voluminous accounts. In this Country it is the practice to call in an Accountant, who goes through the Books; he makes a summary of the accounts, and the other side are left to question them, and this case was conducted in that way. Now, the Appellant appointed persons who were perfectly competent for their duty, he being himself a large and extensive Banker, and they appear to have been Clerks of his own, who themselves went through these accounts, and after they went through them, they were asked, did they want any more documents,—was there anything that the Government could produce which they required? They said there was nothing more. They were examined. Their evidence has been read to their Lordships; and the result of that evidence is that an examination of all these documents tends to show that there was an embezzlement shown by these accounts to the amount stated. But the Appellant rests his defence upon this: he says these accounts do not make out that *Sreekishen Chowby*, the Treasurer, was a party to the embezzlement. The result come to, from an examination of the accounts, as he alleges, is, that they only show that the persons who kept the Persian accounts had been parties to the embezzlement, but that they do not show that the Treasurer had been a party to it.

The question, therefore, in their Lordships' opinion, is reduced to this: Is there satisfactory evidence that *Sreekishen Chowby*, the Treasurer, was a party to these embezzlements? and that also in a great measure resolves itself into this—is there satisfactory evidence that the sums in question were received in cash at the Treasury at all? for if they were received in cash, then, according to the ordinary course of business, they were handed over to the Treasurer himself; and inasmuch as the Persian Clerks never handled the money, it is impossible to see, if the money really was brought into the Treasury, how, by any manipulation of the accounts, the Persian Clerks, who had not got the money, could possibly carry out these frauds or embezzle the Government money without the knowledge and assistance of the Treasurer.

How then does the question stand as to the way in which the payments were made? The actual practice was this: the payments were either made in money or were made by transfer of deposits. When they were made in money from the village authorities, an authority to receive the money was procured to show that it was the intention of the person who had the money to pay in cash. He brought the money to the Treasurer. The practice was, that it was carried into the room where the Treasurer was, and it is stated by one Witness, that somebody else was always there with him, and there the money was paid over. There was a receipt given, and there is produced a form of the receipt for such cash payment, and that formed his receipt. Then it is the duty of the Treasurer to see that that amount of money is entered in the Hindee account. Then it is also taken to the Persian Clerks, and they have to enter receipt of the money in the Persian Books, and then the receipt has also to be taken to some other Clerk, who enters it in the *Dakhilla* account-book, and then the receipt (whether before or afterwards does not clearly appear) is signed by the Treasurer, and that is given to the person who brought the money. Then it would appear, that he takes it back to the village authorities, and in some cases the village authority also puts his name upon the receipt.

Now, when the money is paid by a transfer of deposits, then it appears that these deposits either may be in the Treasury itself, having been previously paid in cash, or they may be in some other Treasury, as at *Benares*, where it may be more convenient to the landowner to make his payment. If that is the case, an order always has to be got from the Collector to authorize that transfer by way of deposit, and then that order appears to be brought to

the office, and upon the authority of that order the transfer is made. Now, there are many of these cases. The Court below divided them into three lists, and for the present reference will only be made to the first class; that is, where the receipts were actually given. Now, in these cases, the forms of the receipts are set out in the record; and the first and the strongest evidence against the Treasurer is this: that the receipts are given in a form which, on the face of it, appears to be exclusively applicable to a payment in money; and looking at the form of the receipt, it is impossible to say that it does not, upon the face of it, support to be a receipt for money. There is a number, and in the first column there is the name of the *Mehal*, and in the second column there is the name of the *Malguzar* on whose behalf the payment is made. Then there is the amount received, and the items in respect of which it is paid. Then there is the date upon which the money was deposited, which plainly means the date of the payment, which is the 30th of March, 1844, upon this receipt which is now before us. Then there is the name of the person through whom the money was deposited, which also plainly means the name of the person who brought the money to the Treasury and paid it in; and then there is the date upon which the receipt was given, which is the 30th of March, 1844, being the same date as that upon which the amount was paid. This is written out in Persian, and purports to be an acknowledgment of the receipt of cash. It is signed at the bottom by the Treasurer himself, with a memorandum "Rs. 743. Received by transfer by a *Porwannah*, No. 2669," in the particular one to which we are referring.

There is perhaps some little difficulty, or, at least, their Lordships had some difficulty in the course of the argument, in discovering exactly what was the mode of giving a receipt when the payment really was made by a transfer. Although there is perhaps no direct evidence of what the form of it was when the payment was made into the Treasury by deposit, whether it was the Treasury at *Mirzapore* or the Treasury at *Benares*, no doubt some receipt, acknowledging that payment, must have been given. Several of the Witnesses who were examined upon the part of the Government stated, that no receipt at all was given when a deposit was transferred, at the time when the transfer was made. In the judgment of the *Sudder* Court, which appears to have been taken principally from the allegations in the plaint, which are not certainly specifically, if at all, denied by the answers, it is stated that at some time or other, whether the practice was first introduced by this particular Treasurer, or whether it was introduced before, is not perfectly clear; but, at any rate, upon many occasions a receipt was given, but that alterations were made in the form of it, as one would suppose would be the case, as otherwise it would represent what was positively untrue; and that it would contain a reference in the body of it, not merely after the signature at the end, to show that it was merely a receipt for a transfer, and that no money was paid at all at the time when it was given. Therefore, the receipt forms the first evidence, and very strong evidence, against the Treasurer.

Then that is confirmed in a great variety of instances by evidence upon the part of the village authorities, the *Canoongoes*, who say that, as respects those villages, they have no deposit accounts,—that it was the ordinary practice to pay in cash. That, secondly, confirms the statement that the payment was in cash. Then there is no entry of a receipt in cash in the Hindee *Siaha*, which would make it clear, and which in fact is not seriously denied, that if it was paid in cash, beyond all question the Treasurer was a party to the embezzlement. Then in the Persian *Siaha* they are entered upon the day upon which the payment was made, and it is very important to observe, that they are entered as paid in cash. In examining the items it is quite plain, that in the body of the *Siaha* they are entered as paid in cash; but, of course, if they had been summed up in the abstract of the day's proceedings, as having been paid in cash, then the amount of cash in the Persian *Siaha* would have differed from that in the Hindee *Siaha*, and then when the Collector came to examine the Books the fraud would have

been discovered directly. Therefore, though they are stated in the body of the Persian *Siaha* as received in cash, yet in the summing up they are not summed up in the cash column, but they are summed up as a part of those sums which were received by transfer of deposit. We also find in these Persian *Siahas* that, day by day, not only is the ultimate balance signed by the Treasurer, but the pages are also signed. It is said, that he does not understand the Persian language; but there is no satisfactory evidence of this, and it is very improbable that the Persian Clerks should have dared to go on, day by day, making those false entries which the Treasurer could have discovered at any time.

Then, besides that, there was another Clerk, who kept a Book of receipts, called the *Dakhilla* account, in which nothing was entered except payments in cash, and in which we find these entries as being received in cash. Now, taking into consideration the evidence of the payments being received in cash, are we to believe that the Landowner, or his Agent, who brought the money, the village authorities, the Persian Clerks, the persons who kept the *Dakhilla* Books (of whose guilt there is no evidence whatever), were all combined to cheat the Treasurer, and that they should succeed during this long period of years in cheating the Treasurer, though at the very time they cheated him they brought these documents, day by day, to him for his signature, thus giving him an opportunity of detecting them?

Moreover, if one looks at the accounts kept at the time, it will be seen that there is no reference in them to the deposit accounts from which the sums embezzled were fraudulently pretended to be taken. There is no reference to them in the Hindee *Siaha*, or the Persian *Siaha*, or in the *Dakhilla* Book. The only place in which you find any reference to them is in the receipts themselves in the handwriting of the Treasurer himself. There you find a reference to the alleged transfer, and that is not denied. It is admitted by the Accountants of the Defendant, that in reality these transfers were all false and fictitious, because in reality they were not transfers from the accounts of the Landowner who made the payments, but were in reality transfers from totally different accounts which had nothing to do with these particular receipts; but being afterwards, as it appears, made up in some other way, which it is not necessary to inquire into, the Courts below agreed in the belief that the money was really received in those cases, and their Lordships certainly do not see any ground at all for differing from that opinion.

This morning Mr. *Forsyth* has taken us through two selected instances, and we have examined and traced these two cases all through, so as to enable us to see what was the effect of the entries; and that which has been stated has been proved in these cases. We have not thought it necessary to go beyond that, nor is it necessary to consider in detail, whether there is sufficient evidence in those cases in which the entries are not produced, but only the copies of the receipts. Their Lordships must consider them as copies of the receipts, nor is it necessary to go into the detail of those cases where no receipts at all are produced, because it is quite clear that the whole of the frauds are upon one system from beginning to end; and when it is once shown and proved that there were frauds to this amount, and how they were concocted and carried out, and when it is further shown clearly from certain instances, that there is evidence, beyond all question, that the Treasurer was a party to them, the inference is very strong indeed that he was a party to all the frauds. It never could be believed that some of the frauds were committed with the knowledge of the Treasurer, he receiving the money, and that the rest of the frauds were not practically committed in the same way.

Upon these grounds, therefore, their Lordships have come to the conclusion, that the judgment of the Court below was right, and that it was fully supported by the evidence, and hence they will recommend to Her Majesty that this appeal should be dismissed with costs.

28th June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KURALI PRASAD MISSER,* *Appellant*,

versus

ANANTARAM HAJRA and others, ... } *Respondents.*

Evidence—Mode of Dealing with its Weight and Effect—Stamps with different Dates—Handwriting—Act IV. of 1840—Suit for Possession.

Where the Judge of first instance doubted the authority of a deed, it being written on two pieces of stamped paper of different dates; held, under the circumstances, not to be a proper deduction.

Where evidence could have been adduced, and was not, as to a handwriting being forged, and the Judge by comparison with other handwriting held it to be a forgery, such finding was disapproved of.

THEIR Lordships delivered the following judgment:—

The Appellant in this case brought his suit for the cancellation of a deed of sale alleged to have been fabricated, and of certain leases granted under the title acquired by means of that deed of sale, and for setting aside an order made in an Act IV case.

The short outline of the case is this:—The Respondent's family were the owners of a *Putni Talook*; that *Talook* was sold for arrears of rent in 1850; it was then purchased in moieties, one moiety being purchased by the father of the Appellant, the other by a person of the name of *Lakhikant*. Whether *Lakhikant* purchased *benami* for the dispossessed *Putnidars*, it is immaterial here to consider, because it is clear that in December 1858, the title of *Lakhikant*, whether a mere nominal title, or a beneficial ownership, was transferred to and became vested in the Respondents. Between December 1858, and the date of this alleged transaction in March 1859, *Madhusudan* and the Respondents were the joint owners of the *Putni Talook*; that is now an admitted fact. It is then alleged on the part of the Respondents that, on the 15th March 1859, they purchased *Madhusudan's* share from him. The deed produced and impeached bears that date. That deed was registered on the 6th April 1859. On the 15th April 1859 the Respondents granted the earliest of the leases impeached to certain native coal-masters, and on the 23rd April 1859, *Madhusudan*, professing to be still owner of a moiety of the *Talook*, granted a lease to a rival coal company, known as the Bengal Coal Company. From that time the parties seem to have been *in flagrante bello*, backed on either side by their respective lessees, the rival coal workers. The active dispute is said, and appears on the face of the Magistrate's proceedings, to have begun as early as the 25th April 1859. It led to proceedings under Act IV. of 1840,—the final proceeding in which was had before the Magistrate in July 1859. He then made an award declaring that the Respondents were in possession, under a deed of sale, of the moiety of *Madhusudan*, and that award was upon appeal affirmed by the Judge on the 20th December 1859. Intermediately there took place those high-handed and lawless proceedings on the part of the Bengal Coal Company in the interest of *Madhusudan*, and in their own interest as the lessees from *Madhusudan*, to which our attention has been directed by Mr. *Bell*. *Madhusudan* died in May 1860, and the suit was brought by the present Appellant, his son and representative, in 1861.

The Principal *Sudder Ameen* decided in favour of the Plaintiff, on the 9th September 1861, and upon appeal that decree was reversed by the High Court, which, on an application to review its decision, pronounced a second decree adhering to

* 8 B. L. R., p. 490.

the first. Against those two decrees the appeal has been brought.

Now it is obvious that the one single issue, upon which the whole case depends is, was this deed forged, or not forged? If the parties claiming under the deed, were trying to defeat an existing possession on the other side, and to recover by virtue of the title derived under the deed, their Lordships are not prepared to say that there are not circumstances of suspicion attaching to the transaction, which might make it doubtful whether Plaintiffs so suing had discharged the burden of proof which lay upon them. But that is not the nature of the suit. The parties claiming under the deed are in possession. They have been found to be in lawful possession by the Magistrate's award confirmed by the Judge. These are decisions of competent Courts that the Respondents were in fact in possession, and that their possession was acquired lawfully and under colour of the deed; and it is impossible wholly to disregard that finding, though, no doubt, the propriety of it is one of the matter in issue in this suit.

That being the case, we proceed to consider, in the first place, what is the evidence on which the Appellant calls upon their Lordships to reverse the decisions under appeal, and to declare this deed a forgery.

The greater part of the evidence adduced by the Appellant is really of the most worthless character. It is the mere rumour existing in the locality as deposed to by *ryots* and others, persons who do not profess for the most part to speak from their own knowledge. On the other hand, there is an absence of that kind of evidence which in such a case one would have expected to see. What the case of the Respondents as to the execution of this deed was must have been made known to the Appellant by the proceedings in the Act IV. case. That case is, that the deed was executed in the house of *Madhusudan*; that the consideration money was brought there, that it was paid there, and the date of the transaction is fixed by the date of the deed. Yet not a single witness is brought from the family of *Madhusudan* either to impeach his handwriting, or to prove that this story was a mere figment, and that the parties were not there at that time, and that no such transaction as deposed to took place. It may be true that this kind of evidence is very often given by witnesses who do not receive much credit; but in every case it must depend on the character of the particular witnesses whether such evidence is credible or not, and the absence of any attempt to prove such a case is a circumstance which is certainly open to much observation.

Such strength as there is in the case of the Appellant is to be found in the judgment of the Principal *Sudder Ameen*. The following are the principal grounds on which he decided in the Appellant's favour. He relied upon the fact that the deed, instead of being executed on a paper bearing one stamp, purchased immediately before the date of the deed and purchased by the persons who propounded the deed, or purchased (according to what is said to be the ordinary course) by *Madhusudan*, the vendor, has been engrossed upon two stamped papers purchased by different persons, and at different dates within a month of the execution of the deed. He also relied upon the circumstances attending the registration of the deed, as to which we shall presently say a few words. Again, although there was no evidence as to the handwriting before him, he upon his own comparison of the handwriting came to the conclusion that the name of *Madhusudan*, when compared with an admitted signature of that person, did not appear to be in his handwriting, and that it resembled the handwriting of the person who wrote the body of the deed. He further in some degree relied upon the witnesses upon whose testimony their Lordships have already remarked, who stated from hearsay that no sale was ever made by *Madhusudan*, and upon some evidence given to show that the Respondents were persons who were not rich enough to purchase the *Talook;* and, on the whole, he came to the conclusion that the forgery had been made out.

Their Lordships entirely concur with the judgment of the High Court, that the stamped papers under all the circumstances of the case do not raise any strong

argument against the validity of the deed.

Upon the question of handwriting they have to deal with this circumstance. There was no evidence given in the cause that the signature of *Madhusudan* was not in his own handwriting; and against the opinion of the *Zillah* Judge, founded on a comparison of handwriting, they have to set the opinion of the two Judges of the High Court, who, in the first instance, decided the appeal, supported as it was by the opinion of three of their brethren, to whom they submitted that point, one of whom was a native, presumably as competent as the Principal *Sudder Ameen* to determine a question of Bengali handwriting. The circumstances attending the registration are no doubt those which most strongly tend to cast suspicion upon the transaction, but their Lordships are not prepared to say that, in a case in which it lay upon the other party to prove the forgery, they amount to proof of a forgery. It seems to their Lordships that the *mookhtear*, who is missing, and is not called by either party, might as well have been called by the one party as by the other, if he had been forthcoming. The *mookhtearnamah* itself is not before them, and upon that part of the case all that can be said is, that it is left extremely bare; and that as it lay upon the Plaintiff, the Appellant, to make out his case, any mere deficiency in the proof must fall upon him, and not upon the other side. Whatever be the value of the testimony as to the inability of the Respondents, and it does not appear to their Lordships to be very great, it is obvious that any deficiency in their means of making the purchase, if it existed, would probably be supplied by the opulent persons who wished to obtain a lease from them for the purpose of working the coal.

With respect to the question of possession, which the Principal *Sudder Ameen* seems also to have considered was wrongly found by the Magistrate in favour of the Respondents, their Lordships are of opinion that there is nothing before them which would warrant their saying that that finding, supported as it is by the judgment of three Judges of the High Court, was erroneous; and if it were not erroneous, it tends very much to support the deed, because it is only to that deed that the possession can in any way be attributed. It was clearly a legal possession, and there was no pretence that they legally acquired the possession of *Madhusudan's* share in any other manner. If that possession had been undisputed for any length of time, that would of course be an extremely strong circumstance in favour of the validity of the deed. That cannot be said to be the case here, because the dispute between the parties supervened so shortly after the execution of the deed, but still, as far as it goes, the possession of the Respondents, however short, is a circumstance which cannot be disregarded.

Therefore, notwithstanding the suspicions which may rest in their Lordships' minds in respect of this transaction, whether by reason of the evidence of Wilson, which, however, is capable of being explained by supposing that he was mistaken as to the dates, or as to what passed in conversation before him, or by reason of the non-delivery of the earlier title deeds, or by reason of the mysterious and unexplained circumstances attendant on the registration, their Lordships feel that there are not before them any grounds upon which they would be warranted in reversing the decision of three Judges of the High Court upon the merits, and that of two other Judges upon the question of possession, and in pronouncing this document to be a forgery.

They must, therefore, humbly recommend Her Majesty to dismiss this appeal with costs.

28th and 29th June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ANUNDO MOYEE DOSSEE, and others,* ... } *Appellants*,

versus

DHONENDRO CHUNDER MOOKERJEE, and others, } *Respondents*.

Execution—Purchaser—Mortgagee—Priority—Lis Pendens—Limitation.

The purchase of property in the *Mofussil* at a sale in execution of decree is valid, notwithstanding a decree for sale of the property in a suit for foreclosure pending in the High Court at the time of sale, to which the purchaser was not a party.

The possession of a purchaser at a sale in execution of decree, without notice of a mortgage of the property, is adverse to the mortgagee, and a suit to disturb his possession must be brought within twelve years of the commencement of such possession.

JUDGMENT was pronounced by

THE RIGHT HON. THE LORD JUSTICE JAMES:

In this case their Lordships are of opinion, that the judgment and decree of the High Court in *India* must be affirmed.

The case has been argued at some length, and several important questions of law and of practice have been discussed before their Lordships. The suit itself, looking at the plaint, scarcely seems to raise any of those questions. The suit is based entirely upon the title of a person who alleges that he purchased under a decree for sale, which decree was made on the 15th of November, 1852. The contention before their Lordships at first was, that that sale was made in a suit for foreclosure of a mortgage, and that that suit for foreclosure having been instituted prior to a sale under which the Defendants claimed, the Defendants are bound by that decree for sale in exactly the same manner as if they were parties to the foreclosure suit.

Their Lordships are of opinion, that there is no foundation whatever for the claim so put, that the case to which they have been referred to, *The Bishop of Winchester* v. *Paine* (*a*), has really no relation to a case of this kind. That case merely determines this,—that where there is a suit for foreclosure and the Mortgagor, a Defendant to that suit, makes a voluntary alienation, pending the suit, of any part of his interest in the equity of redemption, a Purchaser will not be allowed afterwards to institute a new suit for a new foreclosure, the ground being, that if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. But that was simply a foreclosure suit, and the subsequent Mortgagee would be barred from instituting any new suit in the Court of Chancery for the purpose of enforcing the equity of redemption. But no suit of foreclosure ever proceeded actively, or ever was made to work actively, against a party who was not before the Court. That case simply decides, that subsequent Mortgagees of an equity of redemption are bound by a foreclosure suit. This, however, was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Supreme Court at *Calcutta* had no effect whatever *in rem*, as it had no effect whatever over the property in the *Mofussil*. The decree for sale was merely a decree, in substance, that the parties to the suit should concur in conveying and selling the property to a Purchaser, and no such decree for sale could have any operation whatever upon the title of persons in the *Mofussil* who were not parties to the suit. Therefore, it appears to their Lordships that the view of the case presented to them based upon the case of *The Bishop of Winchester* v. *Paine*, has really no application to the subject matter of this suit.

* 14, Moore's I. A., p. 101; 8 B. L. R., p. 122.

(*a*) 11 Ves. 194, 201.

But the Courts below did go into the title anterior to the sale, and upon an investigation of that title the High Court came to a conclusion in favour of the Respondents. Their Lordships think it right, therefore, to some extent to go into the matters which were so discussed in the Courts below.

Now, one of the questions, and the most important question in their Lordships' judgment, conclusive with regard to the matter which was raised, was this: whether the title of the Defendants was anterior to the title of the Mortgagee and was anterior to his mortgage? Their Lordships are satisfied upon the evidence, that before the mortgage was made, which is the foundation of the Plaintiffs' title, whether it was made in October, 1841, or whether it came into existence some time between that and the date of the registration of the mortgage, which is the only thing before them, that is to say, the registration in May, 1842 (whichever date be taken), at the time when that Deed was executed, the property in question was actually attached under a decree of the Court, and under a sale in pursuance of that original decree, and of that execution, the title of the Defendants accrued; and their Lordships are of opinion, that the title of the Defendants, independently of the Regulations of Limitations, is paramount and superior to the title under the Mortgagee.

As a great deal of argument has been addressed to their Lordships upon that question in respect of the Regulations of Limitations, their Lordships think it right to add that, in their judgment, if the attachment under which the title of the Defendants was derived has been posterior to the mortgage, still the Regulations of Limitations would have been a conclusive bar. Their Lordships think that the title of a judgment Creditor, or a Purchaser under a judgment decree, cannot be put on the same footing as the title of a Mortgagor, or of a person claiming under a voluntary alienation from the Mortgagor. They are of opinion, that the possession of a Purchaser, under such circumstances, is really not the possession of a person holding priority of the Mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the Mortgagee. The possession, which the Purchaser supposed he acquired, was a possession as Owner. He thought he was acquiring the absolute title to the property, and that he was in possession as absolute Owner. Their Lordships are assuming that no notice was proved of the existence of the mortgage title given to, or acquired by, the Purchaser; and there being no such notice, they are of opinion, that the possession of the Purchaser was the possession of a person claiming to be Owner. Under these circumstances they are of opinion, that if the title of the Mortgagee to enter by reason of a default having occurred before, had accrued, and if the Purchaser under such a title had been in possession for twelve years, believing himself to be *bonâ fide* Owner, under a claim to the ownership of the property, and not being in possession in any way as Mortgagor or under the Mortgagor, then in accordance with the cases, several of which have been cited to their Lordships, and probably were cited in *India*, according to the principle of those cases, which their Lordships adopt, they are of opinion, that the suit to disturb the possession of such a Purchaser ought to be brought within the twelve years after the commencement of his possession.

Their Lordships, on the whole, are of opinion, that the judgment of the Court below is correct, and they will humbly recommend Her Majesty that the appeal be dismissed with costs.

30th June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

LUCHMESWAR SINGH BAHADUR, MAHARAJAH OF DARBHANGA, AN INFANT UNDER THE COURT OF WARDS,* .. } *(Defendant) Appellant,*

versus

SYAD LUTF ALI KHAN,... { *(Plaintiff) Respondent.*

Bond Debt—Payments—Mode of calculating Interest—Regulation XV. of 1793.

Where payment was made upon a bond, the amount paid being less than the interest due, *held* the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree.

THE late *Maharajah* of *Darbhanga*, on the 21st July 1849, executed a bond for Rs. 334,812-14 *annas* and interest at 12 per cent. in favor of the Respondent and three other persons as heirs of *Syad Abdulla*.

On the 25th December 1856, Rs. 200,000 being paid, a receipt was endorsed on the bond, stating the payment to be "out of the sum stated in this bond."

On the 27th April 1861, the Respondent alone sued the *Maharajah's* estate to recover five-twelfths of the amount as his share. In his plaint he did not give credit for any part of the Rs. 200,000, but claimed five-twelfths of the principal being Rs. 139,505-5-10, and a similar sum by way of interest equal to the principal claimed.

Objections were taken to the non-joinder of the other parties interested, but these were overruled, and the Judge gave a decree calculating the damages thus:—

Total amount of bond ...	Rs.	334,812	14	0	
Interest to date of suit	„	473,544	9	4	
Deduct sum in excess of principal...	„	138,731	11	4	
					334,812 14 0
Total ...	Rs.				669,625 12 0
Deduct sum paid	„				200,000 0 0
Balance ...	„				469,625 12 0
Five-twelfths of which is ...	„				196,677 6 4

Against this decision the Respondent appealed, contending that the amount paid should have been deducted from the amount due for interest at the date of payment.

On the 14th December 1863, the High Court (Mr. Justice *Bayley* and Mr. Justice *E. Jackson*) held that this was the proper mode of making the calculation, the effect of it being to leave at the date of the suit a sum less in amount than the principal, and therefore not making it necessary to deduct anything on the ground of the interest exceeding the principal (1.)

The calculation was made thus:—

21st July 1849. Amount of Bond ...	Rs.	334,812	14	0
25th December 1856. Interest to date ...	„	298,524	10	1
Total	„	633,337	8	1
25th December 1856. Paid this day ...	„	200,000	0	0
Balance	„	433,337	8	1
Interest on the principal from 25th December 1856 to date of suit.	„	175,019	15	2
Total	„	608,357	7	3
of which $\frac{5}{12}$ths is	„	253,480	0	0

for which sum they gave a decree with interest thereon from date of suit to payment at 12 per cent.

The Court of Wards applied for a review which was refused, but the Court amended the decree by calculating interest on the

* 8 B. L. R., p. 110.

(1) See Sevestre's Rep. 1863, 834a.

principal due to the Plaintiff until the date of decree, and then awarding interest on the principal and such interest until payment.

The Court of Wards appealed to *England.*

Mr. *Leith* and Mr. *Bell* for the Appellant.

On opening the appeal their Lordships intimated that, unless the learned Counsel could satisfy them that there had been an appropriation at the time of payment to the payment off of the principal, the creditor had a right to consider it as a payment on account of the interest.

Mr. *Leith* contended that the peculiar wording of the receipt that the sum was paid "out of the sum stated in the bond" showed the intention to deduct the sum paid from the principal moneys, and that by calculating the amount in the way that the High Court had calculated it, the intention of Regulation No. XV. of 1793, to prevent more being charged for interest than principal, was avoided.

Sir *R. Palmer*, Q. C., and Mr. *Pontifex*, were not called upon.

Their Lordships stated that in their opinion the High Court had proceeded upon a sound basis of calculation, and that there had been no appropriation of payment, and that the wording of the Regulation applied to cases where the interest, at the time of suit, had accumulated so as to exceed the principal. There was here no calculation so as to give compound interest, and therefore their Lordships would humbly advise Her Majesty to affirm the decree.

30th June, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SYAD LUTF ALI KHAN, ... *Appellant,*

versus

MUSSAMAT AFZALUNISSA BEGUM and others, ... *Respondents.*

Limitation—Act XIV. of 1859—Agreement—Money had and received.

A, *B*, and *C* being joint creditors of *D*, *A* and *B* received, in 1856, a payment on account in respect of their share in the debt. *D* having made default in payment of the balance, separate suits were brought against him by *A*, *B*, and *C*. The Court having held that the payment was a payment to all, *A* and *B* recovered more than their share, and *C* recovered less. A family suit for partition between *A*, *B*, and *C* was, in 1862, compromised, and it was agreed that all claims between the parties should be considered as settled, but it was agreed that if *C* should, out of an appeal brought by him against *D*, have any claim against *A* and *B*, that should be reserved. *C's* appeal was, in 1863, unsuccessful, and in 1864 he brought an action against *A* and *B* for his share of the money paid in 1856. *Held*, that he was entitled to recover the amount which *A* and *B* had recovered against *D* in excess of their claim, and that the suit was not barred by the law of limitation.

THEIR Lordships gave the following judgment:—

In this case their Lordships are of opinion that the decree of the High Court ought to be reversed, and the decree of the *Zillah* Judge maintained, with a variation which their Lordships will state.

The circumstances of the case are these:—There was a very large bond-debt, and apparently, as far as the evidence in this suit goes, that debt was a debt payable to the shareholders, the heirs of a deceased banker, according to their shares in the

* 9 B. L. R., p. 348.

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estate. Out of that debt a sum of Rs. 2,00,000 was paid, and apparently was paid in respect of some of the shares of the Defendants, and not in respect of the share of the Plaintiff, the present Appellant. The sum of Rs. 2,00,000 having been thus paid, different shareholders were minded to bring separate actions against the debtor for their shares respectively of the balance, in each action assuming that the Rs. 2,00,000 had been paid in respect of the share. But the debtor contended that he was entitled to have the Rs. 2,00,000 appropriated in part reduction of the whole debt. The result in all those actions was that the Court decided that the Rs. 2,00,000 must (against the debtor) be appropriated to the whole debt, and in consequence of their holding that it must be so appropriated, they cut down the claim of the Appellant very considerably, and they enlarged the claims of the Respondents, and gave them a very considerable benefit,—the result being that from that mode of dealing with the payment of the Rs. 2,00,000, the Plaintiff lost Rs. 25,000 of his share, and the Defendants got, as they have admitted through all the proceedings, Rs. 16,000 more than they were entitled to from the common debtor.

That being so, the Appellant filed his plaint, saying, in effect, "you received the Rs. 2,00,000, and it has been now decided that that Rs. 2,00,000 must be considered as being received on account of all of us, and must be so considered from the time when the Court so decided, and you must account to me for my full share of that sum." In this case the Judge of the *Zillah* Court did not take that view, but took it as a debt arising out of the result of the suits, and he came to the conclusion that the Rs. 25,000, which the Plaintiff had lost as the result of the proceedings based upon the new view taken of the original payment, was the sum which the Plaintiff was entitled to recover from his co-obligees. The defence of the statute of limitations was pleaded, and was overruled by the *Zillah* Judge; that defence of the statute of limitations was, however, sustained by the High Court; that defence would certainly not be applicable if the claim were based on, or arose out of, the result of the suits, and not out of the original payment. Their Lordships are of opinion that it did arise out of the result of the suits, and not out of the original payment which, as far as the Appellant and Respondents are concerned, was clearly a payment made upon the footing that it was to be taken out of the share of the Respondents; and it was not till the Respondents had got more than their share that they could be said to have received any money to the use of the Appellant so as to give any ground of action.

But the case does not stand merely upon that. There was a document which appears originally to have been very much relied upon by the Defendants themselves—the Respondents—as a document excluding this claim. They said "there was a deed of compromise made, by which the claim of the Appellant to any share of anything which we have actually received is barred." On the other hand, the Appellant's contention, with reference to that deed, was that there was a particular clause in that deed (the 11th clause of one deed, and the 10th of another similar deed), the effect of which he says is this:—"There is an appeal pending between me and the debtor, in which I am trying to get back what I can upon the footing that the decision of the Court is wrong about the two *lakhs* of rupees; that being so, the compromise is not to affect that in any way whatever, and if any claim should arise out of the result of that appeal, any question upon that is reserved as between us." The *Zillah* Court was of opinion that that was the true effect and construction of the deed, and in that opinion their Lordships concur. From that time, it appears to their Lordships, there could be no question as to the Statute of Limitations, as the thing was, by contract between the parties, reserved and kept open until the decision of that suit was arrived at, and very reasonably so, because, if the Plaintiff had succeeded in that suit in getting the money from the debtor, of course he would have had no manner of claim whatever against the Respondents, who were desirous that he should proceed with that claim, and should recover as much as possible from the other party, and not from them. Their

Lordships are of opinion that the decision of the High Court that there was a bar under the Statute of Limitations was erroneous.

But the Judge of the *Zillah* Court arrived at the conclusion that the Plaintiff was entitled to recover the Rs. 25,000, that is to say, the sum which he lost. Their Lordships are of opinion that that is not the true measure of the liability of the Respondents; that they were not obliged to indemnify him from the loss which arose from the mode in which the suits against the debtor were dealt with; but that, as they had received the Rs. 2,00,000, and afterwards, by the result of the proceedings, they had received in respect of that same debt Rs. 16,000 more than they admitted themselves to be the full amount of their claim, and as part of the same mode of dealing with them, the Rs. 25,000 loss had been incurred by the Plaintiff, their Lordships are of opinion that, upon every principle of equity, the Rs. 16,000 surplus so received was money had and received to the Plaintiff's use, and that his claim to that amount was one of the things which he was entitled to make under the deed of compromise. Their Lordships are of opinion that there is nothing in the contention that this claim was not specifically made by the plaint in this suit. The plaint clearly states the circumstances under which the claim of the Plaintiff arises. He cannot sustain his suit for the whole amount claimed, but there is nothing in his claim for the larger amount which deprives him of his right to recover the smaller amount, which, as the result of the facts pleaded and proved, their Lordships are of opinion is equitably due to him. It can only affect costs, and with those the *Zillah* Judge has dealt on the footing that the Plaintiff had failed for the greater part of the claim.

Their Lordships will, therefore, recommend to Her Majesty that the decree of the High Court should be reversed, and that the decision of the *Zillah* Judge should be affirmed with this variation that, instead of the sum of Rs. 25,530, the sum of Rs. 16,556-6-9 will be the sum inserted; to carry interest from the 21st September 1861 to the date of payment.

The Appellant will have the costs of the appeal here, but no costs are to be allowed of either party of the appeal in the High Court. The costs as originally given in the *Zillah* Court will remain.

1st July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

OUKUR PERSHAD BUSTOOREE, ... } *Appellant*,

versus

MUSSAMUT FOOLCOOMAREE BEBEE, ... } *Respondent*.

Adjustment of Accounts—Breach of Contract—Del credere Commission.

Suit to recover the sum of Rupees 16,051-11-10, alleged to be due in respect of various sales of cotton belonging to the Plaintiff, and which the plaint alleged was sold by the Defendant as a *del credere* agent; and as to which liability plaint set forth that there had been an adjustment of accounts. Defendant denied Plaintiff's allegations as to there being any *del credere* contract with the Plaintiff, or any adjustment of accounts. The Plaintiff, on settlement of issues, abandoned the cause of action as upon an account stated, and sought adjustment of the accounts from the Court, and did not sue upon the account stated; whereupon, besides the pleas to the merits, the Defendant pleaded limitation; it being admitted that the cause of action for the last item in the account had accrued more than three years, but, there were items in the account which had accrued within six years from the commencement of the suit. *Held*, that, the suit was a suit for breach of contract, and came within Clause 9 of Section 1 of Act XIV. of 1859.

17th July, 1871.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. THE LORD JUSTICE MELLISH:

This was a suit brought by the Appellant, who was the Manager of a Factory

* 14, Moore's I. A., p. 134; 10 B. L. R., p. 15.

in *Moorshedabad*, against the Respondent, who carried on an old established business of Broker, to recover a sum of Rs. 16,051 and interest, alleged to be due on the balance of an account. The Defendant had for several years sold the goods of the Plaintiff's Firm, and according to the finding of the Principal *Sudder Ameen*, the correctness of which was not disputed before us, had received a *Puckah* or *del credere* commission, which made her liable to the Plaintiff for all goods sold which were not paid for by the Purchasers. As there was no proof that any part of the price of the goods in respect of which this suit was brought had been received by the Defendant, the claim against the Defendant was only supported upon the ground that as she received a *del credere* commission, she was liable for the price of all goods sold by her for the Plaintiff. It was admitted, that the cause of action for the last item in the account had accrued more than three years, but that there were items in the account which had occurred within six years from the commencement of the suit. The Act of Limitation of suits was pleaded, and the sole question to be determined is, whether under the circumstances, previously stated, the suit is barred by the Act of Limitation of suits, No. XIV. of 1859. The High Court held, that the case came within cl. 9 of the first section, as a suit brought for breach of a contract, and the Chief Justice in giving judgment says, "Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might properly be assumed they had agreed to carry on business on the terms we find them carrying on. It was an engagement on the part of the Defendant that she would sell the Plaintiff's Cotton, and that she would guarantee the Purchasers. There was a liability on the part of the Defendant not arising from a wrong, but a liability arising out of an engagement which she must be assumed to have entered into with the Plaintiff. It, therefore, falls within cl. 9 of section 1. It is a suit for breach of contract not in writing." It was urged before us on the part of the Appellant that the High Court had put a wrong construction on the words "breach of contract," as used in the clause; that these words are not there used for the purpose of distinguishing actions founded on contract from actions founded on tort, but for the purpose of distinguishing actions to recover unliquidated damages for breach of contract, from actions to recover debts, and that the enumeration in the clause itself and in the 8th clause of several debts with respect to which the period of limitation is to be three years, proves that it could not have been intended to make the limitation for all debts three years under the words "breach of contract," and that the present suit was, in substance, a suit to recover a debt or liquidated sum of money, and that the period of limitation was six years under the 16th clause of section 1. Several cases were cited from the Indian Courts, and it appears from them that much difference of opinion has prevailed among the Judges in *India* respecting the proper construction to be put on the words "for the breach of any contract" in the 9th clause of sect. 1. Their Lordships do not think it necessary or advisable that they should attempt on the present occasion to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say, that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them. The real Debtors for the price of the goods sold are the Purchasers of the goods, and the Broker is only sued upon her collateral undertaking that in consideration of the commission paid to her she will pay the price of the goods if the Purchaser fails to do so. An action in such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for a breach of contract.

Their Lordships, therefore, are of opinion, that the judgment of the High Court was correct, and they will recommend to Her Majesty that the appeal should be dismissed, with costs.

1st and 3rd July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Financial Commissioner of Oude.

MUSSUMAT THUKRAIN SOOKRAJ KOOWAR,* } *Appellant*,

versus

GOVERNMENT, BIBOO AJEET SINGH & others, } *Respondents*.

Offence of Trust—Confiscation—Non-liability of cestui qui trust.

Plaintiff was the widow and heir of a deceased *Oude* nobleman, the representative of the cadet branch, as the *Rajah* of *Bhinga* was the representative of the elder branch, of a great *Oude* family. The *Rajah* was the *Talookdar* of a great *Talook*. The younger branch had their separate estate. Many years ago in the then state of things in *Oude* it was thought advisable that both estates should be, as to their relations with the *Oude* Government united in one great *Talookdary*, the head of the elder branch representing the whole, the younger branch, however, continuing in undisturbed and absolute possession, as the proprietor, of its own villages, and paying only its proportion of the *jumma* assessed on the whole. After the annexation of *Oude* by the British power, there being no longer, as he thought the motive for covering him self with the name and protection of the *Rajah* of *Bhinga*, the husband of the Appellant was minded to apply for a distinct settlement with himself. The *Rajah*, however, wrote to dissuade him from this step in a letter in which, while desiring to retain the nominal *Talookdary* of the whole, he acknowledged in the clearest terms the right of his relation, and pledged himself that the possession of the property by the latter should be respected and safe. Plaintiff's husband died, and the *Rajah* hearing that the widow, the Plaintiff, was of the same mind as her husband, and desirous of placing herself immediately under the British *Sircar*, wrote her a letter similar to the one he had formerly addressed to her husband. The summary or provisional settlement was made with the *Rajah*, but before he obtained his regular settlement, and the *sunnud* which would have been his formal grant, he came under the grave displeasure of the authorities, and an order went forth confiscating half his estate. The *Rajah* concealed from Government the real ownership of the Appellant's villages, and contrived that they should be taken to satisfy in part the order of confiscation, against which the Appellant remonstrated and eventually brought a suit for the recovery of her property. *Held*, that the Appellant was the acknowledged *cestui qui trust* of the registered *Talookdar* who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered. That it would be a scandal to any legislation if it arbitrarily and without any assignable reason swept away such rights. That the lady was clearly the equitable owner, and that the decree of confiscation against her trustee could on no principle of Law or Equity, or good conscience, be made to affect her, and certainly could not justify a sentence which in effect made her the sufferer for his offence.

THEIR Lordships, without calling for a reply, pronounced judgment by

THE RIGHT HON. THE LORD JUSTICE JAMES:

The Plaintiff, the Appellant, is the Widow and heir of a deceased *Oude* nobleman, the representative of the cadet branch, as the *Rajah* of *Bhinga* is the representative of the elder branch of a great *Oude* family. The *Rajah* was the *Talookdar* of a great *Talook*. The younger branch had their separate ancestral estate, the *Gowa* estate, wholly distinct from and independent of the *Talook* of the elder branch. But many years ago it was, in the then state of things in *Oude*, thought desirable that both estates should be, as to their relations with the *Oude* Government, united in one great *Talookdary*, the head of the elder branch representing the whole, whether in submission or in resistance to the exactions of the Court of *Lucknow* does not appear; the younger branch continuing, however, in undisturbed and absolute possession as the proprietor of its own villages, and paying only its proportion of the *jumma* assessed on the whole. This was the state of things at the time of the annexation of *Oude* by the British power. While the British authorities were in course of making the settlement of their new acquisition, the Husband of the Appellant was minded to apply for a distinct settlement with himself, there being no longer the motive, as he thought, for covering himself with the name and protection of the *Rajah* of *Bhinga*. He ap-

14, Moore's I. A., p. 112.

parently thought that under British law and British rule his estate would be as safe as the domain of the most powerful *Talookdar*.

The *Rajah*, however, wrote to dissuade him from this step in a Letter in which, while desiring to retain the nominal *Talookdary* of the whole, he acknowledges in the clearest terms the right of his relation, and pledges himself that the possession of the *Mehal* by the latter shall be respected and safe.

Before anything was done, the great outbreak in *Oude* took place. After it was subdued, the arrangements for a settlement were resumed. In the meantime the Plaintiff's Husband had died; the *Rajah* hearing that the Widow, the Plaintiff, was of the same mind as her Husband, and desirous of placing herself immediately under the British *Sircar*, wrote her a Letter similar to the one he had formerly addressed to her Husband.

The summary or provisional settlement was made with the *Rajah*; but before the *Rajah* had obtained his regular settlement, and the *Sunnud* which would have been his formal grant, he incurred the grave displeasure of the authorities, some Arms being found concealed by him, and an Order went forth confiscating half his estate. The *Rajah* concealed from the Government Official the real ownership of the Appellant's villages, and contrived that they should be taken to satisfy in part the Order of confiscation. The Appellant naturally remonstrated and petitioned, but in vain; she petitioned again, and again her second petition, like the first, was unheeded. At length, however, she succeeded in obtaining a hearing. She was told to bring, and did bring, her suit for the restitution of her villages and a settlement. The case was investigated with a care which cannot be too highly praised, and the Assistant Commissioner, acting as Judge, pronounced in the Lady's favour, that she was entitled to have the villages settled with her as a subordinate tenure to the *Talook*. From this decision, an appeal was presented to the Deputy Commissioner, who, thinking that there were some technical deficiencies in respect of some of the details, desired a still further and fuller investigation. The result was, that the Assistant Commissioner re-stated his former conclusion and judgment, but with a modification that the settlement was to be made with her directly, and not as a subproprietor; and the Deputy Commissioner, who had evidently taken great pains with the case, affirmed that decision.

The matter should have rested there. It appears, however, that the Appellant's villages had been included in grants to *Oude* loyalists, in reward for their loyal services to the State, and it was thought that it would be very embarrassing if the Grantees were to be obliged to give up the subject of their grants to the rightful Owner; and, accordingly, a further appeal was made to the Chief Commissioner, who reversed the decrees of the subordinate Officers, and the poor Widow was thereby left stripped of her whole property. From this decree the present appeal is brought.

It has been attempted to be justified on the legislation which existed in Oude on the effect of the new settlement, and on the well-known Letters of the Governor General in Council, addressed to the Landowners of *Oude*, the one announcing the confiscation of existing tenures, and making a *tabula rasa*, the other the Letter of grace and restoration. It is contended, that the effect of the settlement with the *Rajah* under the second Letter was to make him the absolute Owner of the whole estate, including what had been the Appellant's village.

Their Lordships are satisfied that that legislation and that Letter have no such effect. The object and meaning of that Letter are well known and very clear. Soon after the annexation, it was suggested that the true and normal proprietorship of land in *Oude* was that ownership by village communities which had been discovered or established in the *North-West* Provinces, and that the alleged *Talookdary* and *Zemindary* rights were simply a recent usurpation due to the violence and fraud which has marked the last years of the *Oude* monarchy; that at all events many of the individual *Talookdars* and *Zemindars* had by violence and fraud or the corruption of the Government possessed themselves of other people's estates. The

old question, moreover, was further mooted whether a *Zemindar* was really an hereditary Landlord or only a Government functionary.

The *Talookdars* and *Zemindars* were threatened with an universal *quo warranto*.

It was to announce the abandonment of this policy, and to quiet men's titles and possessions, that the Letter was written. It said, in substance, we acknowledge the *Talookdary* tenure—we acknowledge that the tenure does confer an hereditary lordship descendible in fee simple, and we will not allow the existing titles to be disturbed by old dormant claims. At the same time we preserve, in like manner, all the rights of your subordinate *Zemindars* and *Ryots*, whose rights and the rights of persons entitled to *Seer* and *Nanka* you shall respect as we respect yours. For that purpose and to that extent an absolute title was given to the person who was settled with as *Talookdar*, with the fullest powers of alienation, and consequently of binding his right by contract, so that effect may be given to the rights of persons not claiming adversely to the registered title, but claiming, by agreement with him an old estate, consistently with that title. In English language, it gave the registered *Talookdar* the absolute legal title as against the State and against adverse Claimants to the *Talookdary;* but it did not relieve the *Talookdar* from any equitable rights to which he might have subjected himself with a view to the completion of the settlement by his own valid agreement. In this case the Appellant was the acknowledged *cestui que* trust of the registered *Talookdar*, who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered.

It would be a scandal to any legislation if it arbitrarily and without any assignable reason swept away such rights; and in this very painful case it is at all events agreeable to their Lordships to find that no such scandal attaches to the Laws or Regulations or Government Acts in force in *Oude;* and that the cruel wrong of which this Lady has been the victim is due to the misapprehension of the law by the Commissioner.

It is almost superfluous to observe that the Lady being clearly, as she was, the equitable Owner, the decree of confiscation against her Trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence.

Their Lordships are, therefore, of opinion, and will recommend, that the judgment of the Financial Commissioner be reversed, and that the judgment of the Deputy Commissioner, affirming the decision of the Assistant Commissioner, be affirmed.

The Appellant will have her costs of this appeal, and also the costs of the proceedings in both the Courts below.

Their Lordships cannot but express a hope that, by an act of prompt justice and a liberal estimate of what is due to this Lady, the Government will relieve her from further litigation. She had two decisions in her favour carefully and correctly adjudged, which, as they were consistent with the plainest principles of justice, it should have been the effort of an appellate Tribunal, unless the law controlled it, to maintain.

1st and 3rd July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

WILLIAM FARQUHARSON,* *Appellant*,

versus

DWARKANATH SINGH and the GOVERNMENT OF INDIA, ... *Respondents*.

Ism-nawisi Papers—Evidence—Regulation VIII. of 1819—Ghatwal.

In a suit by a purchaser of a *putnee* at a sale for arrears of rent to enhance the rent of the *ghatwal* under Regulation VIII. of 1819, *held* that *ism-nawisi* papers for 1811—1813, stating that the amount held by the *ghatwal* was 100 *beegahs*, did not entitle the Plaintiff to enhance the rent of the surplus over that 100 *beegahs* in the face of satisfactory oral evidence of long uninterrupted possession.

THE RIGHT HON. THE LORD JUSTICE MELLISH:

THIS is a suit for ejectment which was brought to recover, nearly 3,000 *beegahs*, of land.

The Plaintiff was the Purchaser of a *Putnee* under a sale for non-payment of the rent of the *Putnee*, and claimed that under the *Ben.* Reg. VIII. of 1819, section 11, having purchased the *Putnee* in such circumstances, he was entitled to set aside all estates which had been created after the origin of the *Putnee*, and to recover all the lands which were originally part of the *Putnee*. However, it appearing, that the first Defendant had been in possession of those lands for a very long time, admitting that Defendant's possession of the lands, the Plaintiff afterwards sued for a right to increase the rent, and have a proper rent payable to him out of the land.

The evidence which the Plaintiff produced in support of his case entirely consisted of three documents. At first only one document was produced, which was an *Isumnovisee* of the year 1811. Subsequently, two other documents were produced, which appear to be returns made by the Police, and there appears to be evidence to show that they are made generally on the information of the *ghatwally*-holder, stating his name, the quantity of land which he held, and the *Putnee* rent which he pays for it; and it appears, in one of the returns for these three years, that the then holder of the estate which the first Defendant now holds, the *ghatwally*-holder had returned that the quantity of his land was 100 *beegahs*. That was the sole evidence of the Plaintiff. He did not produce any evidence at all to show how it happened that if 100 *beegahs* was all that the *ghatwally*-holder was entitled to in the years 1811, 1812, and 1813, that quantity of 100 *beegahs* had increased to the very large quantity of 3,000 *beegahs* at the time when the sale took place. On the other hand, the first Defendant produced evidence to show that as far back as living memory went, the whole quantity of 3,000 *beegahs* had been held. He produced one Witness of 80 years old, and another of 75 years old, who had known the land all their lives, who said that the *ghatwally*-holder had held the whole 3,000 *beegahs* during all the time that they remembered the property. Both the Courts below believed those Witnesses, there being no evidence whatever to contradict them, and thought that for sixty years the land had been so held. Then the question rose as a simple question of fact before the Courts below, taking the evidence on both sides, whether they ought to find that the original estate of the *ghatwally*-holder consisted of 100 *beegahs* only, or of 3,000 *beegahs*. Both the Courts below found, as a matter of fact, on this evidence, that the original *ghatwally* consisted of that number of *beegahs*, and that, therefore, the Plaintiff was not entitled to maintain this suit.

Their Lordships entirely agree with those decisions. Not only does this case

* 14, Moore's I. A., p. 259; 8 B. L. R., p. 504.

come within their ordinary rule that on a mere question of fact where both the Courts below have agreed and where there has been no mistake in point of law, they will not reverse the decisions of the Courts below, unless they can see that those decisions are clearly wrong, but their Lordships come to the same conclusion. It appears to them that weight must be given to ancient possession, and that there may be a variety of causes why incorrect returns may have been made in the years 1811, 1812, and 1813. It may have been that the Police Officer was careless and did not care about what he returned, or it may have been that the *ghatwally*-holder at that time had some reasons for giving incorrect information, or possibly it may have been that the ancient *Ghatwals* originally held only 100 *beegahs* but that the estate had increased to 3,000 *beegahs* many years before and before the creation of the *Putnee*, which notwithstanding the *Ben.* Reg. VIII. of 1819 would entitle the *ghatwally*-holder to hold the whole quantity. But whatever the reason may have been, their Lordships are of opinion, that the long uninterrupted possession of the *ghatwally*-holder ought clearly to have greater weight than those returns. Upon those grounds, therefore, they think that the judgment of the Court below must be affirmed.

With respect to the cases which have been referred to, all that they really show is this, that different Courts at different times have given greater or less weight to those returns. All the Courts agree that they are admissible in evidence, and they have been admitted in evidence in this case. In each particular case the Courts have considered what weight ought to be given to them, and it is nothing very surprising if the Courts at different times have not given exactly the same weight to those documents. Their Lordships are of opinion, that the Courts in this particular case have given quite as much weight to these returns as they deserve.

Their Lordships will, therefore, humbly recommend to Her Majesty that this appeal be dismissed with costs.

3rd and 4th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

FUTTEH CHUND SAHOO,*... *Appellant*,

versus

LEELUMBER SINGH DOSS and others, ... *Respondents*.

Registration of Deeds—Act XX. of 1866.

Where a deed, which ought to be registered, is refused registration, the party aggrieved should proceed under s. 84 of Act XX. of 1866 (1); and if this course is not pursued, he cannot make use of the document as evidence in a civil suit brought by him to enforce specific performance of the terms of the deed, and to set aside a subsequent deed as fraudulent.

AT the conclusion of the argument, judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

In this case, the Appellant brought his suit, which was in the nature of a Bill for specific performance, claiming to have the contract entered into by the instrument in question carried out, and, on the footing of that, a Deed of absolute sale executed; and he added that the suit was also for issuing "an Order for its registration." Their Lordships understand those words to import a prayer, that the Deed of absolute sale, when executed, might be ordered to be registered; and not to point to the registration of the instrument upon which the suit was brought. This prayer was probably inserted, with a view to meet

*14, Moore's I. A., p. 129; 9 B. L. R., p. 433.
(1) See Act VIII. of 1872, s. 72.

the difficulties which it was apprehended might be occasioned by the prior registration of the Defendants' Deed of Sale of a date subsequent to that of the instrument on which the Appellant sued. The Court of First Instance found that this instrument was not one which the Registration Act, then in force, required to be registered, admitted it accordingly in evidence, and upon the merits, made a decree in favour of the Plaintiff. The case then went by appeal to the High Court, and the objection was there taken that the instrument being one which the Registration Act requires to be registered, and which had not been registered, it was not receivable in evidence, and that, therefore, there was no foundation for the Plaintiff's suit. The High Court entertained that objection, and the decision of the Court below was accordingly reversed, and the suit dismissed with costs. The appeal before us is against that decision.

It appears to their Lordships that, although this case is undoubtedly an extremely hard one, they are bound to affirm the decree of the High Court. The Registration Act, No. XX. of 1866, recently passed in *India*, is extremely stringent. Their Lordships have, in the first place, no doubt whatever, that the instrument in question is one which, by cl. 2 of section 17 of that Act, is required to be registered; that it is an instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question, and what in equity would operate as a sale of the property. The forty-ninth section of the Registration Act says, that no document that has not been registered under the Act (supposing it is one which ought to be registered), is receivable in evidence. The procedure which the Act prescribes is of this kind: The party seeking to register a document is, under the thirty-sixth section, to go first before the Registrar, or, as in this case, a Sub-Registrar. If the Sub-Registrar refuses to register the document, there is then an appeal from his refusal, upon whatever reasons it is founded, to the Registrar, the next higher Officer, and if that person confirms the Order refusing the registration, the eighty-fourth section gives to the party aggrieved the power of going by petition to the District Judge. In the present case the Sub-Registrar and afterwards the Registrar refused to register the instrument, because the Respondent, by whom it purported to have been executed, denied that he had executed it. It has been argued, that the Act affords no means for trying such an issue as was thus raised; and consequently, that unless the unregistered instrument be admitted in evidence in a regular suit wherein the fact of its execution could be tried, the right of the party claiming under it would be defeated by the false and dishonest denial of his own signature by the opposite party. Their Lordships, however, looking to the words of the eighty-fourth section, and the form of the petition given in the schedule, and in particular to the fourth paragraph of that form, which contains the words "the said *C. D.* appeared personally before the said Sub-Registrar and falsely denied the execution of such instrument," think that the *Zillah* Judge would have jurisdiction to determine such a question. Power is expressly given to him to summon the parties, and their Lordships imagine, that there must also be power to summon Witnesses, if examination of Witnesses should be necessary. How the *Zillah* Judges may deal with this statutory jurisdiction their Lordships are unable to say. It seems, however, reasonable to suppose, that if they saw that a *primâ facie* case of execution of the Deed was made out, they would direct the document to be registered, and refer the parties to try the question of forgery or non-forgery in a regular suit. Such a decision would not finally bind the rights of the party denying the execution of the document; and, on the other hand, it would not preclude the opposite party from proving in a less summary proceeding that the denial was false. Their Lordships must assume, in the absence of any proof to the contrary, that the Judges exercise this jurisdiction in a reasonable and proper manner.

Well, then, how do the facts stand upon this case? The Appellant went before the Sub-Registrar, and then he appealed to the Registrar. He then, unfortunately for

himself, through bad advice or some other cause, omitted to proceed as the Act directs under the eighty-fourth section, in which case he might have obtained the registration of the Deed of agreement in the way before suggested, or brought a suit relying on a non-registered Deed. He failed to pursue the remedies given him by that section of the Act, or at least to exhaust those remedies. It seems impossible to their Lordships, under these circumstances, to say that, acting under the provisions of a very useful, though stringent Act, the Judges of the High Court have miscarried in ruling that the instrument, not having been registered, was inadmissible in evidence, and that the Plaintiff's suit had on that ground wholly failed. Their Lordships feel that this may be a very hard case; they would willingly have relieved the party if they could, but to make any special Order, such as that suggested by Mr. *Bell*, seems to their Lordships to be beyond the functions and province of an appellate Court. It may be that, the Appellant may be able partially to obtain relief, since part of the consideration money seems to be still in his hands. Their Lordships, however, dealing with this appeal, have but one course before them, which is humbly to recommend Her Majesty to dismiss the appeal with costs.

4th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

BROJONATH KOONDOO CHOWDRY and others,* } *Appellants,*

versus

KHELUT CHUNDER GHOSE, ... } *Respondent.*

Mortgage—Foreclosure—Purchases from Mortgagor—Adverse Possession—Limitation.

Where a party *bonâ fide* purchased from another, as his own property, land in fact mortgaged, and obtained possession and mutation of names, his title was held to be adverse to that of the mortgagee.

Foreclosure proceedings in the Supreme Court as to *Mofussil* property, to which a purchaser from the mortgagor is not made a party, cannot affect that purchaser.

After a *bonâ fide* purchaser had been in open possession more than twelve years, and after the lapse of more than twelve years from the accrual to the mortgagee of the right of entry under the mortgage deed (which was in the English form), the mortgagor sued the purchaser to obtain possession of the property, *held*, the suit was barred.

Quære.—Whether in cases in the *Mofussil* where the mortgagor continues in possession paying rent to the mortgagee, the Law of Limitation begins to run from the date of the right of entry.

17th July, 1871.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. THE LORD JUSTICE JAMES:

In this case the only question to be decided is, whether the High Court was

* 14 Moore's I. A. p. 144; 8 B. L. R., p. 104.

justified in holding that the suit was barred by the Act of Limitations.

The Plaintiffs were Assignees of a Mortgagee, originally a puisne Mortgagee, but who had acquired the rights of the first Mortgagee, as afterwards stated.

The Defendant was the Purchaser from the Assignee in insolvency, of a person who had purchased the property in question from the Mortgagor. The original purchase from the Mortgagor was upwards of twelve years before the commencement of this suit, followed by registration and mutation of names in the Collector's Book, the Order for which was made on the 15th of January, 1850, and possession.

At the time of the sale the property was subject to a mortgage, made in the form of the English mortgage, with the usual proviso for redemption, and a proviso that the Mortgagor should continue in possession until default, and on default an express right of entry was given to the Mortgagee.

More than twelve years before the commencement of this suit such default was made.

After the sale under which the Defendant claims, the first Mortgagee instituted a suit for foreclosure in the late Supreme Court of *Calcutta*. This suit proceeded to a foreclosure *nisi* on the 11th of December, 1850, and which was made absolute on the 9th of February, 1852.

The Plaintiff in that suit, however, procured that foreclosure to be opened, paid off the first Mortgagee, took a transfer of his mortgage, and then proceeded himself to foreclose the Mortgagor, and obtained his final decree for foreclosure on the 15th of July, 1862.

To these foreclosure proceedings the Purchaser of the property in question was not made a party, and it was of course held by the High Court that he was in no wise affected by those proceedings.

Having foreclosed his mortgage, the Appellants commenced this suit against the Defendant, who pleaded his twelve years' possession in bar. The plaint was filed on the 27th of August, 1863.

The High Court has held that bar to be sufficient. Their Lordships do not doubt that such decision was correct. It was contended before them that so long as the mortgage security was a subsisting security, and dealt with as such, time did not run as between the Mortgagee, who was content to rest on his security, and the Mortgagor, who was permitted to remain in possession, and persons claiming under him; and it was also contended, that until the foreclosure put an end to the security it was a subsisting security, and that it was then, and not till then, that time began to run. It was further contended, that the Defendant, who derived his title under a purchase from the Mortgagor, could not be in a more favourable position than the Mortgagor himself.

The foreclosure proceedings did not affect the Defendant, or the property in question, and it is difficult to see how a right of entry or cause of action against one man, in respect of his property, could be either lost or gained by proceedings against another man in respect of his property.

As against the Defendant the Plaintiff has acquired no right, except that which was conveyed to him by his securities.

The right under the mortgage Deed was to obtain possession of the land, and the cause of action accrued when default was made.

The words of section 1, cl. 12, of the Limitation of suits Act, No. XIV. of 1859, are—

"To suits for the recovery of immoveable property or of any interest in immoveable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose."

To this there is by sect. 6 one exception in respect of mortgages, which is this:—

"In suits in the Courts established by Royal Charter by a Mortgagee to recover from the Mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt."

This exception does not apply to the present case, and where there is an express exception so limited to one special case of mortgage, it might plausibly be argued

that it cannot be extended to any other case, even in the case of the original Mortgagor himself continuing in possession and paying interest to the Mortgagee.

The judgment of the High Court appears to be, that the bar extends even to such a case when not provided for by that section. The ruling, however, was not necessary for the determination of this suit.

It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court, which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation, and their Lordships, dealing with suits upon mortgages in the Native Courts of *India*, might, in the simple case of a Mortgagee and his Mortgagor being permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased. No such question, however, arises in the present case, for it is impossible to hold that the Defendant, the Purchaser, was holding or supposed that he was holding by the permission of the Mortgagee; and when both things concur —possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old—it is impossible to say that such a possession is not protected by the Law of Limitations.

Therefore, without expressing an opinion, whether the broader and more general rule laid down in the judgment of the High Court can be supported, their Lordships have no doubt that the decision in this case is correct.

It has been pressed on their Lordships that the decision will destroy the value of mortgage securities in *India*. Their Lordships do not share in that apprehension. It may be, and probably is, better that Mortgagees keeping their securities locked up in their strong Boxes, and allowing the Mortgagor to be the ostensible Owner in possession for a long series of years, should occasionally, as in this case, find themselves deprived of portions, more or less small, of the mortgaged property, than that *bonâ fide* Purchasers and persons claiming under them, after many years' possession, and perhaps much expenditure, should be evicted under a mortgage title perhaps half a century old, because somebody has been paying interest on the mortgage money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the Mortgagee to assert his title earlier.

Their Lordships will recommend that the judgment be affirmed, and the appeal dismissed with costs.

4th and 5th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

HURRYHUR MOOKHOPADHYA,* } *Appellant,*

versus

MADUB CHUNDER BABOO and another, } *Respondents,*

AND

NOBOKISHTO MOOKHOPADHYA, } *Appellant,*

versus

KOYLAS CHUNDRO BHUTTACHARJEE and others, } *Respondents.*

Resumption—Regulation XIX. of 1793, s. 10—Regulation II. of 1819, s. 30—Act X. of 1859, s. 28—Onus Probandi—Lakhiraj.

Reg II. of 1819, s. 30, does not apply to a suit in a Civil Court for resumption under s. 10 of Reg.

* 14, Moore's I. A., p. 152; 8 B. L. R., p 566.

XIX. of 1793. In such suits the *onus* is upon the Plaintiff to prove a *primâ facie* case. The decisions in *Sonatun Ghose* v. *Moulvi Abdul Furar* (1) and *Hira Mani Debi* v. *Kunj Behari Holdar* (2) upheld.

18th July, 1871.

THE consideration of the appeals having been reserved, their Lordships' judgment in both cases was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This appeal, and that of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo*, were lately argued *ex parte* before this Committee. The principal question involved in them is common to both, but inasmuch as in each some subordinate point peculiar to it was also raised, their Lordships will deal with them separately. They propose to take first the appeal of *Nobokishto*, though the last argued, because that record contains a judgment pronounced on the 27th of March, 1865, in a third case, No. 268, of 1864, wherein the High Court stated fully the grounds upon which the ruling impugned by both these appeals is founded.

This suit was instituted by the Appellant as a *Durputneedar*. Its object was to obtain a declaration that certain lands which the Respondents claimed to hold as *Lakhiraj* land were so held by them under an invalid title; that they were the *mâl* lands of the Appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but under the provisions of an Act of the *Bengal* Council, No. VII. of 1862, was afterwards transferred to the Principal *Sudder Ameen* of *Zillah Hooghly*. The plaint expressly stated, that the suit was brought under the 1st clause of section 30 of Regulation II. of 1819. Their Lordships need not consider particularly the provisions of that enactment. It is only material to observe, that in suits brought under it by a *Zemindar*, or one to whom the *Zemindar's* rights have been transferred, the whole burthen of proving the nature and commencement of his title was understood to be thrown upon the Defendant, the *Lakhirajdar*, whom the Plaintiff, who disputes the validity of the tenure, might compel to produce the *Sunnuds* and other ancient documents upon which such title rested. The sole proof of title which the Defendant could require, in the first instance, from the Plaintiff was that the lands in question were within the ambit of his *zemindary* or *putnee*, as the case might be. This issue the Respondents in the present case did raise, and successfully raise, as to part of the land. As to the rest of the land, the only issue, except that of limitation, was, whether it was the Respondents' valid rent-free land or not, the whole burthen of proof on this issue being cast on them.

The Principal *Sudder Ameen*, the Judge of the Court of First Instance, found that of the land in suit, 2 *beegahs* and 1 *cottah* were not within the Appellant's *putnee*; that as to 12 *beegahs* and 14¾ *cottahs* other part of that land, the Respondents had proved, by certain ancient documents, that they had held and enjoyed them as rent-free lands from long before the 1st of December, 1790, and that, consequently, the claim to assess them was barred by limitation. The residue, being 3 *beegahs* 17¾ *cottahs*, he held liable to assessment. Both parties appealed against this decision to the *Zillah* Judge, who, on the 21st of June, 1864, confirmed the decree of the Principal *Sudder Ameen*, so far as it related to the 2 *beegahs* and 1 *cottah*, but reversed it as to the rest of the land, making as to that a decree in favour of the Appellant's claim. The grounds of his decision were, that the documents produced by the Respondents were untrustworthy, and, therefore, that they had failed to prove either a valid title to hold the land rent-free, or that the land, having been held rent-free for a period commencing before the 1st of December, 1790, the Appellant's right to assess them was barred by limitation.

The Respondent then preferred a special appeal to the High Court. Of the grounds stated for the appeal it is only necessary to notice the third and the fourth. The third is, that the suit being brought, though im-

(1) B. L. R., Sup. Vol. 109.
(2) Case No. 869 of 1864; 22nd February 1866.

properly, under section 30, *Ben.* Reg. II. of 1819, was admittedly barred by limitation. The fourth, that the *onus probandi* had been improperly thrown upon the Defendants. On the 13th of April, 1865, the High Court remanded this suit, with five others, which it treated as being in the same category, to the Court of First Instance, stating only that "the *onus* having been misplaced, these cases must go back to the First Court with reference to the principles laid down in case No. 268 of 1864."

Before considering the propriety of this remand, which is the principal question raised by the appeal, it will be convenient to complete the history of this particular case. The Appellant went again before the Principal *Sudder Ameen*, amending his plaint pursuant to the Order of remand by striking out all reference to the Reg. II. of 1819, and making it a plaint for the resumption of land fraudulently made *Lakhiraj* after the 1st of December, 1790, and, therefore, falling within the 10th section of Regulation XIX. of 1793. The Principal *Sudder Ameen* thereupon framed fresh issues, the first of them being, whether the land in dispute ever formed a portion of *mâl* land at the time of the Government settlement, and whether at any subsequent time it had been fraudulently made rent-free; and on the 13th of September, 1865, he dismssed the suit upon the ground, that the Plaintiff, the Appellant, had produced no documents or evidence in the suit, and had thereby failed to support the burthen of proof which this issue cast upon him. The Appellant afterwards, in August, 1865, obtained from the High Court a very special leave to appeal to Her Majesty in Council, on the ground that this suit, though the subject-matter of it was far below the appealable value, was one of a large class in which similar remands had been made. Their Lordships will assume that this leave to appeal was properly granted, and that the object of the appeal, or at least its principal object, is to test the correctness of the principle on which remands in this and similar cases have been directed, and the burthen of proof to some extent cast on the Plaintiff in suits of this nature.

In order to do this, it is necessary shortly to review the law relating to *Lakhiraj* tenures within the Provinces embraced by the Perpetual Settlement, and some recent decisions of the High Court of *Calcutta* concerning it.

The foundation of that law is well known to be Regulation XIX. of 1793. That Regulation, after affirming in the strongest terms the *primâ facie*, or, so to speak, Common law right of the ruling Power to a certain proportion of the produce of every *beegah;* after declaring all *Lakhiraj* tenures to be exceptional and in contravention of that right; that many of the existing tenures of that kind were invalid; but that all, whether valid or invalid, had been excluded from the Decennial Settlement; and that the *jumma* assessed upon the estates of individuals under that Settlement was to be considered as exclusive and independent of all *Lakhiraj* lands, whether exempted from the *Khiraj*, or public revenue, with or without due authority; proceeded thus to deal with the then subsisting *Lakhiraj* tenures. It divided them into two classes, viz., those created by Grants made previous to the 12th of August, 1765, the date of the Grant of the *Dewanny* to the *East India Company*, and those created by Grants made between that date and the 1st of December, 1790. The former by the second section were, subject to certain conditions, declared to be valid. The latter, with certain exceptions, and subject to certain conditions, were, by the third section, declared to be invalid; and, as such, to be resumable and subject to future assessment. The Regulation then went on to sub-divide the invalid and resumable tenures into two classes, viz., those which comprised lands not exceeding 100 *beegahs*, and those which comprised lands in excess of that quantity. The revenue which might thereafter be assessed on the former was declared to belong to the *Zemindar* or *Talookdar*, within whose estate the lands were situate. The revenue which might thereafter be assessed on lands falling within the latter class was declared to belong to the Government. And thus the power of bringing a resumption suit to impeach a *Lakhiraj* tenure existing at the date of the Decennial Settlement, and to

have revenue or rent assessed thereon came to belong to the Government, or to private proprietors, according to the quantity of land comprised in such tenure. Having thus dealt with all the *Lakhiraj* tenures then subsisting, the Regulation proceeded to legislate against the future conversion of any rent-paying lands comprised in the Decennial Settlement into rent-free lands. This was done by the 10th section, which is in these terms:—

"All Grants for holding land exempt from the payment of revenue, whether exceeding or under 100 *beegahs*, that may have been made since the 1st of December, 1790, or that may be hereafter made, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such Grant, either with regard to the property in the soil or the rents of it. And every person who now possesses, or may succeed to the proprietary right in any estate or dependent *Talook*, or who holds, or may hereafter hold, any estate or dependent *Talook*, in farm of Government, or of the proprietor, or any other person, and every Officer of Government appointed to make the collections from any estate or *Talook* held *khas*, is authorized and required to collect the rents from such lands at the rate of the *Pergunnah*, and to dispossess the Grantee of the proprietary right in the land, and to re-annex it to the estate or *Talook* in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of the dispossession or annexation to any Officer of Government; nor shall any such proprietor, Farmer, or dependent *Talookdar* be liable to an increase of assessment on account of such Grants, which he may resume and annul during the term of the engagements that he may be under for the payment of the revenue of such estate or *Talook* when the grant may be so resumed and annulled. The Managers of the estates of disqualified proprietors, and of joint undivided estates, are authorized and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this section."

It is obvious that this enactment relates solely to lands which, on the 1st of December, 1790, were *mâl* or rent-paying lands; that it treats the Grant of a rent-free tenure in such lands not as voidable, but as absolutely void; that it reserves to the Government no right in such lands unless they happened to be held *khas;* and that it positively declared, that no length of possession should give validity to any such Grant. It further expressly authorized the Landowner to dispossess the Grantee by the high hand, without having recourse to the machinery provided by other sections of the Regulation for the resumption or assessment of resumable *Lakhiraj* tenures; or to any other legal proceeding.

The machinery provided for resumption suits by the Regulation of 1793 was modified by several subsequent Regulations, and in particular by the Regulation II. of 1819, which has been already mentioned. And in process of time Landowners seeking to enforce their rights under the 10th section of that Regulation seem to have found it expedient to do so by means of legal proceedings rather than in the summary manner authorized by that enactment. An important distinction was, however, established by judicial decisions between a suit to enforce a claim under this 10th section, and ordinary resumption suits, whether brought by Government or individual proprietors under the earlier sections of the Regulation. Whatever doubts may at one time have existed, it became unquestionable, after the decision of this Committee in the case of the *Maharajah of Burdwan* (4 Moore's Ind. App. Cases, 466; 1 P. C. J., p. 385), that the right of the Government to resume a voidable *Lakhiraj* tenure comprising more than 100 *beegahs* was subject to the sixty years' limitation; and that by parity of reasoning the right of *Zemindar* to resume a voidable *Lakhiraj* tenure, comprising less than 100 *beegahs*, was subject to the twelve years' limitation. On the other hand, the Courts construing the Regulation of Limitation in connection with that part of sect. 10 of Regulation XIX. of 1793, which says, that no length of possession shall give validity to such a Grant,

came (whether on sound principles or not it is immaterial here to consider) to the conclusion, that the claim of a Landowner under this section was subject to no limitation. Notwithstanding, however, these distinctions between the two rights, and between the suits to enforce them, a loose practice seems to have sprung up, under which Landowners claiming the right to assess lands held and enjoyed rent-free brought their suits generally under Regulation II. of 1819, without specifying whether they were seeking to enforce the right given to them by the 7th and 9th sections of Regulation XIX. of 1793, or that given to them by the 10th section. The result was that the stringent provisions of Regulation II. of 1819, and of the other Regulations *in pari materiâ*, were indiscriminately applied; and that in all cases the burthen was cast upon the Defendant of proving, by the production of ancient documents, that his tenure existed before the 1st of December, 1790. If he established this he would probably succeed, whether his ancient *Lakhiraj* tenure was voidable or not, the suit, unless the Plaintiff happened to be an auction Purchaser at a Government sale, being barred by limitation.

So stood the law and practice until Act, No. X. of 1859 was passed. The 28th section of that Act repealed so much of the 10th section of Regulation XIX. of 1793 as authorized the Landowner summarily to dispossess the Grantee of a rent-free tenure; it provided, that every Landowner who should desire to assess any such land, or to dispossess the Grantee, should take proceedings before the Collector, which were to be dealt with as a suit under that Act; and it fixed a period within which such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865, the Courts of *Bengal* seem to have been somewhat divided upon several questions touching the proper mode of enforcing the claims of *Zemindars* and other Landowners, under the 10th section of Regulation XIX. of 1793; and some, at least, of such questions were finally referred for adjudication by a full Bench, consisting of seven Judges of the High Court, in the appeal of *Sonatun Ghose* v. *Moulvie Abdool Furar*. This case, which was numbered No. 869 of 1864, was decided on the 25th of January, 1865, and is reported in 2 Weekly Reporter, p. 91. The Judges were divided in opinion, each delivering a separate judgment, in which the law on the subject was elaborately reviewed. But the following was the final judgment of the Court. All the Judges held, that before the passing of Regulation II. of 1819 the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by *Zemindars* for the declaration of their rights to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or titles which had their origin subsequently to the 1st of December in that year. Four of the Judges against three held, that such suits were unaffected by the passing of Regulation II. of 1819, section 30, of which the proper operation was limited to suits for the resumption of *Lakhiraj*, existing prior to the 1st of December, 1790. And four of the Judges against three held, that the jurisdiction of the ordinary Civil Courts to try the suit was not taken away or affected by the 28th section of Act, No. X. of 1859.

The second of these rulings is, that which is most material to the decision of the present appeal; the necessary consequence of it being that a suit to enforce a claim arising under the 10th section of Regulation XIX. of 1793, if brought under the 30th section of Regulation II. of 1819, in order to get the benefit of the procedure there prescribed, is improperly framed.

The same case came again before a full Bench of seven Judges, somewhat differently composed, on the 22nd of February, 1865. They unanimously held, that they were bound by the decision of the 25th of January, 1865, so far as it went. But they further decided, that the regular suit which, notwithstanding the 28th section of Act, No. X. of 1859, might still be brought to assess or resume invalid *Lakhiraj*, created since the 1st of December, 1790, was not subject to limitation; and further, that in every fresh suit it lay upon the Plaintiff to prove that the case was one falling within the 10th section of

Reg XIX of 1793 And the Court added, 'He must prove his allegation, that the land held by the Defendant, and which he claims to be *Lakhiraj*, is part of the *mâl* land of the Plaintiff If he prove that fact, and show that it was assessed to the public revenue at the time of the Decennial Settlement, it may be presumed that the right under which the Defendant claims to hold as *Lakhiraj* commenced subsequently to the 1st of December, 1790, unless the Defendant gives satisfactory evidence to the contrary" In another case, *Sonatun Ghose* v *Moulvie Abdool Furar*, decided the same day by the same Judges (2 W R p 207), they adhered to the ruling in No 869 of 1864, to the effect, that section 30 of Reg II of 1819 related only to suits for resumption of *Lakhiraj* created prior to the 1st of December, 1790, and held that, as a consequence of that ruling, every suit alleged to be brought under section 30 was necessarily not one to which the rule created by section 10, Reg XIX of 1793, of exemption from limitation, applies They further decided, that the Plaintiff, having erred in stating that the suit was brought under section 30 of Reg II of 1819, should, if he wished to do so, be allowed to amend his plaint, and that, in such case, the cause should be remanded for re trial, but that if the Plaintiff did amend his plaint, he must show on the face of it, as required by the Law of procedure, when his cause of action accrued, and if it accrued beyond the period ordinarily allowed by any law for commencing such a suit, upon what ground an exemption was claimed

There has been, so far as their Lordships are aware, no appeal from these decisions of a full Bench of the High Court They have since given the law to the Division Benches of that Court, and the Order of remand, of which the present appeal complains, is one of many which have been made in accordance with them The judgment in the case of *Khelut Chunder Ghose* v *Poorno Chunder Roy*, (*a*) No 268 of 1864 is, in fact, only a recapitulation of what had been decided and laid down in

(*a*) The judgment of *Messrs Loch* and *Seton Karr*, in the case No 268 of 1864, *Khelut Chunder Ghose* v *Poorno Chunder Roy*, above referred to, is from its importance, here set out —

"The Plaintiffs state that they seek to resume 33 *beegahs* 11 *cottahs* 12 *gundahs* of invalid *Lakhiraj* land in the possession of the Defendants, situated within the limits of *Mouzah Sulkea* appertaining to their *Zemindary*, *Pergunnah Paekan*, *Zillah Hooghly* The suit is brought under the provisions of sect 30 Reg II of 1819 The Defendant pleads that the suit is barred by limitation, as he and his predecessors have held possession of these lands rent free, from a period anterior to the assumption of the *Dewanny* by the late East India Company, that the lands are known as the '*Feelkhana*' and were granted by the *Nuwab Nazim* of *Bengal* to *Santee Ram Singh* of *Jorasanko*, that they were inherited by his Son, and the property descended to his family, and it was last sold, in execution of a decree of the Supreme Court, on 7th of May, 1855, and purchased by the Defendant (the Appellant) now in possession The Lower Court found for the Plaintiffs, holding that the Defendant had failed to prove the validity of his tenure, and the Judge gave a decree for resumption declaring the lands to pertain to the *mal* lands of the Plaintiff's *mehal* An appeal was preferred by the Defendant, the hearing of which was deferred till the result of a reference to a Bench of seven Judges, in the case of *Sanatun Ghose and others*, special appeal No 869 and of *Heeramonee Debya*, special appeals Nos 1290 and 1291, was made known The reasons for this reference may be shortly stated Previous to the enactment of Act, No X of 1859 suits for the resumption and assessment of land held on invalid *Lakhiraj* title, whether under sect 30, Reg II of 1819, or sect 10, Reg XIX of 1793, used to be brought indiscriminately either in the Civil Court or before the Collector It was very questionable, under the law as it then stood, whether the Collector had any jurisdiction in cases under sect 10 Reg XIX of 1793 which related to lands alienated from a permanently settled estate subsequent to the 1st of December, 1790 But whether the law correctly interpreted, admitted this jurisdiction or not the hearing of such cases as if they were brought under the provision of Reg II of 1819, by the Collector had grown into a custom, and by the provisions of sec 28, Act No X of 1859 the jurisdiction of the Collector was distinctly extended to these cases By the

one or other of the above-mentioned decisions of the full Bench

No attempt was made at the Bar to impugn the correctness of the first decision

ruling of a Full Bench, in the case of *Bishumber Misser* bearing date the 18th of March, 1863, it was held that cases thus tried by the Collector were suits, and not summary Orders, and a further question then arose, whether the Legislature, when creating this new jurisdiction in the Collector, intended to take away the jurisdiction over such suits from the Civil Courts, and vest it solely in the Collector Another point had to be considered The provisions of sect 28, Act No X of 1859, had introduced the law of limitation as barring the hearing of suits under sect 10, Reg XIX of 1793 unless instituted within twelve years from the date that the Plaintiff's right of action accrued But that law which remained unrepealed declared that no length of possession should give validity to such grants If then there were a concurrent jurisdiction in the Civil Court and the Collector, it was evident that in suits brought in the Civil Courts, limitation would not apply, while in suits before the Collector the suit would be subject to a law of limitation It was further argued, that one object of sect 28 of Act No X of 1859, was to draw a clear distinction between suits under sec 10, Reg XIX of 1793, and suits under sect 30, Reg II 1819 that the latter law related only to lands held as rent free at or before the 1st of December 1790, and that a suit brought by a *Zemindar* under the provisions of sec 30 Reg II 1819, was an admission on his part of the existence of the tenure in 1790, and such admission was sufficient to bar his suit, unless he were an auction Purchaser at a sale for arrears of Government revenue Owing, however, to the very confused state in which plaints were usually drawn up, the Plaintiff claiming to resume the lands as forming part of his permanently settled estate, which was a suit under sect 10 Reg XIX 1793 and as invalid *Lakhiraj* under the provisions of sect 30, Reg II 1819 it was difficult to know upon whom the *onus* of proof should be thrown When the Plaintiff came with a distinct allegation, that the lands were part of his permanently settled estate, and had been subsequently separated from it by the Defendants, who held it as *Lakhiraj*, it appeared but reasonable, that the Plaintiff should start his case as in ordinary suits, but when he came in to resume, under sect 30, Reg II 1819, that the burden should be on the Defendants The practice, however, had been otherwise, and the burden of proof had always been thrown on the party claiming to hold as *Lakhirajdar*, not to prove the validity of his title but to show that the tenure was in existence as *Lakhiraj* previous to the 1st December 1790, before he could plead limitation These were some of the reasons which rendered a reference to a Full Bench of seven Judges necessary, and the determination of the Court may be given under the following heads —

First that prior to the enactment of Reg II of 1819 the Civil Courts were competent under their ordinary jurisdiction to try suits from possession under sect 10 of Reg XIX 1793

Second, that Reg II 1819 related only to suits for resumption of *Lakhiraj* existing prior to 1790, and that sect 30 of Reg II 1819 did not extend the jurisdiction of Collectors to suits under sect 10, Reg XIX 1793, and that from the time that law came into operation there was a concurrent jurisdiction in the Civil Courts, and in the Collector to try those cases

Fourth, that where proceedings have been instituted before the 31st of December, 1861 (*viz*, before the new law of limitation came into operation) to enforce a right under sect 10, Reg XIX of 1793 in the ordinary Civil Courts the law of limitation does not apply

Fifth, that as sect 10 Reg XIX of 1793, applies only to grants made since 1st of December 1790 the *onus* of proving that the case falls within sect 10, or in other words, that the grant was made since 1st of December, 1790 and that the case is not affected by the law of limitation, rests with the Plaintiff He must prove that the land held by the Defendant and which the Defendant claims to be *Lakhiraj* is part of the *Mal* land of the Plaintiff, and must show that it was assessed with the Public revenue at the time of the Decennial Settlement If he proves this fact, it may be presumed that the rights under which the Defendant claims to hold as *Lakhiraj*, commenced subsequently to the 1st of December, 1790, unless the Defendant give satisfactory evidence to the contrary It the Plaintiff fail to give the necessary proof, the issue as to limitation must be found for the Defendant

Sixth in cases Nos 1290 and 1291, it was held by the Full Bench that a suit alleged to be brought under sect 30, Reg II of 1819, must be assumed to refer only to a *Lakhiraj* created prior to the 1st December 1790, and is necessarily not one to which

in No. 869 of 1864. It must be held, therefore, to be settled law that the provisions of the 30th section of Reg. II. of 1819 do not apply to such a suit as the Appellant's, and the only questions which the appeal raises are whether, this being so, the High Court has been right in remanding this and other suits similarly circumstanced for re-trial; whether on such a re-trial the burthen of proof should be cast in the degree in which the High Court cast it on the Plaintiff; and lastly, whether there is anything in this particular case which renders such an order of remand, though otherwise correct, improper.

Their Lordships are very clearly of opinion, that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the Plaintiff, whose suit, if not so remanded, ought to have been dismissed. The invocation of the 30th section of Reg. II. of 1819 is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment, and the enactments *in pari materiâ*, greatly to the advantage of the Plaintiff, and consequently to the prejudice of the Defendant. It follows that, if the procedure was not applicable to the case, there had been a mis-trial.

Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the Plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the Plaintiff to prove a *primâ facie* case. His case is, that his *mâl* land has, since 1790, been converted into *Lakhiraj*. He is surely bound to give some evidence that his land was once *mâl*. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the *mâl* assets of the estate at the Decennial Settlement. His *primâ facie* case once proved, the burthen of proof is shifted on the Defendant, who must make out that his tenure existed before December, 1790.

It may be objected that the result of

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the rule created by sect. 10, Reg. XIX. of 1793, of exemption from limitation, applies.

Seventh, that looking at the past practice of the Courts, and the peculiar circumstances under which the suits now before the Court have been brought, it was held, that if a Plaintiff have erred in stating that his suit is brought under sect. 30, Reg. II. of 1819, and wishes to amend his plaint, he may be allowed to do so by striking out the allegation that the suit is brought under sect. 30.

Eighth, that if the Plaintiff amend his plaint he must comply with the provisions of clause 3, sect. 26, Act, No. VIII. of 1859, by stating when his cause of action accrued, and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which exemption from the law is claimed.

The above, therefore, are the rules as gathered from the decisions of the High Court in the cases of *Sonatun Ghose*, Appellant, No 869, *Heeramony Debya*, Appellant, No. 1290, by which the Lower Courts should be guided for the future in disposing of resumption suits. In all cases now pending in the Courts below the parties should be allowed to amend their pleadings with reference to the above rules. We would further observe, that the cases referred to the Full Bench were instituted previous to the coming in operation of Act, No. XIV. of 1859. That law came into operation after the 31st of December, 1861. In all suits instituted subsequent to that date the effect of c. 14, sect. 1 of Act, No. XIV. of 1859, on the Plaintiff's suit must be taken into consideration.

We remand this case to the Lower Court to enable the Plaintiff to amend his plaint, if so minded, according to the rules laid down, and we direct the Lower Court to replace the suit, after the amendment has been made, on its own file, and to proceed with it as if the plaint had originally been presented in its amended form. The Court will permit the Defendant to file a fresh answer, and also allow the parties sufficient time to bring forward any further evidence they may wish to adduce."—27*th March*, 1865.

For the judgments of the Bench of seven Judges referred to, *see* 2 Weekly Reporter, pp. 91, 205.

this ruling may be that Plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the Plaintiff to give *primâ facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the Defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if, in such cases, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and by relieving Defendants from a burthen which every year made it more difficult to support.

The only other point to be decided on this appeal is, whether there is any peculiarity in this case which ought to take it out of the general rule. Their Lordships are of opinion that there is not. Mr. *Doyne* argued that the Defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the Appellant's estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the Plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been *mâl* lands. In fact, the Defendants strenuously asserted the contrary. The Appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint, the decree dismissing his suit was right.

In the other appeal, that of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo*, the suit was also, on the face of it, brought under section 30 of *Ben.* Reg. II. of 1819, though to enforce a claim under section 10 of Reg. XIX. of 1793. In fact, in this case there was a preliminary proceeding under the 28th section of Act, No. X. of 1859. The Defendants (the Respondents) undertook to prove that their tenures existed before December, 1790. The Principal *Sudder Ameen* decided, on the 9th of April, 1863, that they had failed to do so, and decreed in favour of the Appellant. That decree was affirmed on appeal by a Division Bench of the High Court on the 14th of March, 1864. An application for a review of judgment was made on the 10th of June, 1864, on the ground, amongst others, that the Appellant having stated that the lands were his *mâl* lands, the Court had erred in throwing the *onus* of proof on the Defendants. The review was admitted on this ground; and on the 24th of August, 1865, the Court made an Order in these terms:—"A notice will issue to the other side, when the case will be argued, whether or not our decision, which has been overruled by a subsequent ruling of the full Bench, should not be altered;" and on the 6th of September, 1867, the Court made the second Order for a remand, saying, "the *onus* being on the *Zemindar*, he will be permitted to amend his plaint; and he will have to prove that the land is *mâl* by showing that he has received rent for the same."

Their Lordships conceive that, subject to the point which will be subsequently noticed, the question, whether this remand was correct must be governed by their decision on the other appeal. They do not think that the Order is vitiated by the specification of one amongst the various methods by which the Plaintiff might prove his case. They do not conceive that the High Court really meant to limit him to that kind of proof. It was, however, argued by Sir *Roundell Palmer* that the remand of this particular case was improper, because the suit had already been finally decided in the Appellant's favour, and ought not to have been admitted to a review, in order to give the Defendants the benefit of what had been decided in other cases after such final judgment had passed. Their Lordships, however, observe that the application for a review seems to have been regularly made within ninety days of the date of the decree sought to be reviewed, pursuant to sect. 377 of the Code of Procedure; and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application

until the law on which so much doubt existed had been settled by the judgments of the full Bench of the High Court, which have been already noticed. Therefore, in this case also, their Lordships think that the final Order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both appeals. As the Respondents have not appeared on either, it is unnecessary to say anything about costs.

10th and 11th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

KOOER GOOLAB SINGH, and others,* ... } *Appellants*,

versus

RAO KURUN SINGH, ... *Respondent*,

AND

RAO KURUN SINGH, ... *Appellant*,

versus

NAWAB MAHOMED FYZ ALI KHAN and others, } *Respondents*.

Hindu Widow—Alienation, Gift by—Reversioner—Practice—Heir—Sister's Son—Act VIII. of 1859, s. 7—Mortgage by Widow—Burthen of Proof.

By the *Mitakshara*, a male descendant in the fifth degree from the great-grandfather of the *præpositus* succeeds to the exclusion of the Sister's Son.

A Hindu Widow executed deeds of gift, in which her late Husband's Mother, the nearest reversioner, concurred. After the death of the Widow, but in the life-time of the Mother, the next presumable reversioner sued to set aside the deeds and for possession. *Held*, that the suit was good so far as it sought to set aside the deeds; and the Mother having died before decree, that no objection could be taken to the suit on the ground that the decree gave possession to the Plaintiff.

Such suit was held to be no bar to a second suit by the same Plaintiff to set aside a mortgage by the Widow and the Mother of the deceased of a portion of the property which was the subject of the first suit, although in that suit the property was described as subject to the mortgage, and the name of the Mortgagee was mentioned. The true test of the application of s. 7 of Act VIII. of 1859 is whether there has been a splitting of the cause of action.

The burthen of proving the necessity for a mortgage by a Hindu Widow rests on the Mortgagee where that necessity is disputed by the next heir.

THEIR Lordships' judgment in both appeals was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

Their Lordships, in delivering their judgment in these two cases, will begin with that which was first argued, namely, the case of "*Kooer Goolab Singh* v. *Rao Kurun Singh*."

The Plaintiff in the suit and the Respondent in this appeal sued in the *Zillah* Court of *Allyghur*, in the *North-Western Provinces*, as heir of one *Rao Dhuleep Singh*, to set aside certain alienations of the immoveable estate that had been *Rao Dhuleep Singh's* up to the time of his death, made by his Widow, who succeeded to the estate as his heir. The Defendants were respectively the persons claiming under these alienations, and the Mother of *Rao Dhuleep Singh*, who had concurred in them. The Mother survived the Widow, and was entitled, at the death of the latter, to succeed as heiress to her Son, *Rao Dhuleep Singh*. The *Zillah* Court decreed the suit in favour of the Plaintiff. At the date of the decree the Mother was dead, but she was alive at the time of the commencement of the suit.

The Plaintiff and *Rao Dhuleep Singh* descended from a common ancestor. The Plaintiff was fifth in degree, counting from that ancestor. In his line was his Grandfather, who still lived, but was a lunatic

* 14, Moore's I. A., p. 176; 10 B. L. R., p. 1.

at the time of the institution of the suit, and at the time of *Rao Dhuleep Singh's* death. The Plaintiff's Father was then dead. On appeal to the late *Sudder Dewanny Adawlut* at *Agra*, that Court affirmed the decree. From that decision this appeal is now brought.

On the argument of the appeal, nothing was addressed to the Court on the facts to show that these alienations were valid, but the whole argument was addressed to the competency of the Plaintiff to question them. The learned Counsel for the Appellant objected, that at the time of the suit the Plaintiff was not entitled to the possession, and that the suit was one for possession, that he sued as Guardian of his Grandfather, and that he was not duly so constituted, and lastly, that he had shown no title as heir.

As to the first objection, the answer is, that this suit in its main object was brought to set aside certain alienations, and that as the nearest reversioner at the time when they took place was charged as concurring in them, the next presumable reversioner was entitled to question them, and the pendency of her life was not a fatal objection to the institution of the suit so far. And, as it appeared, that when the decree gave him possession, he was then entitled to possession, the objection on this point resolved itself into one of form, not affecting the real merits of the case.

As to the second objection, there are two answers to it; first, that the Grandfather was not the heir, but the Plaintiff, and that if the latter had been obliged to sue on the Grandfather's title, the objection also would have been one of form, and not affecting the merits of the case. The objection to the Plaintiff's title as heir, which was taken in the Court below, on the ground of its remoteness from the common ancestor, was plainly untenable, and was not here insisted on. This objection, as taken below, necessarily assumes the Plaintiff to be claiming as heir to the Son, and to urge on the hearing of the appeal for the first time, that the real title of heirship must be derived from the Mother, and not from the Son, was to start a new ground of objection to title, which the Plaintiff had had no opportunity of meeting in the Court below. The same objection also applied to the argument which was addressed to their Lordships, that a Sister may inherit to a Brother, and that that line of descent through the assumed Sister from the Brother was not exhausted by the Plaintiff's proof. To admit such a line of argument would be also to expose the Plaintiff to objections which, had they been raised below, might have been answered from what was known to be the law of the District, and by the want of proof that the person claiming to be the Son of a Sister, did in fact, stand in that relation to the *præpositus*. It will be found from the judgment of the *Sudder* Court, that what the Court understood to be the questions raised before them, and the sole issues raised, were, first, "Should the Plaintiff's cause of action be held to have arisen on the death of *Rao Dhuleep Singh* or of *Koondon Kooer*, and is the suit within time or not? Second, Was *Koondon Kooer* competent or not to alienate the property in question? Third, Is the Plaintiff so nearly related as to be entitled to inherit?"

Again, the argument at the Bar that the Plaintiff was not the heir, but that the person who appears in the pedigree, and who was a Defendant on the Record, was a nearer heir of *Rao Dhuleep Singh*, depends first upon proof that *Rao Dhuleep Singh* was the Sister's Son, and next, of course, upon the point of law whether the Sister's Son is capable of inheriting. That it is by no means clear that *Rao Dhuleep Singh* was the Sister's Son, would appear from the statement which precedes the judgment of the *Sudder* Court, in which the Judges say that "in 1856 *Mussumat Toolsa*," that is the Mother, "is said to have likewise executed a *Hibbanamah*, bestowing *Mouzah Mohood Khera* on her Husband's Sister's Son, *Doolut*, and her own Nephew, *Buldeo*," there treating *Doolut* not as the Sister's Son, but, in fact, as the Aunt's Son. There was, therefore, no real proof before the Court of the relationship of this party to the *præpositus*, and if there had been such a proof, then, inasmuch as the point was not taken in the Court below, there was nothing whatever

to show that the law would not have been as it is contended to be, namely, that that person was not entitled, under the law of the *Mitácshárá*, to inherit. There was nothing to show that the interpretation of the ancient text of the law on which Mr. *Prichard* relied, even assuming the relationship to be made out, did obtain in the *North-West Provinces*, and there is every reason to suppose from what has taken place in this case, that it has not been received there. The silence of the Defendant, supposing him to be in that degree of relationship which it asserted he was, and of the Court on this point, would be inexplicable on any other hypothesis. Moreover, it is clear that the Sister and her descendants find no place in the tables of succession, according to the law of the *Mitácshárá*, which have been framed by several persons of authority, and in particular by that eminent Hindoo lawyer, the late *Prossonno Coomar Tagore*. The learned Counsel for the Appellant seemed indeed to concede this, and to admit that the exclusion did prevail in fact; but he contended, that it had its origin in error, and pleaded for a return to what he contended was the correct interpretation of the texts, founding himself chiefly on the authority of *Balam-Bhatta*. But it is entirely opposed to the spirit of the Hindoo customs to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the Country, and it seems to their Lordships that it would be extremely mischievous to disturb upon points taken here for the first time any such course of decision.

Their Lordships, therefore, see no ground whatever for disturbing the decisions of the Courts below in this case, and will humbly advise Her Majesty to dismiss the appeal with costs.

In the other case two questions were raised; the first upon the decree of the High Court, which dismissed the suit of the Plaintiff, the Appellant, in this case, upon the ground that the case fell within the 7th section of the Act, No. VIII. of 1859, which says that "every suit shall include the whole of the claim arising out of the cause of action, but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

Their Lordships think that the true test of the proper application of this section to any particular case must be, whether there has been a splitting of the cause of action; and it is, therefore, necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action.

Now, the first suit, as has already been shown, was brought against various Defendants to inpeach certain alienations made by the Widow and Mother of *Rao Dhuleep Singh*. They were alienations by which the inheritance, subject to the interests of those persons, was transferred to certain foster-sons, or near relations, or dependents of the two Ladies so as to exclude the remoter heirs. The suit with which their Lordships are now dealing was brought to set aside a mortgage which had been granted by those Ladies to the Respondent's ancestor in this case before the alienations which were the subject of the other suit. It no doubt appears in the description of the property, which was the subject of the first suit, that three of the villages forming part of that property were subject to the mortgage now in question, and the name of the Mortgagee is mentioned. But it appears to their Lordships that the causes of action in the two cases were essentially different; in the one case the Widow and Mother, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the Defendants in the first suit. In the case, the issue was, whether they had duly exercised the limited power which belongs to a Hindoo female having a Hindoo female's right of inheritance in the estate, of charging the estate for certain defined purposes.

The only ground upon which it can be plausibly contended, that these two claims against distinct persons and of a very dis-

tinct nature really form part of one cause of action, is founded upon the circumstance that in the first suit the Defendant sued for the possession of the lands, the argument being that the Mortgagees being parties then in possession, the suit for possession of the lands ought to have contained a prayer for setting aside the mortgages. It is, however, to be observed that the suit, though in form a suit for the possession, was not properly brought, and could not properly be brought, at the time it was first instituted for that purpose. The prayer for possession was, if things had remained as they were when the suit was first instituted, one which could not have been granted. But the substance of the suit really was, as has been stated in the judgment delivered in the other appeal, to have those alienations of the inheritance, which, if not impeached, would have been fatal to the claim of the Plaintiff as reversionary heir, set aside and declared invalid. That object was, as their Lordships think, perfectly distinct from that which is the object of the present suit, which is to have these mortgages declared invalid, as against the person who has in the former suit established his title to the possession of the estate as heir, on the ground that they were securities, which those who granted them had not the power to grant as incumbrances upon the inheritance.

That being so, their Lordships have next to consider whether, the decree of the *Sudder* Court being incorrect upon the sole point on which it proceeded, there are sufficient grounds before them for affirming the decree of the Principal *Sudder Ameen*.

The case made is that this mortgage was granted by the Widow and Mother, and that it was not within the power of a Hindoo Widow to grant it, the money not being raised for any of those purposes for which the Widow is allowed to pledge the estate. In such a case, whatever be the precise degree of proof required from those who rely upon the mortgage, there is no doubt that those who take such a security from a person, having only a limited power to grant it, are bound to show, *primâ facie* at least, that the money was raised for a legitimate purpose. The Defendants plead that "The real circumstances of the case stand thus:—*Mussumat Koondun Kooer* and *Toolsa Kooer*, the heirs in possession of the entire property left by *Rao Dhuleep Singh*, borrowed Rs. 13,000 from our ancestor, under the necessity of liquidating the debt due from the deceased, and that incurred on account of his funeral ceremonies performed for the benefit of his soul, and in lieu of this sum they mortgaged the three villages in dispute to him, and thus saved the property." Upon that pleading it is to be remarked, that no distinction is made between any of the items making up the Rs. 13,000, that the Defendants pledged themselves to the borrowing of the whole sum for the purposes therein mentioned, and that in those purposes it is not very distinctly stated, that any part of the mortgage money was borrowed for the purpose of saving the estate by paying an arrear of Government revenue. The case made at the Bar to-day, however, is that the mortgage is at all events partially good, inasmuch as Rs. 3,000, part of the claim was unquestionably borrowed for the purpose of saving the estate from a Government sale.

In all these cases it is to be expected, that those who have to support the affirmative of such a case, should give some clear testimony by Witnesses as to the nature of the transaction; and it is very remarkable that in this case the oral testimony on the part of the Plaintiff is so entirely worthless that neither of the learned Counsel for the Appellant thought fit to refer to it. That some evidence as to the nature of the transaction might have been given one would have supposed, because although the Respondents are the children or remoter descendants of the original Mortgagee, still, in those proceedings which have been relied upon as showing what the nature of the transaction was, and in particular as to the alleged Bond for Rs. 3,000, it is stated that it was taken in the name of *Kullyan Doss*, Cashier of the Respondent's ancestor. *Kullyan Doss* is not proved to be dead, nor is the absence of his testimony at all accounted for. There is really no evidence from any trust-

worthy person whatever employed in the family of the Defendants, as to what the real transaction was. In lieu of that, we are referred to the various proceedings which have been read and relied upon by Sir *Roundell Palmer*. But what is the documentary evidence, if evidence it can be called, as to the Rs. 3,000, which is in fact the only item on which any substantial question seems to arise? It is to be found in a plaint filed in a suit brought by the Mortgagee against the Widow and the Mother of *Rao Dhuleep Singh*, seeking to be maintained in possession as Mortgagee. The account that it gives of the transaction is this:—"The Plaintiff files a regular suit in this Court against *Mussumat Toolsa Kooer*, the Mother, and *Koondun Kooer*, the Widow of *Rao Dhuleep Singh*, the proprietors of *Pergunnah Burowlee*, to be maintained in possession as Mortgagee, by insertion of his name as such in the revenue records of this District, and by allowing him to pay the Government revenue in respect of *Mouzah Fuzulpore*, in *Pergunnah Burowlee*, assessed at Rs. 506, and to recover Rs. 328, the interest up to the end of the month of *Jeith*, 1254 *Fusly*, as well as Rs. 242, the mesne profits for the rainy season crop for 1255 *Fusly*, which the Defendant has forcibly realized from the lessees of the village, notwithstanding her having already given up its possession to the Plaintiff, according to the terms of the registered deed of mortgage, dated the 30th of July, 1846, engrossed on stamp paper, which is the basis of this action. Total value of suit, Rs. 1076. He founds his claim on the assertion that on the demise of *Rao Dhuleep Singh*, the proprietor of the *Talook* of *Burowlee*, the aforesaid Defendants became his heirs; and as Owners of the entire *Talook* and all other property left by him, and in the certificates of death filed in the revenue department in respect to every one of the villages forming the *zemindary* of the deceased, the names of the Ladies were entered as his successors." That mutation of names took place, as is shown by the proceeding of that date, on the 22nd of February, 1847; and on the face of the proceeding as well as by evidence which has been given in the cause, it appears that the proceeding was one which followed upon certain litigation between the Widow, who was the immediate heir according to the Hindoo law, and the Mother, who contested her title, which at last ended in a compromise, whereby one took two-thirds and the other one-third of the estate. This plaint goes on to state:—"They then, for the payment of the Government revenue, asked the Plaintiff for a loan, and, according to their request, he lent them Rs. 3,000." Certainly the inference one would draw from this statement is that the loan was a joint transaction, that it was subsequent in date to the determination of the litigation by the compromise, and the insertion of the names of the two Ladies, as the registered Owners of the *Talook*.

Then, again, this Deed which is said to have been executed by them, and to have been registered on the 3rd of August, 1846, which is a date not quite reconcilable with what has just been said, or with what one would infer, is not produced. Neither that nor the mortgage Deed for Rs. 13,000 has been produced. And their Lordships, looking at this documentary evidence on which the Respondents rely, and contrasting it with the account given by the Witnesses for the Appellant, think that the case deposed to by the Witnesses for the Appellant, to whom credit was given by the Principal *Sudder Ameen*, is far more likely than anything which has been alleged on the other side, to be a true account of the real transaction. They are clearly of opinion, that the Respondents have failed to support that burden of proof which the law casts upon them, of showing that the mortgage was given in any part for the purposes, for which the Widow was entitled to pledge the estate.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed, that the decree of the High Court be reversed, and that in lieu thereof a decree be made dismissing the appeal to the *Sudder* Court and affirming the decree of the *Zillah* Court, with costs. The Appellant in this suit, and the Respondent in the other suit, must have the costs of both the appeals.

12th and 13th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

On Appeal from the High Court of Judicature at Calcutta.

ALBERT BIRMINGHAM MILLER, Official Assignee of the Court for the Relief of Insolvent Debtors at Calcutta,* } *Appellant,*

versus

THOMAS BARLOW, ... *Respondent.*

Insolvency—Interest.

There is nothing fraudulent or improper in an Insolvent firm parting with or putting an end to a current speculation, the result of which is still uncertain, on the best terms they are able; on the contrary, such a course is an honest one to follow.

The rescision and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one creditor to others after a debt has been incurred.

If an honest man discovers he cannot pay a bet if he loses, and is ready to rescind the bet before the event happens, he is not bound to take the chance of winning for the benefit of his creditors.

In a suit against the Official Assignee of the Court for the Relief of Insolvent debtors at *Calcutta. Held*, that, under the circumstances a Court of Equity would clearly be disposed to give interest; and that as the High Court had the powers both of a Court of Equity and a Court of Law, interest had been properly allowed.

20th July, 1871.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. THE LORD JUSTICE MELLISH:

This was a suit brought in the High Court of *Calcutta* by *Thomas Barlow*, who traded under the style of *Thomas Barlow* & Brother, against the Defendant, who is the Official Assignee of the Court for the relief of Insolvent Debtors at *Calcutta.*

The plaint set out the terms of an agreement made in 1862 by the Plaintiff's Firm, the Firm of *Small* & Co., of *London*, and the Firm of *Balfour* & Co., of *Calcutta*, consisting of *Lewis Balfour* the elder, *James Hamilton Robinson*, and *Lewis Balfour* the younger, respecting goods to be bought by the Plaintiff's Firm at *Manchester*, and shipped by *Small* & Co. to *Balfour* & Co. at *Calcutta*, by which each of the three Firms was to take one-third share of profit or loss; the Plaintiff's Firm to draw Bills at six months on *Small* & Co. for the cost of the goods, the Bills to be discounted by *Overend, Gurney* & Co.; *Balfour* & Co. to remit Bills on *Small* & Co. as a provision for the six months' Bills, and *Balfour* & Co. on the sale of the goods, specially to remit the proceeds to *Overend, Gurney* & Co., and *Overend, Gurney* & Co. thereupon to give up *Balfour* & Co.'s drafts on *Small* & Co. under rebate. The plaint states, that the Plaintiff, under that agreement, in September and October, 1866, purchased and shipped goods to *Balfour* & Co. in *Calcutta*, and that after the goods were shipped, another agreement was come to between the Plaintiff, *Small* & Co., and *Balfour* & Co., whereby, in consideration of the Plaintiff taking upon himself all risk attaching to the shipment, and discharging the Firms of *Small* & Co. and *Balfour* & Co. from all liability to pay any losses, these Firms made over to the Plaintiff all their respective right, title, and interest in the shipments; that shortly after the Plaintiff directed *Balfour* & Co. to hand over the shipments and documents relating to the same to *Barton, Baynes* & Co., and that the Bills of lading were accordingly handed over by *Balfour* & Co. to the Firm of *Barton, Baynes* & Co.; that the shipments arrived in *Calcutta*, and were taken possession of by *Barton, Baynes* & Co., and the larger portion thereof sold on account of the Plaintiff; that *James Hamilton Robinson* filed his petition in the Court for the relief of Insolvent

* 14, Moore's I. A., p. 209.

Debtors at *Calcutta* on the 7th of February, 1867, and *Lewis Balfour* the elder, on the 18th of May, 1867; that the Defendant, as such Assignee, on the 1st of March, 1867, demanded possession of the goods from *Barton, Baynes* & Co., and on their refusal to comply with the demand, he procured an Order from the Insolvent Court requiring them to re-indorse and re-deliver to the Defendant, all the documents and goods belonging to the estate of the Insolvent as were then in their possession, and to account to him for all they had parted with; that in consequence of that Order *Barton, Baynes* & Co. handed over twelve bales of goods to the Defendant, and paid to him the net proceeds of those which had been sold, Rs. 90,563. 3 as. 1 p. The plaint concluded with a prayer, that the Plantiff's rights in respect of the goods, or the net proceeds thereof, and money might be declared, and that the Defendant might be directed to pay the same, with interest, to the Plaintiff.

The Defendant, in his answer, denied the alleged agreement by which the Firms of *Small* & Co., and *Balfour* & Co., assigned their interest in the shipments to the Plaintiff; and also alleged, that such agreement, if made, and the delivery of the Bills of lading and goods to *Barton, Baynes* & Co. under it, was a fraud upon the laws relating to Bankruptcy and Insolvency; that it was void from having been made within two months of the insolvency of *James Hamilton Robinson;* and that the goods, at the time of *James Hamilton Robinson* filing his petition, were in his possession, order and disposition, with the consent of the true owner.

The case came on to be tried before Mr. Justice *Norman;* and it was proved at the trial, that the original agreement for the consignment of goods to *Calcutta* was acted upon by the three Firms up to the failure of *Overend, Gurney* & Co., in May, 1866; that after that time the parties never obtained any Firm to take the place of *Overend, Gurney* & Co.; that the Plaintiff, nevertheless, bought the goods in question at *Manchester*, and shipped them through *Small* & Co., in four Ships, to *Balfour* & Co., in *Calcutta;* that the Plaintiff drew Bills on *Small* & Co., who accepted them for the price of the goods, and discounted the Bills with Messrs. *Cunliffe*. A correspondence was given in evidence between the Plaintiff and *Small* & Co., and *Lewis Balfour*, senior, who was then in *London*, during the autumn of 1866, with reference to procurin a Firm to supply the place of *Overend, Gurney* & Co.; but that no agreement was come to on that subject; that early in December, 1866, *Small* & Co. stopped payment, and dishonoured Bills drawn by *Balfour* & Co. That it was known to all the parties in *London* that the stoppage and insolvency of *Small* & Co. would necessarily involve the stoppage and insolvency of *Balfour* & Co. That on the 15th of December, 1866, *Small* & Co. wrote as follows to the Plaintiff:—"Pending the completion of arrangements, we have sent out a Telegram, jointly with Messrs. *Balfour*, directing all funds and goods then in their hands to be handed over to *Jardine Skinner* & Co." And, on the 18th of December, the Plaintiff wrote to *Balfour* & Co. at *Calcutta*:—"In consequence of correspondence with Messrs. *Small* & Co., you will please hand over the goods as per annexed list, to Messrs. *Barton, Baynes* & Co. They are bought, you are aware, under special agreement, in triplicate account." On the 2nd of January, 1867, the agreement for the transfer of *Small* & Co.'s and *Balfour* & Co.'s interests in the shipments was made, and is contained in a Letter of that date from the Plaintiff to *Balfour* & Co., and was also signed in the corner by *Small* & Co., and *Lewis Balfour*. [His Lordship read the Letter* and proceeded:—]

The subsequent facts were proved to have taken place as alleged in the plaint. Upon this evidence Mr. Juctice *Norman*

* "*Manchester*, 2nd *January*, 1867.

"Messrs. *Balfour* & Co., *Calcutta*.

"Dear Sirs,—Referring to the goods shipped on triplicate a/c under special agreement against which Messrs. *Small* & Co. have given their acceptances, you will please hand over all such goods (particulars of which we enclose) to Messrs. *Barton, Baynes* & Co., *Calcutta*. We agree to take said goods on our own risk and responsibility. We have

held, that the transfer of the interest of *Balfour* & Co. to the Plaintiff by the Agreement of the 2nd of January, 1867, was fraudulent and void as against the Defendant, and on that ground dismissed the suit with costs. From that judgment an appeal was heard before two of the Judges of the High Court, the Chief Justice, Sir *Barnes Peacock*, and Mr. Justice *Markby*. Mr. Justice *Markby* was of the same opinion as Mr. Justice *Norman*, and thought his judgment ought to be affirmed, but the Chief Justice was of a contrary opinion, and, in accordance with his opinion, and under sect. 36 of the Letters Patent of the High Court, the judgment of Mr. Justice *Norman* was reversed, and a decree was made in favour of the Plaintiff, and the Defendant was ordered to pay to the Plaintiff, Rs. 95,279. 10 as. 1 p., together with damages, in the nature of interest at 6 per cent. from the days when the cause of action as to each part of the principal arose up to realization, with the Plaintiff's costs of the original suit and of the appeal.

From this decree an appeal has been brought before their Lordships, and a preliminary objection to the decree was raised, that the 36th clause of the Letters Patent of the High Court was not applicable; and that under the rules made by the Judges of the High Court, the Judges who heard the appeal being equally divided in opinion, judgment of affirmance of the Decree of the Court below ought to have been entered. Their Lordships do not think it necessary to give any opinion on this question. They are of opinion, that it is their duty to hear and decide the case on the merits, and that it is quite immaterial how the judgment in the High Court ought to have been entered in consequence of the difference of opinion between the Judges, because the judgment of the High Court, as entered, cannot be reversed, if it was right upon the merits.

With respect to the case on the merits, it is clear that the goods were not in the order and disposition of *James Hamilton Robinson* at the time he petitioned the Insolvent Court, because he had previously indorsed and handed over the Bills of lading relating to all the goods to *Barton, Baynes* & Co., and the principal question to be determined is, was the transfer of the interest of *Balfour* & Co. in the shipments to the Plaintiff, by the Agreement of the 2nd of January, 1867, binding on the Defendant. Their Lordships are of opinion, that *Lewis Balfour* the elder, had, under the circumstances of this case, authority as a Partner in the Firm of *Balfour* & Co. to bind his Firm to that Agreement by attaching his signature to the Letter of the 2nd of January, 1867, and that, therefore, the Agreement was binding upon the Defendant unless the Defendant can make out that the Agreement was rendered void by the provisions of the 11th & 12th *Vict.* c. 21, or was a fraud upon the Creditors of *Balfour* & Co.

It is desirable, in the first instance, to consider what was the position and the

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agreed to return to Messrs. *Small* & Co. the following acceptances :—

£	s.	d.			
"2,943	8	2	due 13th March, 1867 a/c		*Warwick Castle.*
589	3	0	„ 1st April	„ „	*Tantallon Castle.*
4,707	5	2	„ 9th May,	„ „	*Kenilworth Castle.*
208	0	11	„ „	„ „	Do.
804	5	2	„ 22nd May,	„ „	*Riversdale.*

"In the meantime, until we hear that you have handed over the goods, we have made *Williams, Deacon* & Co. custodians for said acceptances, also of £217. 1s. 10*d.* paid by Messrs. *Small* & Co., for charges on account of the said goods. We refer you at foot to Messrs. *Small* & Co.'s signature, and also to Mr. *Balfour* and Messrs. *Mattheson* & Co.'s signatures, in confirmation of this. Messrs. *Mattheson* & Co. of course sign this in case any goods have arrived in *Calcutta*, and are delivered to *Jardine, Skinner* & Co. of *Calcutta*, and this Letter is sufficient authority in such case for Messrs. *Jardine, Skinner* & Co. to hand over the goods to *Barton, Baynes* & Co.

"We are, dear Sirs,
"Yours truly,
"THOMAS BARLOW & BRO.

"We confirm the above.
"*Mattheson* & Co.
"*Small* & Co.
"*Lewis Balfour.*"

legal rights of the parties at the time the Agreement of the 2nd of January, 1867, was entered into. Mr. Justice *Markby*, in his judgment, states his opinion to be, that if the assignment of the 2nd of January, 1867, had not been made, the general Creditors of *Balfour* & Co. would have been entitled to one-third of the goods. Their Lordships cannot agree with this opinion. It is obvious that, even if Mr. Justice *Markby* was right in thinking that the property in the goods whilst on board Ship was vested in the three Firms; still, that the Creditors of *Balfour* & Co. could have no right to any part the proceeds of the goods until all the liabilities of the three Firms, with reference to the adventure, were first satisfied; and one of these liabilities was an obligation to satisfy the Bills drawn by the Plaintiff on *Small* & Co. Their Lordships also agree with the Chief Justice, and for the reasons stated by him, that neither the circumstances that the parties had not procured any Firm to supply the place of *Overend, Gurney* & Co., nor the insolvency of *Small* & Co., and of *Balfour* & Co., interfered with the right of the Plaintiff to have the Agreement between the three Firms carried out: that is to say, his right to have the goods sold in *Calcutta*, and the proceeds returned to *England* in good Bills, for the purpose of satisfying the Bills drawn by the Plaintiff on *Small* & Co.

Their Lordships are also of opinion, that the insolvency of *Balfour* & Co. deprived them of the right of acting as Factors for the three Firms in the sale of the goods at *Calcutta*, and the remission of the proceeds to *England*, and that, therefore, the orders to transfer the goods first to *Jardine, Skinner* & Co., and afterwards to *Barton, Baynes* & Co., which were sent out to *Calcutta* in December, 1866, were proper orders, and their Lordships think, that *James Hamilton Robinson* would have been perfectly justified in handing over the Bills of lading to *Barton, Baynes* & Co., even if the Agreement of the 2nd of January, 1867, had never been made, and the Telegram which was sent out in consequence of it never sent out. Such, then, being the position of the parties, was the Agreement of the 2nd of January, 1867, a fraudulent Agreement as respects the Creditors of the Firm of *Balfour* & Co.? When this Agreement was entered into it was quite uncertain whether the consignment of these goods to *Calcutta* would turn out a profitable or an unprofitable adventure, and their Lordships are of opinion, that there is nothing fraudulent or improper in an insolvent Firm parting with or putting an end to a current speculation, the result of which is still uncertain, on the best terms they are able. On the contrary, such a course is an honest one to follow. If an honest man discovers he cannot pay a bet if he loses, and is ready to rescind the bet before the event happens, he is not bound to take the chance of winning for the benefit of his Creditors. The rescission and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one Creditor to others after a debt has been incurred. In the present case it seems to their Lordships clear that, on the 2nd of January, 1867, the Plaintiff was not a Creditor of *Balfour* & Co., and could not have proved against the estate of *Balfour* & Co. in respect of these transactions, and this alone conclusively proves that the Agreement was not a fraudulent preference.

It remains to be considered, whether the Agreement of the 2nd of January, 1867, and the transfer of the Bills of lading under it, was rendered void by the 11th & 12th *Vict.* c. 21, s. 24, and their Lordships are clearly of opinion, that the case does not come within that section. The fact that the Plaintiff was not at the time a Creditor of the Firm of *Balfour* & Co., takes the case out of the section, and, moreover, the Agreement was not a voluntary assignment by *Balfour* & Co., and still less by *James Hamilton Robinson*, of any defined interest in the goods, but was an Agreement whereby, in consideration of being freed from all liability to loss, *Balfour* & Co. sold to the Plaintiff their interest in any profit that might be made in the speculation. A further objection was taken that, even assuming the judgment of the Chief Justice to be correct on the general merits of the case, the Plaintiff was not entitled to interest. On this point it is material to observe that, in the account

which was drawn up between *Barton, Baynes* & Co. and the Defendant as Official Assignee, interest is charged, and it, therefore, appears that by the wrongful act of the Defendant the Plaintiff has been deprived of money which was actually making interest, and their Lordships are of opinion that, under these circumstances, a Court of Equity would clearly be disposed to give interest; and it is by no means clear that, even in a Court of Law, although the ordinary rule is, that in actions for money had and received interest is not given, the fact of the Defendant having received interest would not be a sufficient ground for making the Defendant liable to pay interest; and as the High Court have the powers both of a Court of Equity and a Court of Law, their Lordships are of opinion that interest has been properly given.

On the whole, their Lordships will recommend to Her Majesty that the decree of the High Court be affirmed, and this appeal dismissed with costs (*a*).

(*a*) See *Ex parte Copeland*, 3 Dea. & Ch. 199, and *Ex parte Prescott, Ibid.* p. 218.

15th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore, (Judge of the High Court of Admiralty), the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

MOONSHEE AMEER ALI,* *Appellant,*

versus

MAHARANEE INDERJEET SINGH, BABOO RAMKISHEN SINGH, RANEE ASMODHEE KOOER, RANEE SOONETH KOOER, RUN BAHADOOR SINGH, MOODEYDHUR SINGH, LALL NARAIN SINGH and DEOPUTTEE NARAIN SINGH, *Respondents.*

Appeal—Agreement not to appeal—Counsel—Costs—Sum given Nomine Expensarum.

Where the Counsel for the Appellant had agreed, at the hearing of the case on appeal before the High Court, that, if the High Court would restrict its judgment to a finding on one of several issues, his client would not appeal to *England*; *Held* that that agreement was binding and that the appeal could not be heard.

Where an appeal is preferred contrary to an agreement not to appeal, application to stay the proceedings should be made before the case is prepared for hearing.

A fixed sum was given to each Respondent *nomine expensarum*, in lieu of costs.

THE RIGHT HON. THE LORD JUSTICE JAMES:

THEIR Lordships are of opinion, that the preliminary objection taken to the

* 14, Moore's I. A., p. 203; 9 B. L. R., p. 460.

hearing of this appeal ought to prevail. The certificate of the High Court of *Fort William* in *Bengal* is to the effect, that in consideration of the Court deciding the appeal before them upon one point only, that is, the validity of the *Mookternamah*, the Counsel for the Appellant, in the presence and with the consent of the Son and Agent of the Appellant, stated to the Court that he would not appeal from the decision as to the validity of the *Mookternamah*. Their Lordships, upon consideration, find that there was really very good and sufficient consideration for such an agreement on the part of Counsel, as part of the conduct of the case, because the result was this, and a very important result to the parties, that by obtaining the decision upon the validity of the *Mookternamah* alone, the case became a case not decided against *Baboo Bischen Singh*, the party in whose right the Appellant was suing. If the case had been heard by the High Court, and upon appeal the merits had been gone into, and the whole matter determined upon as in a suit by *Baboo Bischen Singh* and others, *Baboo Bischen Singh* and the persons claiming under him would not have been precluded from appealing to this Court, but might, on the other hand, have had to successive decisions against them upon questions of fact going to the merits of the case. But confining it to the decision upon the *Mookternamah*, it was really substituting a nonsuit for an adverse verdict, leaving it open to *Baboo Bischen Singh* and the Appellant himself, if he can get a new and genuine document in his favour, to bring a fresh suit. That being so, it was clearly a valid agreement on the part of Counsel not to appeal, and there is no doubt that it was done with the actual consent of the Son and representative of the Appellant. The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought where the real merits of the case have been withdrawn from the Court below.

But their Lordships have had some difficulty in determining what should be done with regard to costs. Now, their Lordships feel that where a certificate of this kind comes over with the record, and must, therefore, be known to both parties, it was the duty of each party to have made an application to the Registrar, who would at once have brought the matter to the attention of their Lordships, and taken their Lordships' directions as to what ought to be done with a record so constituted before any expense had been incurred in preparing cases, or in delivering Briefs for the hearing. It was wrong of both parties to proceed with an expensive litigation in the face of this certificate without its being brought, either through the Registrar or by an application at their Lordships' Bar, to their attention. Disposing of it upon this preliminary, but still very serious, objection, their Lordships feel that they ought not to give all the costs as if the case had been fully heard upon the appeal, but still they think the Appellant ought not to escape a very considerable portion of the costs which have been incurred. They think, therefore, that this is a case in which they may use the power with which they are invested, to give a sum of money, *nomine expensarum*, and, therefore, they will humbly recommend Her Majesty to dismiss the appeal, allowing to each of the three Respondents the sum of fifty guineas for the costs of the dismissal of the appeal.

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18th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

FAEZ BUKSH CHOWDRY,* ... *Appellant*,

versus

FUKEEROODDEEN MAHOMED AHASSUN CHOWDRY, ... *Respondent*.

Benami—Evidence—Suspicion.

In determining the right to property seized in execution, the Court must not declare a person claiming as purchaser to be a *benámidár* for the debtor upon suspicion merely, but its decision must rest upon legal grounds established by legal testimony.

THE RIGHT HON. THE LORD JUSTICE JAMES:

IN the judgment delivered in the case to which their Lordships have been referred, viz. *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, p. 43; *Ante*, p. 215), there is this passage:—"Undoubtedly there are in the evidence, circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the Appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony." That principle is sufficient to dispose of this appeal, which only differs from the case referred to in this respect, that in the appeal now to be decided, there is not, in their Lordships' opinion, any legal evidence to create suspicion, or any doubt to be entertained with regard to the substantial honesty of the transaction.

It appears quite clear that the Father, whose judgment Creditor obtained this property, was in insolvent circumstances, that he had not a farthing of money with which to purchase the property in question; that the property was then in the hands of a Mortgagee, who had foreclosed, and had become the absolute Owner of the property, so that it was his to deal with as he thought fit.

Having probably, as was suggested in the judgment of the High Court, kind considerations for the Father and the family, he was induced not to insist on retaining the whole value of the property so acquired, but to allow it to go back to the family, on being satisfied or secured, in some way or other, the real amount of the debt for which he had seized the property.

In that state of things the way in which the transaction was completed was this,—the Son gets a man to lend him part of the money in consideration of a *Putnee* and a Bond. The Son gives a mortgage to the original Mortgagee for parting with the interest which he had obtained under the foreclosure; he gives his Bond, and then the Conveyance is made to the Son.

Their Lordships think, in accordance with the judgment of the High Court, that this was done for the benefit of the family. The whole circumstances show, that it was open to the Mortgagee and to the family to do it, not by a Conveyance to the insolvent Father, or in trust to the insolvent Father, which would give it to the Creditors, who had no right, equitable or moral, with regard to this property, but to give it in such a way as best to effect their object, that is, to give it to the Son, who seems to have been the proper man to carry out the arrangement for himself and for his family.

Under those circumstances, their Lordships think, that the judgment of the Principal *Sudder Ameen* was right; and they will, therefore, humbly recommend to Her Majesty, that the judgment of the High Court ought to be reversed, and that

* 14 Moore's I. A., p. 234; 9 B. L. R., p. 456.

in lieu thereof there should be an order dismissing the appeal from the Principal *Sudder Ameen*, with costs.

The Appellant is to have the costs of this appeal.

18th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

KOOLDEEP NARAIN SINGH,* *Appellant*,

versus

THE GOVERNMENT OF INDIA and others, ... } *Respondents.*

Resumption—Hereditary Tenure—Purchaser at Auction-sale.

A purchaser at an auction-sale cannot, where lands are held under an hereditary *ghatwally* tenure originally created before the decennial settlement and at a fixed rent, resume those lands on the suggestion that the *ghatwally* services are no longer required. The omission of words of inheritance does not show conclusively that a *sanad* is not hereditary; it being shown that a *ghatwally* tenure had descended from father to son for several generations, it was *held* that it was an hereditary tenure.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

THIS is a suit brought by an auction Purchaser to resume possession of certain villages held under the tenure known as the *ghatwally* tenure. It does not appear to be an ordinary suit for resumption and re-assessment; for the Plaintiff claims a right to the possession of the land from the date of the auction-sale, with mesne profits from that time; but the substantial question raised in the suit is, whether the Appellant, as auction Purchaser, having acquired the rights of the *Zemindar*, with whom the original Settlement was made, is entitled to resume and put an end to the *ghatwally* tenure. It has been found as a fact by the Courts below (and their Lordships must assume that finding to be correct), that this tenure existed in its present form before the Decennial Settlement. The original *Sunnud* granting the *ghatwally* tenure is far more ancient. The first document produced goes back to the year 1743, and that *Sunnud* appears to refer to and recite a former *Sunnud*. There is no mention in this document of the rent reserved, but there does appear to their Lordships to be, as there appeared to the Judges of the High Court to be, on the record, proof that the rent payable in respect of these *Mouzahs* at the date of the Decennial Settlement, was the present rent of Rs. 61. The auction Purchaser, therefore, coming in by virtue of the sale, would appear to have no right to disturb this tenure in the way in which an auction Purchaser can sweep away incumbrances created since the Decennial Settlement. The only advantage which he gains by the character of being auction Purchaser is, that he is relieved from any difficulty arising from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former *Zemindars*, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the *Zemindary*. It would seem, therefore, that if he has any right at all to destroy the tenure, it must be by virtue of that clause which has been cited from Reg. VIII. of 1793, sect. 41, relating to *Chakeran* or service lands. That enactment does not seem to have been much discussed below, but their Lordships fail to see upon what the title of the auction Purchaser can depend, if it does not depend upon that. Their Lordships further consider it to have been properly found by the Courts below that this tenure is an hereditary tenure. It is true that the

* 14, Moore's I. A., p. 247; 11 B. L. R., p. 71.

Sunnud which is produced contains no words of inheritance, but it is in their Lordships' knowledge that before the acquisition of the *Dewanny*, before the British power became the ruling Power in *India*, it was extremely common where a tenure was in fact hereditary, when it practically passed as hereditary from Father to Son, to take out a new *Sunnud* upon each descent. Therefore, it appears to their Lordships, (and they are under the impression that it has been so decided here (*a*), as it appears to have been decided in the High Court), that the omission of words of inheritance does not show conclusively that the *Sunnud* was not hereditary. Then there is the strongest possible evidence that these tenures have descended from Father to Son; that they have, in fact, been hereditary, and their Lordships are, therefore, of opinion, that the conclusion to which the High Court came upon that point was correct.

The question, then is, whether, upon the suggestion that these *ghatwally* services have ceased to be necessary, the *Zemindar* has a right to resume the lands, and to turn out the persons who have enjoyed them for such a long period of time. Now, their Lordships think that the principle which should govern this case is that which was laid down in the case of *Forbes* v. *Meer Mahomed Tuquee* (13 Moore's I. A. Cases, 438; *ante*, p. 588), which has been referred to. They concur in the view entertained by the Chief Justice, and, in fact, by all the Judges who sat with him, that, under the circumstances of this case, the right does not accrue to the *Zemindar* on the mere suggestion that the services have ceased or that they are no longer necessary. They are by no means prepared to say, that if the Government, who had clearly a joint interest with the *Zemindar* in the continuance of the services when necessary, were not here disputing the *Zemindar's* right, that the *Zemindar* would, as between him and the *Ghatwal*, have any right so to resume the land; they are disposed to think that, upon the principle laid down in the case just referred to, that right would not exist. The case which has been cited in support of a right so to dispossess the *Ghatwal* is a case decided on the 5th June, 1866, the case of *Rajah Neelanund Singh* v. *Surwun Singh* (5 W. R., 292). That case was decided by two of the learned Judges who sat in the High Court in the case now under appeal, Mr. Justice *Kemp* and Mr. Justice *Jackson*, who seem to have considered that the land being held in lieu of wages and on a *quasi* contract for services, the *Zemindar* was at liberty to determine the tenure when the services were no longer required. In that case, however, the *Ghatwals* were said to hold the land, not under a *Sunnud* conferring an hereditary and indefeasible right, but "on the payment of a quit rent, with enjoyment of the profits of the land in lieu of wages, and possession, however long, would not entitle them to hold the land at a fixed *jumma*, or to retain a portion of the land after they have ceased to perform the duties for which the land was assigned to them." It would appear, therefore, that the particular tenure there in question was very different from the present tenure. If it were of the same nature, it is clear that the two learned Judges who decided that case have departed from their former opinion, since they have concurred in the judgment now under appeal. Mr. Justice *Jackson* indeed differed from the rest of the Court as to the conclusion that the tenure was hereditary,—he did not think that the evidence was sufficient to make that out,—but in all other respects he joined with his Brethren in pronouncing the judgment now under appeal. It seems to their Lordships, that they would be taking upon themselves a very great responsibility, if, upon a question of this kind, a question of tenure peculiar to *India*, and upon which the judgment of Indian Courts is so valuable, they were to overrule the unanimous and carefully considered judgment of a full Bench of the High Court, particularly when that judgment appears to them to be entirely consistent with the general principles of justice and equity. They must, therefore, humbly recommend Her Majesty to dismiss this appeal with costs.

(*a*) See *Rajah Suttosurrun Ghosal* v. *Moheshchunder Mitter*, 12 Moore's I. A., 263; *ante*, p. 420.

19th, 20th and 22nd July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Madras.

RAMAMANI AMMAL (as Mother and Guardian of MUTTU DURAISAWMI TAVER),* ... ... } *Appellant*,

versus

KULANTHAI NATCHEAR, and others, ... } *Respondents*.

Acquiescence—Evidence—Legitimacy—Marriage.

A marriage between a *Zemindar* of the *Malavar* class, a sub-division of the *Soodra* caste, with a woman of the *Vellala* class of *Soodras*. *Held* (1) as to the *factum*, that a marriage had taken place, and (2) that such a marriage was valid by Hindoo law.

In questions of disputed facts, the rule of the Judicial Committee is, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to the Courts below may commonly be; that due weight must be given to the evidence; and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed, without some grave grounds to support the imputation, as such a rejection would virtually submit the decision of the rights of others to the suspicion, and not to the deliberate judgment, of the Judge. The entire history of a family must, therefore, not be thrown aside because the evidence of some of the Witnesses is incredible or untrustworthy.

20th November, 1871.

THE consideration of their Lordships' judgment having been reserved, judgment was now delivered by

THE RIGHT HON. THE LORD JUSTICE JAMES:

This is an appeal from a decision of the High Court at *Madras*, which reversed a Decree of the Civil Judge of the *Zillah* of *Madura* in favour of the Appellant.

The suit was brought by the Appellant, as Mother and Guardian of her infant Son, to establish his right as the legitimate and sole Son and Heir of *Sivaswami Taver* of *Ramnad*, to inherit the property, movable and immovable, of the Father, valued in the plaint at Rs. 94,795. The Plaintiff claimed as a Widow, stating herself to have been the second Wife of the deceased, and made title to the sub-division *zemindary* of *Ramnad* on behalf of her Son. The first Defendant was the childless Widow of the late *Zemindar*, according to the Appellant's representation, the senior, and to her own, his sole Widow. The other Defendant, who was joined as a Defendant on a ground not established, viz., his having possessed himself of part of the estate of the deceased after his death, was a first cousin of the late *Zemindar*. Both Defendants disputed the marriage of the Plaintiff and the legitimacy of her Son.

The statement of both Defendants was that the Plaintiff was a Dancing-girl, and treating that *stutus*, or caste, as continuing, they both insisted that she could not be the Wife of her alleged Husband, that her Son could not, since she was a prostitute, be the Son of the late *Zemindar*, and could not have any title to inherit, even had a marriage between the *Zemindar* and the child's Mother been celebrated in fact. They denied that any marriage had taken place. It is unnecessary to repeat the very language of these statements, which, as translated, is coarse and unbecoming. It is plain, that the case insisted on was that the Plaintiff herself was a Dancing-girl, not merely the child of one, at the same time when her connection with the *Zemindar* commenced, which the Defendants represented as a connection with a Dancing-girl, a prostitute by profession, attached to the Temple service.

Their statement contains no intimation of her having abandoned that calling prior to the birth of these children, or at all. The language used, plainly imports a continuing *status*; that the Judge so under-

* 14, Moore's I. A., p. 346.

stood the statements appears from the issues which he framed.

The term "Dancing-girl" was not used in the answers. A fouler name was there used, and it seems to their Lordships to have been designedly employed to mark a distinction between an intercourse with a concubine and one with a common prostitute, which might influence the decision of a question of filiation and legitimacy.

The issues were, first, whether the Plaintiff was a *Vellala* woman, or a Dancing-girl.

Secondly, whether the Plaintiff was legally married to the *Zemindar*.

The third issue was one of law as to the validity of the marriage, should it be proved.

The fourth issue was one of fact as to the second Defendant's possession of the property which he was alleged to have appropriated. This issue was found for the Defendants. The finding is not appealed against; and this part of the case, except as the charge effects the honesty of the Plaintiff's claim, need not be considered.

The Plaintiff claimed to be by birth a legitimate child of one *Shunmuga Pillai*, a *Soodra* man, of the *Vellala*, one of the sub-divisions of the *Soodra*, caste. As such she would be a *Vellala* woman. The Defendants insisted that she was a mere Dancing-girl connected with the service of the Hindoo Idol, at a *Pagoda* situate at *Tiruchuly*, the place of her birth and of her Father's residence, who was the headsman of the village. The Judge uses, in the issue which he framed, the term "Dancing-girl," as distinct from the *Vellala* class, to denote a particular class of women, described in treatises on Hindoo Law as incapable of contracting marriage.

The parties went to trial on the issues before stated. The proofs and conduct of the case of the Defendants were applied to and influenced by them.

That her alleged Son really was the *Zemindar's* Son was made by such unquestionable evidence that it was strongly pressed on their Lordships, that the Defendants had in fact never intended to represent her as not having the *status* of a concubine, or the children as not having the *status* of illegitimate children; but had only denied that she was the Wife, and that the children were legitimate. Their Lordships are unable so to read the case made by the pleadings with the light thrown upon it by the evidence of her exposing herself openly on the balcony with all the outward marks and costume of a professional Dancing-girl, and such evidence as the following: "As *Thanga Natchear* is the Daughter of a Dancing-girl, I did not hear who her Father was. As she is a Dancing-girl's Daughter, who can be called her Father? I know *Muttu Duraisawmi*, the second Plaintiff, his Mother is *Ramamani Ammal*. I have not heard who his Father is." The case originally made and attempted to be established was, that of professional prostitution and of promiscuous intercourse, so that in Hindoo law and opinion, as well as in English, it would be impossible to predicate any paternity of the offspring.

The statement that she was a Dancing-girl was designed to affect her case in two ways, first as to the *factum*, and then as to the legality of the alleged marriage.

The evidence that she was not a Dancing-girl was adduced by the Plaintiff, in support of her case by anticipation to rebut that of the Defendants, which their Counsel stated to have been principally directed to prove this her original condition of life. If a marriage *de facto* were proved by the Plaintiff's Witnesses, it lay on the Defendants to show conclusively that such *de facto* marriage could not legitimate the children of it, and thus, in that event, the failure to substantiate this issue would be fatal to the defence, on the question of legitimacy.

The Plaintiff called many Witnesses, twenty-four in number, thirteen of whom deposed to the marriage; amongst these, not fewer than five Witnesses of the *Zemindar's* family, nearly allied to him, *primâ facie* at least, unimpeached and credible Witnesses, such as a Court would ordinarily desire to hear on a question of this kind in issue before it, and would be most disposed to trust, proved their actual presence at the marriage. Her Father, her whole Brother, and her half-Brother proved the Plaintiff to be of the *Vellala* caste, and a member of their common family.

The Civil Court of *Madura*, of which Mr. *Pochin* was then the Judge, believing these Witnesses, necessarily decided that the marriage was proved, and also that the Plaintiff never was a Dancing-girl. On appeal to the High Court, that decision was reversed upon the first point. On the second point, the High Court did not come to a positive conclusion that the Plaintiff had been a Dancing-girl, but stated that they inclined to that opinion, an expression indicating distrust of the Defendant's Witnesses to the fact that several of them had actually seen her officiating in that character.

The *Zemindar* was not of the *Vellala* caste. His caste, also an inferior *Soodra* caste, was that of the *Malavars*. The union in marriage of persons of these two sub-grades of *Soodras* seems to have been uncommon, and the legality of such marriage was doubted at the time when the *Zemindar* is said to have married the Appellant. The marriage between such a man and a mere Dancing-girl has been described as "impossible." The Judges of the High Court express much doubt, whether a marriage between the *Zemindar* and a *Vellala* woman would be legal, but they do not directly affirm its illegality. On the argument of this appeal this objection was not insisted on; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of these two sub-classes of the *Soodra* caste. This uncertainty, which undoubtedly prevailed at one time as to the legal rights flowing from such matrimonial connections, has an important bearing on the proof of a part of this case, and will subsequently be considered.

The case before their Lordships is one of conflicting evidence and of conflicting decisions. The opinion of Mr. *Pochin*, the Judge who tried the case, is opposed to that of two Judges of the High Court. They differ as to the habits of natives in their domestic relations, as to the credibility of Witnesses, the weight of evidence, and the proper inferences to be drawn from conduct. The decision of the case by their Lordships must necessarily involve a somewhat close examination of part of the evidence, and of the grounds of the opinions of the Judges of the respective Courts.

It was urged on behalf of the Appellant that Mr. *Pochin*, who saw and heard the Witnesses, could better judge of their respective claims to belief than the appellate Tribunal. On the other hand, it is stated, that as he was an European, his advantage in that respect over the appellate Court was less than that of an intelligent native Judge.

It is due to Mr. *Pochin* to observe, that he appears to have been extremely diligent and laborious in the conduct of his investigation. In a case of great uncertainty and difficulty, where no evidence is exempt from suspicion, if in all parts of the case his conclusions have not the concurrence of their Lordships' opinion, such difference of opinion should not weaken his just claims to respect. The decisions of both Courts will receive the most anxious and respectful attention.

The first in order and weightiest of the objections made to Mr. *Pochin's* conclusions by the Judges of the High Court, as well as by the Counsel for the Respondent in their very able arguments before their Lordships, is that he had failed to observe the total improbability of the story told by *Shunmuga Pillai*, the Father of the Appellant, as to her introduction into the family by the deceased *Zemindar*, and to draw the inferences which should rationally and justly have been drawn from that strange story. Their Lordships, on this part of the case, agree with the judgment of the High Court, which pronounces the story of the treaty for marriage and introduction of the Bride incredible as it is told. They think that the story as told does not give a true history of the circumstances under which this Lady first came to enter and reside in the *Zemindar's* house; and they also think that the statement of the Father of the Appellant as to the origin of his connection with her Mother, warrants an inference not much at variance with the observations of the High Court upon it. There may have been family matters which a Husband and Father would be studious to conceal. The existence of such matters would afford an explanation of the con-

duct of the parties in the celebration of the alleged marriage more satisfactory than that suggested by Mr. *Pochin*, viz., that the inferiority of the fortune and social position of the Father of the Appellant to that of the *Zemindar* might account for an introduction and reception of a Bride not usual in native families, an explanation which certainly is not satisfactory to their Lordships.

The story of the marriage must be viewed as full of suspicion in its very outset, and, therefore, requiring a more than ordinary degree of jealous scrutiny, a jealousy which must extend itself to the testimony of the Witnesses of the marriage.

Their Lordships are led by the judgment under review, and by some portion of the argument that has been addressed to them, to state, as has often been stated before by this Committee, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that is, due weight must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicions and not to the deliberate judgment of their appointed Judges. Nor must an entire history be thrown aside because the evidence, or some of the evidence, of some of the Witnesses is incredible or untrustworthy.

On the subject of the marriage, in fact, of the *Zemindar* to this Lady, the Plaintiff, their Lordships think that the judgment of Mr. *Pochin* is fully supported by the evidence; and that so very strong a *primâ facie* case is made in favour of the marriage as to require the most conclusive evidence for its overthrow. It must be borne in mind that, whilst the evidence of the marriage given by many apparently credible Witnesses having presumably no motive to misrepresent the fact or to deceive the Court, and incapable of being themselves deceived about it, is direct and positive, that by which it is met is, for the greater part, indirect and inferential, turning on the improbability and inefficacy of the marriage of a Dancing-girl. The evidence in support of the marriage is that of numerous Witnesses of respectable position and character, members of the family, the very Witnesses whose evidence in like cases is looked for by a Court, and the absence of which weakens every case where such absence is found; confirmed, moreover, by the treatment by the *Zemindar* of his children as legitimate, which, in the opinion of their Lordships, the marriage of his Daughter, *Thanga Natchear*, sufficiently proves. This treatment alone, unless answered, would, after the death of the parents, suffice to establish a claim to a direct lineal succession against a reversioner, and must receive its due weight here.

Upon the question of recognition of his children as legitimate, their Lordships are compelled to express their dissent from the conclusions of the High Court. The marriage of the Daughter of the *Rajah*, as legitimate, is a fact sufficiently proved. The Husband and his Father have both been examined. The evidence of the Husband leads directly to the conclusion that he married his Wife as legitimate, concluding her to be so. He says that he would not have married her had she been the Daughter of a Dancing-girl. This statement is such as might be expected from him. The Father confirms him, and presumption from experience confirms both. The Witness himself is unimpeached; on what ground, then, should his statement be set aside? The Judges of the High Court say, in effect, that as he was marrying the Daughter of a powerful man is scruples might, therefore, give way; but what is this but opposing a conjecture of the Court itself to positive testimony against its truth; the conjecture itself seems to derive no support from the wealth of power of the *Zemindar*, for relatively to the Husband and his family, the *Zemindar* was not a man high above them in fortune or rank, nor does the alliance seem to have been above the degree or the reasonable expectations of one of the Husband's family. Again, the High Court observes

that the marriage was not like that of a legitimate Daughter, as it was not celebrated with the ceremony of the *Homan*, which, however, the Husband says did accompany it. He is contradicted, indeed, on this point; but though this conflict of testimony might induce doubt in the minds of the Judges, still they were not justified, in this balanced state of the evidence, in reasoning concerning the *status* of the Bride, her Mother, and Brother, on the basis of the absence of this ceremony. Other circumstances, which ordinarily attend the marriage of a legitimate Daughter, as the existence of an alliance equal and honourable, the presence of near relatives and friends on both sides were proved, and nothing, even had the ceremony of the *Homan* been omitted, would have indicated a marriage between unequals in degree. The other circumstances which have been argued on the side of the Appellants as proofs of recognition, by the Father of his children as legitimate, viz., the *Benamee* transaction, afford no certain indication of the sense in which the terms Son and Daughter were used by the Father. Their Lordships cannot, however, agree with the Judges of the High Court in thinking that these documents support an inference of illegitimacy. They are obviously *Benamee* transactions, so common as to require no explanation why, in a particular instance, they were adopted. In an acknowledged case of legitimate birth they would have excited no attention. They afford no sort of evidence that the *Zemindar* designed them at all to be a provision for children. As these children, even if illegitimate and incapable of inheriting, would have been entitled to maintenance and provision in his life-time, gifts not exceeding such an allowance of maintenance as would have been fair and usual, would have been no material advancement of their interests. It is unnecessary to enter upon any examination in detail of the family co-membership, position, and respectability of those Witnesses, members of the family, who depose to their presence at the marriage. The judgment of the High Court gives them due weight, abstractedly of the particular ground on which it justifies the rejection of their evidence. The propriety of this rejection of a whole body of evidence otherwise unimpeached, must now be considered.

The Advocate-General, who was Counsel for the Plaintiff, had admitted that the Agent of the superior *Rajah* of *Ramnad* supplied the necessary funds for carrying on her suit. It was obviously an admission made in a spirit of rectitude, involving, as made, no acknowledgment or sense of any violation of any law or duty whatever. Such an act may be viewed in very different lights; it might bear the character of a generous support, on the part of a powerful head of a House compassionating the helpless state of a child contending for a just inheritance, and acknowledged by its Father in his life-time as a legitimate Son.

It might, on the other hand, be capable of being viewed as a spiteful and vindictive act, an unprincipled maintenance of a wrongful suit. What presumption was there in this case to lead the mind to entertain either view? The Manager of the *Rajah* was not a party to the suit. His conduct was in no other respect before the Court. No ground existed for supposing him capable of what would have been a very criminal conspiracy, liable to severe punishment. His name was inserted in a list of the Defendant's Witnesses, which fact seems to conflict with the statement of the pleadings, that his enmity produced the claim.

The Witnesses themselves, whom the hypothesis supposes to be all perjured, the Court below had believed, seeing them, and observing no signs of falsehood in them. The hypothesis of the High Court is, that the *Rajah's* Agents had got up the case from enmity. One Witness for the Defendants, it seems, had opposed the *Rajah's* adoption. This was held evidence enough; and it is assumed that this Agent had influence enough to make all this *primâ facie* respectable men come forward to support in Court a notoriously false case by deliberate perjury, for their guilt admitted of no concealment on the hypothesis of mere well-known concubinage and illegitimacy. Let it be conceded that the Father of the present Plaintiff had wilfully given an untrue account of the first introduction of his Daughter into the *Zemin-*

dar's family, yet other grounds might be supposed, if mere supposition could in any case be made, for concealment and untruth on the subject of his family connections, which would not be inconsistent with the marriage of his Daughter to the *Zemindar*.

But it may be said a marriage with a Dancing-girl was incredible. The High Court has not found the fact that she was a Dancing-girl, and this foundation is wanting to their rejection of this evidence: they should first have been convinced of that. A marriage *de facto* then being established and supported by recognition by the deceased *Zemindar* of these children as legitimate, the very strongest evidence would be required to show that the law denied to these children their presumable legal *status*, on the ground of their Mother's incapacity to contract a marriage. The first point taken in this part of the case was that the incapacity to inherit had been virtually admitted by the acknowledgment of the first Defendant's title as heiress.

This point was relied on by the Judges of the High Court, and was strongly urged on the argument of this appeal. The certificate of heirship granted to the elder Widow under the circumstances and unopposed, was declared to be a tacit admission of absence of title in the Claimant in this suit. Considerable weight is due, *primâ facie*, to such a submission to an adverse title as the objection supposes, but the weight depends on the just belief that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting, a step injurious to it, which are ordinarily in the possession of each of either of two rival Claimants. One of the Plaintiffs in this case is an infant; the other is a Hindoo female. Against neither is it the practice of the Courts in *India* to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences. The contrary doctrine has been constantly affirmed and acted on, both in Indian Courts and before this Tribunal. In addition to this it must be observed that, if a supposed acquiescence in one place be contemporaneous nearly with a claim not abandoned, it amounts to little or nothing.

This case affords ground for the conclusion that the germ of this litigation existed in the Palace at the time of the *Zemindar's* death, and was never afterwards abandoned. The hypothesis that the claim sprung up, first, from the spite of the *Rajah's* Agent, is inconsistent with the concurrence in the family at the time of the *Rajah's* death. The Brother of the first Plaintiff was before and at the time of the death in the Palace. He sent for his Father, who came, and was present at the funeral ceremony. This summons and presence leads to the conclusion that in some mode the Lady's own family were acting on a supposed right to be included amongst the family connections. It is most improbable that the Daughter's Husband would admit her illegitimacy, and his assertion of his Wife's legitimacy would be virtually that of her infant Brother, whose maternal Grandfather and Uncle were present. The performance of the obsequies, by delegation, by the Son-in-law of the deceased *Zemindar*, whilst the second Defendant was at hand, who was the elder Widow's Nephew, and her Manager subsequently, leads to the same inference of a then existing claim by the child's friends. And if this claim were then being urged, though not acquiesced in, the hypothesis of its after origin is inadmissible. There is no evidence that it was ever intentionally abandoned; for temporary helplessness and want of funds may very easily be supposed to have been the causes of inaction and delay for a time. The excuses made for the choice of the Son-in-law are feeble and unconvincing. One relative might be, as alleged, unpunctual, but why should all be behind their time?

Can, then, this marriage *de facto* be supposed an idle, and in a Hindoo point of view, profane ceremony? Such, it is conceded on all sides, it would have been if the marriage was with the Dancing-girl, in the sense of the statements and issue.

Their Lordships entirely concur with the opinion of the Judge who tried the cause that the evidence on the part of the

Defendants to prove the Plaintiff a Dancing-girl at any time of her life fails. He has given his reasons for thinking her not a Dancing-girl, which it is unnecessary to repeat; they are corroborated by others of considerable weight, which at least balance the inference drawn from her name, age, and puberty. The whole Brother was a Witness. His caste is that of his Father. It is not to be presumed that his Father, the head of his village, would violate the ordinary feelings of people of his caste, and make a distinction between children of the same womb, leaving the Daughter to lead a licentious life, from which, according to the hypothesis, he had withdrawn her Mother. The children of this man's acknowledged and admitted marriage prove that the children of both connections were brought up together as one family. This theory, therefore, of her original *status* as a Dancing-girl of the Temple has formidable presumption opposed to it at its outset. The Judge has remarked on the conflicting character of the evidence given in support of it; on the non-production of the alleged Mother of the Plaintiff. Mr. *Benjamin* strengthened very materially the inference which the Judge drew therefrom, by referring to the abstract of the Defendants' evidence, and the unexplained omissions to produce evidence from the Temple. Their Lordships feel strongly that if a few years only before the suit, she had been an avowed public Dancing-girl attached to the Temple, clear and abundant evidence of that fact might have been given. Considerable reliance was placed in the argument before their Lordships on the evidence of *Abdool Khadur*, which will, therefore, be considered more particularly than that of the other Witnesses, who depose to the Plaintiff having been a Dancing-girl. This Witness was represented correctly as a Government Official, as one who *primâ facie* was entitled to credit as an independent and respectable person. He deposed to the Plaintiff having actually appeared and danced before him at *Tiruchuly* in the years 1847, 1848, and 1849. His story when subjected to a careful examination appears to their Lordships to bear a strong resemblance to those admissions which the wants of a case often produce. Being an Official his only connection with *Tiruchuly* was that he went on circuit there with his master. Nothing is shown to induce the belief that the Dancing-girls would more engage his attention or thoughts, than would be the case with ordinary Official persons, before whom such appearances took place to do them honour. It is not represented by the Witness that any special cause for distinguishing this particular Dancing-girl from the rest existed, that she was eminent above the others in beauty or grace, or that her after fortune fixed in his memory, what otherwise might have been a fleeting impression. Yet after the long interval of eighteen or nineteen years he is deposing to the name, parentage, and appearance of one individual Dancing-girl. This is unexplained. It may be that, if his evidence had been obtained in the careful manner in which evidence is ordinarily brought out in an English Court of Justice, these improbabilities might disappear, and his evidence prove to the supportable for the reasons urged to support it before their Lordships; but their Lordships have no assurance that the evidence is capable of being supported by these considerations, that her after fortune led to the remembrance of her, or that she otherwise possessed any superiority over her associates. The Witness proceeds to give another account of the matter, for he represents that he heard from *Shunmuga Pillai* that she was his Daughter. "He said he kept her Mother, and also gave me his Daughter's name." No explanation has been given, and none suggests itself to their Lordships' minds to account for a communication so utterly improbable. It is shown that *Shunmuga Pillai*, from his first intercourse with her, withdrawn the Mother from her former life, whatever it was, and had placed her in his House. Such a communication by a Hindoo headsman to a stranger and a *Mussulman* is opposed to all experience of native habits: when and how did it occur, what produced it? The Witness does not state, that *Shunmuga Pillai* was present and pointed her out: or otherwise account for that supposed fulness of description which

would identify the particular Dancing-girl. He deposes further to another conversation equally improbable and at variance with native usage; and, lastly, represents himself as casually producing this most important evidence, which, if true, would fix on the Plaintiff the *status* of a common Dancing-girl, in an interview with the *Vakeel* which had reference to another cause, one of his own, with nothing whatever to lead to a discovery of evidence so important to the *Vakeel*, and so little likely to have been then casually disclosed. Such testimony is very common, it is possible in a given case that it may be true, but it is of so dangerous a nature, and presents so few claims to be believed, that evidence of the kind is little regarded even though the Witness deposing to it be in no other way discredited than as one deposing to evidence on which a Court cannot rely.

The presumption against her imputed *status*, which the marriage of the Daughter affords, and the whole evidence leads their Lordships to affirm on this point, the conclusion of the Judge below, that the Plaintiff herself was not a Dancing-girl, and was not one incapacitated to contract marriage.

The observations of Mr. *Pochin* concerning the habits of native families from which the Judges of the High Court dissent, seem not to have been applied by him to the case of a Concubine treated with respect and attention little inferior to that of a Wife. He was dealing with a case presented to him of a Dancing-girl, and was applying his mind to the statements, issue, and evidence before him. Both Tribunals may be correct enough with respect to that which each was considering. The High Court, however, is inconsistent with itself in some respects, for whilst it entertained the gravest doubts, whether a marriage, if celebrated, would have had any validity, it regards the acts of the Plaintiff and her advisers as unaffected by the like uncertainty. The Judges suppose the Plaintiff must have known that if a marriage had taken place, her Son would be legitimate, a matter which certainly was involved in considerable uncertainty, which their judgment shows them to have shared.

The legal presumption in favour of a child born in his Father's House of a Mother lodged, and apparently treated as a Wife, treated as a legitimate child by his Father, and whose legitimacy is disputed after the Father's death, is one safe and proper to be made; and the opposing case should be put to strict proof. The legal presumption as to the *status* of Mother and Son accords with the actual finding of the Court below, which had before it very strong proof indeed of recognition and actual marriage. This decision was reversed on grounds which impute to many Witnesses *primâ facie*, not likely to have committed it, a very serious criminal conspiracy, subjecting all the parties to it to severe punishment. This imputation was one unwarranted by any proofs in the cause, and militated against the ordinary rule that crime is not to be presumed.

Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed, and that in lieu thereof, an order be made dismissing the appeal to that Court from the Decree of the *Zillah* Judge with costs, and that the Appellant have the costs of this appeal.

12th July, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Calcutta.

MUSSUMAT KUMEEROONISSA,* ... ... } *Appellant*,

versus

MIRZA SYUFFOOLLAH, ... *Respondent*.

Pleadings—Different case in appeal.

Judgment of the High Court dismissing a Plaintiff's suit confirmed on the evidence, in a case in

* From the judgment of Norman and Campbell, J.J., in Regular Appeal No. 303 of 1865, decided 9th April, 1866—5 W. R., Civil, p. 198.

which Plaintiff sought in the Lower Court to set up a deed of alleged sale from a Mahomedan *purdanusheen* Lady in favor of her niece, which position he abandoned before the High Court, where he suggested that although it was not good as a deed of sale, it would be good as a deed of bounty, the sale being colourable for the purpose of giving effect to a gift which otherwise it might be difficult to make under the Mahomedan Law.

THIS is an appeal from a judgment of the High Court which affirmed the judgment of the Principal *Sudder Ameen*, setting aside a deed which on the face of it purports to be a deed of sale for rupees 9,000 of property, which was alleged, and without contradiction, to be worth rupees 100,000. The alleged sale was by a Mahomedan lady, a *Purdanusheen*, during a very severe and painful illness, of which she died within a few days afterwards. The vendee was the niece of the lady, and the deed was prepared by the directions of the niece's husband. The Court below, upon hearing all the evidence, and upon looking at the nature of the transaction, the nature of the deed, and the value of the property, came to the conclusion that as a matter of business, treated as a sale, the deed under the circumstances could not stand. Then, when it came on appeal to the High Court, the ground upon which alone the case was pleaded and tried in the Court below, that is, that it was valid as a deed of sale, treating it as a matter of business, was wholly abandoned, and it was then suggested, as it has been suggested before us, that, although it was not good as a deed of pure sale, it would be good as a deed of bounty, the sale being colourable for the purpose of giving effect to a gift which otherwise it might be difficult to make under the Mahomedan Law. The High Court, after having heard an elaborate and learned argument from the same Counsel that we have heard to-day, and having heard all the points suggested there, came to a conclusion in which their Lordships entirely concur, namely, that there is no evidence sufficient to satisfy the burden of proof which lies upon every person who endeavours to sustain a deed of this kind as a deed of gift from a person *in extremis* where the thing has assumed on the face of it a totally different character, and where, in the first instance, it is pleaded and endeavoured to be supported as a deed of such different character.

The High Court having come to the conclusion that there was not sufficient to satisfy them, their Lordships are of the same opinion, and, therefore, will humbly recommend Her Majesty to dismiss this appeal with costs.

AN

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TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

IN THREE PARTS:

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PART I.—GENERAL.

ABATEMENT OF RENT.

See PUTNEE LEASE.

ABSCONDING PROPRIETOR.

As on the one hand the share of the absentee in joint family property may be confiscated and sold by Government even if he be not registered as proprietor, so on the other hand only his proper share in such property will be affected by his contumacy although his sole name appear in the Collector's Register.

A sale under Bengal Regulation XI. of 1796 does not sweep away all sub-tenures or incumbrances created by the absconding proprietor or those through whom he claims. [*Juggomohun Bukshee* v. *Roy Mothooranath Chowdry*,] ... 246

ACCOUNTS.

See ACCOUNTS, RE-OPENING OF.
— BYE-BIL-WUFFA.
— FORECLOSURE.
— INTEREST.
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ACCOUNTS, NATURE OF.

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ACCOUNTS, PRODUCTION OF.

See BYE-BIL-WUFFA.

ACCOUNTS, REFUSAL TO RENDER.

See PROFITS.

ACCOUNTS, RE-OPENING OF.

The Respondent's father being indebted to the Appellant's firm, did after examination of accounts accept the balance shewn therein to be correct and purchased the forbearance of the creditors by executing fresh bonds in their favor for such balance—and no fraud was established.

The firm having sued for the principal and interest on those Bonds, the Court below, with the assistance of experts, re-opened the accounts between the parties and gave a modified decree.

Held (reversing the decree of the Court below) that there was no ground for re-opening the accounts and reforming the contract of the Respondent's father [*Shah Koondun Lal* v. *Rajah Ameer Hossein Khan*,] 239

ACCOUNTS STATED.

See ACCOUNTS, RE-OPENING OF.

ACCOUNTABILITY.

See JOINT TENANTS, RECEIPTS BY.

ACCRETIONS.

1. Where property is wholly submerged by a river, any land forming afterwards on the site will, when the ownership of that site is proved to exist in the former owner, remain in him, and the accretions will not belong to the adjacent proprietor.

The decision in *Katteemonee Dossee* vs. *Ranee Monmohinee Dabee* (3 W. R., p. 51) is erroneous in not regarding the site of the increment. [*Felix Lopez* v. *Muddun Mohun Thakoor*, ... 594

2. The question whether land is formed by gradual accretion depends on evidence, but it would be an error in law to consider it as conclusive of that fact that the surface of the land all been changed, and the marks all obliterated, so that no old houses, or trees, or mounds, or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river.

Suing for new accretions after a former suit is not a splitting of action within the meaning of s. 7 of the Civil Procedure Code. [*Pahalwan Sing* v. *Maharajah Moheshur Buksh Sing*,] 683

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— EVIDENCE 9.

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ACT XIX. OF 1841.

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ACT XIX. OF 1843, SEC. 2.

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See REGISTRATION OF DEEDS.

ACT, INDIAN COMPANY'S, SEC. 174.

See COMPROMISE 2.

ACCUMULATIONS.

See H. L. STEP-MOTHER.

ADJUSTMENT OF ACCOUNTS.

Suit to recover the sum of Rupees 16,051-11-10, alleged to be due in respect of various sales of cotton belonging to the Plaintiff, and which the plaint alleged was sold by the Defendant as a *del credere* agent; and as to which liability plaint set forth that there had been an adjustment of accounts Defendant denied Plaintiff's allegations as to there being any *del credere* contract with the Plaintiff, or any adjustment of accounts. The Plaintiff, on settlement of issues, abandoned the cause of action as upon an account stated, and sought adjustment of the accounts from the Court, and did not sue upon the account stated; whereupon, besides the pleas to the merits, the Defendant pleaded limitation; it being admitted that the cause of action for the last item in the account had accrued more than three years, but, there were items in the account which had accrued within six years from the commencement of the suit. *Held*, that, the suit was a suit for breach of contract, and came within Clause 9 of Section 1 of Act XIV of 1859. [*Oukur Pershad Bustooree* v. *Mussumat Fooloomaree Bebee*,] ... 703

See BYE BIL-WUFFA.

ADMISSION.

1. *Held* that the depositions of the Appellant's father wherein the Respondent was described as the adopted son of *Shanmuga Pillai* amounted to a complete admission of the whole title of the Respondent, both in fact and in law; for if there were no adoption at all, or if the actual adoption were for any reason legally invalid, he would not be entitled to that designation. [*Ramalinga Pillai* v. *Sadasiva Pillai*,] 51

2. An admission by a *jaghiredar* in a suit brought by Government to assess the lands that the lands were comprised in a *zemindary*, is evidence of that fact in a suit by the *Zemindar* to resume those lands. [*Alexander John Forbes* v. *Meer Mahomed Tuquee*,] 588

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See EVIDENCE 11.
— JOINT TENANTS, RECEIPTS BY.
— PRINCIPAL & AGENT.

AGREEMENT.

Where the Counsel for the Appellant had agreed, at the hearing of the case on appeal before the

High Court, that, if the High Court would restrict its judgment to a finding on one of several issues, his client would not appeal to *England ; Held* that that agreement was binding and that the appeal could not be heard.

Where an appeal is preferred contrary to an agreement not to appeal, application to stay the proceedings should be made before the case is prepared for hearing.

A fixed sum was given to each Respondent *nomine expensarum*, in lieu of costs. [*Moonshee Ameer Ali* v. *Maharanee Inderjeet Singh,*] ... 731

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See M. L. LEGITIMACY.

APPARENT BONA FIDE TITLE.

See SALE UNDER DECREE.

APPEAL.

1. It is open to a party on an appeal from a final decree to question a prior interlocutory order, without separately appealing against the latter. *Maharajah Moheshur Singh* v. *The Bengal Government* (7 Moore's Ind. App., p. 302) followed. [*Sheonath* alias *Burray Kaka* vs. *Ramnath* alias *Chotay Kaka,*] 134

2. It is not necessary to appeal from an Interlocutory Order which does not dispose of the suit. Such order can be impeached on appeal from the final decree.

Maharajah Moheshur Sing v. *The Bengal Government* (7 M. I. A., p. 283, 1 P. C. J., p. 643) and *Sheonath* v. *Ramnath* (10 M. I. A., p. 413, 2 P. C. J., p. 134) followed. [*Alexander John Forbes* v. *Amceroonissa Begum,*] ... 153

3 Reception of documents under section 39, Act VIII. of 1859, by the Court of first instance, cannot be a ground of appeal. [*Goshain Tota Ram* v. *Rajah Ruckinee Bullub,*] ... 487

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APPOINTMENT OF ARBITRATORS.

See ARBITRATION 1.

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See NATIVE CHRISTIAN.

ARBITRATION.

1. Under the Civil Procedure Code, (Act VIII. of 1859), secs. 312, 314 and the law priorly in force in *Oudh*, the *Punjab* Code, Part II., sec 2, cl. 15, no Civil Court can refer a case to Arbitrators nominated by itself against the protest of one of the parties.

The parties must either name the Arbitrators or consent to the nomination of them by the Court.

The irregularity of the appointment was neither cured by the fact that the parties had prior to the suit united to make an abortive agreement to refer the matters then in dispute between them to the same Arbitrators ; nor by the fact that the Appellant failing in repeated protests and appeals against such appointment, defended his case before the Arbitrators. [*Sheonath* alias *Burray Kaka* vs. *Ramnath* alias *Chotay Kaka,* 134

2. P. N., and D. M. and Co., two partners, agreed to the arbitration of certain persons, subject to the decision of an Umpire on the points where they differed, by an agreement in writing with a memorandum at the foot which contained these words—" We the undersigned, P. N. and D. M. and Co., have executed this power under and in conformity with the provisions of sec. 327 of Act VIII. of 1859 ; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within-mentioned duly empowered arbitrators may give under the aforesaid Act." The arbitrators agreed in certain points and expressed their decisions thereon in two intermediate awards. Shortly after the second intermediate

award, the Appellant wrote to the arbitrators to make their award in ten days, or, if they were unable to do so, to appoint an umpire, which was not done. The Appellant thereupon wanted to withdraw from the arbitrators and cancel the award; while the Civil Court ordered the submission to be filed under sec. 326 of Act VIII. of 1859, at the instance of the Respondent:—*Held*, on appeal,

I. That, upon proper construction of the secs. of the Procedure Code relating to the subject, the Civil Court had jurisdiction under sec. 326 to direct the submission to arbitration to be filed:

II. That although sec. 326 was not expressly referred to in the submission to arbitration, still that submission was under and subject to the sections contained in the Code relative to that subject, that the memorandum at the foot was introduced for that purpose; that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them, that it was to be subject to the Act; and that the special notice of sec. 327 was introduced only *ex majori cautela*:

III. That when persons have agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause, and that a mere revocation of the authority is not permitted; and

IV. That, considering the prevailing tendency of the Indian and the English Legislature to put an end to the distinction between the agreement to refer and the authority thereby conferred, it was not in the power of the Appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he has concurred.

The Code of Civil Procedure in *India* must be construed with reference to the constitution of the Indian Courts, and the abiding direction to them to proceed in all cases according to equity and good conscience. [*Pestonjee Nusserwanjee* vs. *Manockjee & Co.*,] 390

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ATTACHMENT.

Under section 205 of the Civil Procedure Code, sums to be attached must be not inchoate but existing and definite, and although liquidated demands in their nature definite and certain though *sub lite* and unproved may be seized, a mere expectancy or a mere right of suit cannot be attached: the attachment must operate at the time of attachment and not be anticipatory so as to fasten on some future state of property in which the suit may result [*Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad & Ladlee Pershad*,] ... 656

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— TENURE, ANCIENT.

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The Collector's order for mutation of names in 1843 held not to be an award of the nature contemplated by Act XIII. of 1848. The operation of that Act is limited to awards made by the

Collectors under Regulations VII. of 1822, IX. of 1825, and IX. of 1833. [*Jowala Buksh* v. *Dharam Singh*,] 189

See BOUNDARY DISPUTE.
— THAKBAST AWARD.

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See JUDGMENT IN REM.
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BENAMEE PURCHASE.

1. The habit of holding land *benamee* is inveterate in *India*; but that would not justify the Court in making every presumption against apparent ownership. [*Moonshee Buzloor Ruheem* v *Shumsoonnissa Begum*.] 259

2. In cases where the question is whether property bought and held in the name of another than the party claiming as the real purchaser is the property of that other or merely bought and held in his name (*benamee*) for the claimant, the criterion is from what source the purchase money came; the presumption is that a purchase made with the money of *A* in the name of *B* is for the benefit of *A*; and where the purchase is by a father whether Hindu or Mahomedan, in the name of his son, there is no presumption of an advancement in favour of that son.

Upon the facts, the decision of the Court below reversed. [*Moulvie Sayyud Uzhur Ali* v. *Mussumat Bibee Ultuf Fatima*,] 522

3. In determining the right to property seized in execution, the Court must not declare a person claiming as purchaser to be a *benámidár* for the debtor upon suspicion merely, but its decision must rest upon legal grounds established by legal testimony. [*Faez Buksh Chowdry* v. *Fukeeroodeen Mahomed*,] 738

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BOND.

Where payment was made upon a bond, the amount paid being less than the interest due, *held* the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree. [*Luchmeswar Singh* v. *Syed Luft Ali Khan*,] ... 700

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BOUNDARY DISPUTE.

In a question of boundary the Judicial Committee, the Court of last resort, is extremely reluctant to reverse the judgment of an Indian Court, and will not do so, unless they are upon the facts and evidence, satisfied that the decision of the Court below was clearly wrong.

There is a strong presumption against a Plaintiff who seek to set aside an Award made by Co-

vernment Officers on a revenue survey, after full local inquiry, for the purpose of obtaining a rectification of the boundaries between two estates, and the *onus* of proof that the Award was wrong lies on the party impeaching it. [*Rajah Leelanund Singh* v. *Rajah Mohendernarayun Singh*,] 482

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See LIMITATION 2.

BYE-BIL-WUFFA.

The law of foreclosure as established by the Regulations and the practice of the Courts in Bengal stated.

Till 1806, the rights of the holder of a *Bye-bil-wuffa* (Mortgage by Conditional Sale) were enforceable according to the strict terms of the contract. The Mortgagor was bound to tender the amount due or to pay it into Court within the stipulated period for the repayment of the loan.

Changes made by Regulation XVII. of 1806; after which enactment the general effect of the Regulations was this :—If anything be due on the mortgage and the Mortgagor makes an insufficient deposit, and *a fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The Mortgagee however must, in order to complete his title, bring a regular suit to recover possession if he is out of possession or to obtain a declaration of his absolute title if he is in possession. In that suit the Mortgagor may contest on sufficient grounds the validity of the conditional sale or the regularity of the foreclosure proceedings taken under the Regulation to make it absolute. He may also allege and prove that nothing is due, or that he has made a sufficient deposit. But the issue in so far as the right to redeem is concerned, will be whether any thing at the end of the year of grace remained due to the Mortgagee, and if so whether the necessary deposit had been then made. If that be found against the Mortgagor the right of redemption is gone.

Held, that although the Mortgagee's suit was for possession and mesne profits, the finding that he was already in possession under a *Benami* lease was not sufficient ground for its dismissal. The objection as to the form of the suit had not been clearly raised in the pleadings and if raised, the *Sudder* Court had not considered it to be valid. The real object of the Mortgagee's suit being to perfect his title as absolute owner of the property, there was no reason to withhold that relief, if he be otherwise entitled to it; because, under an erroneous view of the legal effect of the lease, the prayer in the plaint was in a somewhat different form and for something in addition (mesne profits) to which Plaintiff was not entitled.

Under sec. 8, Regulation XVII. of 1806 or Circular Order No. 37 of the 22nd July, 1813, it is not necessary that the private demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a Mortgagee in possession should be produced in the foreclosure proceedings.

Held, upon the construction of sec. 11, *Beng.* Regulation XV. of 1793 that the production of accounts by a Mortgagee in possession seeking to foreclose cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the admitted balance.

A Mortgagee in possession is bound to produce accounts;

1st, When the Mortgagor has deposited the principal sum, leaving the question of interest to be settled by an adjustment of accounts.

2ndly, When the Mortgagor has deposited all that he admits, or alleges, to be due; and

3rdly, When he pleads and undertakes to prove that the entire debt, principal and interest has been liquidated by the usufruct of the mortgaged property.

Beng. S. D. A. D. for 1852, pp. 678, 1063, distinguished S. D. A. for 1859, p. 492 approved. [*Alexander John Forbes* v. *Ameeroonissa Begum*,] 153

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CHUR LANDS.

In a dispute as to the position of *chur* lands, where the change of the course of the river throw, doubt upon their position, the judgment of the Court of first instance, given after local investigation, was upheld against the decision of the High Court, founded on inspection of the maps and on the arguments adduced before it. [*Ranee Sarut Soondree Debia* v. *Baboo Prosonno Coomar Tagore*,] 632

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COHABITATION.

See M. L. MARRIAGE.

COGNATES.

See H. L. MITAKSHARA.

COLLATERAL HEIRS.

See H. L. STRIDHUN.

COLLECTOR.

See ABSCONDING PROPRIETOR.
— ENAM.
— JURISDICTION.

COLONY.

See SUICIDE.

COMMISSIONER.

See GOVERNMENT 2.
— JURISDICTION 1.

COMPANY'S PAPER.

See PARTNERSHIP 1.

CONTRACT.

See CONTRACT OF SALE.
— EVIDENCE 10.
— MORTGAGE 3.

COMPROMISE.

Two brothers executed and filed a deed of compromise, dividing between them the family property, and a decree was passed in terms thereof. Under this decree, the elder was to hold possession of certain lands, the rents of which were to go to perform the worship of the family idol. The younger, however, kept the elder out of possession of the lands, who therefore performed the worship at his own charges, and then took out execution for possession and mesne profits, in order to recoup his own expenditure on the family idols. The younger also took out execution, and objected that his brother had not performed his trust as family *shevait*, so that he had been compelled to perform ceremonies at his own expense. His objection was overruled. The elder brother having died without executing his decree, his widow applied to execute it for the amount of the mesne profits due under it. *Held*, on the appeal of the younger in his own case, that the non-performance of ceremonies by his brother gave him no ground of complaint, unless he could show that such failure was not caused by any default on his part *Held*, in the other case, that the widow was entitled to execute the decree for mesne pro-

fits of the idol lands, without showing that the ceremonies had been performed by her husband out of his own private funds. [*Radha Jeebun Moostuffy* v. *Taramonee Dossee*,] ... 457

2. Under section 174 of the Indian Companies' Act, the Court has power to sanction compromises of calls, debts, and liabilities, before the list of Contributors has been settled or the competence of the Shareholders has been ascertained.

The Privy Council will be reluctant to interfere with the discretion of Courts having jurisdiction to sanction a compromise by the liquidators of a Company winding-up under section 174 of the Indian Companies' Act, where all the facts have been placed before the Court in *India*, and there is no reason to suppose that the proceedings for a compromise have been tainted with fraud.

Ex parte Totty distinguished. [*The Bank of Hindustan, China and Japan, Limited in Liquidation*, v. *The Eastern Financial Association, Limited, in Liquidation*]. 476

See DECREE ON COMPROMISE.
— TITLE 1.

CONCUBINE.

See M. L. MARRIAGE.
— MORTGAGE 4.

CONCURRENT JUDGMENT.

See PRACTICE 16, 17, 19, 26, 30, 33, 34, 35, 36.

CONDUCT.

See GOVERNMENT 2.
— H. L. PARTITION.
— M. L. MARRIAGE.

CONFISCATION.

Plaintiff was the widow and heir of a deceased *Oude* nobleman, the representative of the cadet branch, as the *Rajah* of *Bhinga* was the representative of the elder branch, of a great *Talook*. The younger branch had their separate estate. Many years ago in the then state of things in *Oude* it was thought advisable that both estates should be, as to their relations with the *Oude* Government united in one great *Talookdary*, the head of the elder branch representing the whole, the younger branch, however, continuing in undisturbed and absolute possession, as the proprietor, of its own villages, and paying only its proportion of the *jumma* assessed on the whole. After the annexation of *Oude* by the British power, there being no longer, as he thought the motive for covering himself with the name and protection of the *Rajah* of *Bhinga*, the husband of the Appellant was minded to apply for a distinct settlement with himself. The *Rajah*, however, wrote to dissuade him from this step in a letter in which, while desiring to retain the nominal *Talookdary* of the whole, he acknowledged in the clearest terms the right of his relation, and pledged himself that the possession of the property by the latter should be respected and safe. Plaintiff's husband died, and the *Rajah* hearing that the widow, the Plaintiff, was of the same mind as her husband, and desirous of placing herself immediately under the British *Sircar*, wrote her a letter similar to the one he had formerly addressed to her husband. The summary or provisional settlement was made with the *Rajah*, but before he obtained his regular settlement, and the *sunnud* which would have been his formal grant, he came under the grave displeasure of the authorities, and an order went forth confiscating half his estate. The *Rajah* concealed from Government the real ownership of the Appellant's villages, and contrived that they should be taken to satisfy in part the order of confiscation, against which the Appellant remonstrated and eventually brought a suit for the recovery of her property. *Held*, that the Appellant was the acknowledged *centui qui trust* of the registered *Talookdar* who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered. That it would be a scandal to any legislation if it arbitrarily and without any assignable reason swept away such rights. That the lady was clearly the equitable owner, and that the decree of confiscation against her trustee could on no principle of Law or Equity, or good conscience, be made to affect her, and certainly could not justify a sentence which in effect made her the sufferer for his offence. [*Thukrain Sookraj Koowar* v. *Oude Government*], ... 705

See ABSCONDING PROPRIETOR.
— CONSTRUCTION 3.

CONSTRUCTION.

1. Sec. 5 read with the exception in sec. 7, *Beng.* Reg. XLIV., 1793, showed that what was meant by sec. 5, was not the destruction of tenure, but the increase of rent, under certain specified and equitable limitations.

Quære.—Whether sec. 5, *Beng.* Reg. XLIV., 1793, is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the *Zemindary*, which passed to subsequent purchasers. [*Rance Surnomoyee* v. *Maharajah Sutees Chunder Roy, Bahadoor*,] ... 60

2. The words "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding" in the latter part of sec. 2, Act XIX of 1843, apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift. The enactment was plainly intended to be general and the words in question being words of reference and the terms used being general and comprehensive, there was no reason for confining their operation to only one branch of the enactment. *Held* further that in the proviso that "the authen-

ticity of the deed be established to the satisfaction of the Court" pointed not only to the exclusion of forged but also of fraudulent deeds from the benefit of priority under the Act. [*Sreenath Bhattacharjee* v. *Ramcomul Gungopadhya*,] 121

3 *Bengal* Reg. XI. of 1796, sces. 4, 6 do not authorise Government to confiscate the entire interest of all the members of a joint Hindu family in a *Zemindary* or *Sudder* farm, for the contumacy of one absconding member, although he may be the registered proprietor in the Collector's Register. [*Juggomohun Bukshee* v. *Roy Mothooranath Chowdhry*,] 246

4. Regulation XV. of 1793, sections 8 and 9, forbids the maintenance of any suit arising out of an usurious transaction. [*Thomas Alexander Wise* v. *Juggobundhoo Bose*,] 459

5. The Court was not satisfied that the 20th and 21st Sections of Act No. I. of 1845, raised a presumption fatal to the case of *Benamee* purchase set up by the Appellant in a suit wherein one of the points raised was, whether the lands were purchased by a Hindoo female out of monies constituting her *Stridhun*, or peculiar estate, or were held by her *Benamee* for her husband. [*Gereesh Chunder Lahoree* v. *Mussumat Bhuggobutty Dabia*,] 579

See ARBITRATION 2.
— BYE-BIL-WUFFA.
— DISQUALIFIED PROPRIETOR.
— ENAM.
— GOVERNMENT 1.
— GUARDIAN.
— H. L. ADOPTION 1, 5.
— FAMILY ARRANGEMENT.
— JOINT UNDIVIDED FAMILY 1.
— MOHUNT.
— SHEBAIT.
— WIDOW 1.
— WILL 1.
— M. L. DOWER 1 & 2.
— MORTGAGE 3.
— POTTAH 1.

CONTRACT OF SALE.

It is very questionable in any case whether the effect of the execution of a Bill of sale by a Hindu vendor is to pass an estate irrespectively of the actual delivery of possession. Where the vendor sells an estate, of which he is not in possession, in consideration of advances to enable him to sue for its recovery, it is not open to the purchaser, after failing to complete his part of the contract, to claim specific performance and delivery of the recovered estate, on tendering the balance of the purchase-money. [*Rajah Sahib Perhlad Sein* v. *Maharajah Rajendar Kishore Singh*,] ... 430

CO-PARTNERS.

See ENAM.
— EQUITY OF REDEMPTION.

CORPUS, DOMINION OVER.

See M. L. GIFT.

CORPUS, GIFT OVER OF.

See WILL, CONSTRUCTION OF.

CORPUS, PROFITS.

See H. L. WILL 1.

COSTS.

— *See* JURISDICTION 1.
— LEGITIMACY.
— M L. LEGITIMACY.

COURT OF WARDS.

See DISQUALIFIED PROPRIETOR.

CRITERIA.

See BENAMEE PURCHASE 2.
— EQUITY OF REDEMPTION.

CROWN.

See H. L. MITACSHARA.
— MORTGAGE 2.

CROWN CLAIMING BY ESCHEAT.

See ONUS PROBANDI.

DAMAGES, SUIT FOR.

In a suit to recover damages caused by the Defendants' plundering the house of the Plaintiff, the Court of first instance passed, upon the evidence of two witnesses, a decree in favor of the Plaintiff. On appeal by some of the Defendants, the Judges of the *Sudder Dewanny Adawlut* of *Agra* held that the fact of plunder was not proved, and dismissed the suit as against all the Defendants.

Held by the Privy Council that as the Defendants did not come forward to exculpate themselves by their own evidence and as the evidence in support of the charge was unopposed, the decree of the Court of first instance could not be set aside.

Held, that in a suit for compensation for damage done to property, each and every one of the persons was equally responsible to make compensation for the loss sustained, when he happened to be a part of the common assembly and executed a common purpose, and not in proportion to his share of the plunder received or of the damage done by him. Coercion to form a member of the assembly or bear a part in the damage is no excuse

from responsibility in a civil suit for compensation. [*Ganesh Sing* v. *Ram Rajah*,] 505

See RES-JUDICATA 2.
— TORT.

DEBT.

See LIMITATION 11.

DEBTS OF NATIVE PRINCES.

See EVIDENCE 1.

DEATH-BED DISPOSITION.

When the disposition is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeds, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed, and expresses his real intentions. [*Gereesh Chunder Lahoree* v. *Mussumat Bhuggobutty Dabia*. ... 579

DECREE.

See COMPROMISE 1.
— DECREE, FORM OF.
— EXECUTION PURCHASER.
— GOVERNMENT 2.

DECREE ON COMPROMISE.

The manager of the Court of Wards effected a compromise with claimants on the estate ; a decree was passed on the basis of that compromise, but before the parties wished the decree to be made ; in the decree leave was reversed to apply for a review if the compromise was not sanctioned by the Commissioner, and was prejudicial to the parties. The compromise was sanctioned by the Commissioner, but afterwards the manager found that he had been deceived by his servants, and that the claim had been allowed erroneously. *Held*, that the Court having granted a review, and the claim being proved to be exaggerated, a decree was properly given for the true amount. [*Lalgi Sahu* v. *The Collector of Tirhoot*,] 643

DECREE, FORM OF.

Where a woman is in possession of her husband's estate as security for unpaid dower, the proper decree, in a suit against her for possession by the heir, is a decree of possession, subject to the amount due with a direction for an account as to mense profits received by her. [*Nawab Mahomed Ameenoodeen Khan*, v. *Moozuffur Khan*,] 585

See APPEAL 2.
— FORGED DOCUMENT.

DECENNIAL SETTLEMENT.

See ENHANCEMENT OF RENT.

DEED OF MORTGAGE.

See ESTOPPEL.

DELIVERY OF POSSESSION.

See CONTRACT OF SALE.
— SALE UNDER DECREE.

DEVISE.

See H. L. ADOPTION 1.
— WILL, CONSTRUCTION OF.

DILUVION.

See ACCRETION.
— CHUR LANDS.
— EVIDENCE 9.

DISABILITIES.

The pendency of an appeal to *England* does not put the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties. [*Rajah Sahib Perhlad Sein* v. *Maharajah Rajendar Kishore Singh*,] 430

DISPOSSESSION.

See LIMITATION 4.

DISQUALIFIED PROPRIETOR.

R., executed a Bond before she succeeded to a *Talook* in the custody of the Court of Wards, under Regulation LII. of 1803, as the property of a disqualified female *M.* After *R.'s* succession, the *Talook* continued to be under the Court of Wards until a suit was instituted against *R.*, for the recovery of the money due on the Bond :—*Held*, recovering the decisions of the Courts below, that *R.*, was not by reason of that possession, a disqualified female and incapable of binding herself by contract ; that in order to give effect to such a disqualification, the Regulations must be strictly pursued ; and that the provisions of the Regulation for reporting a female disqualified, were not mere forms, but necessary preliminaries to the disqualification of a female, so as to invalidate an alienation even of the property under charge of the Court of Wards by her.

Regulation LII. of 1803 is little more than an extension of Bengal Regulation X. of 1793 to the N. W. Provinces.

The case of *Jan Khatun* v. *Khwaja Ali Mullah* (5 *Bengal Sudder Dewanny Adawlut* Reports, 240) followed. *Mohammud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer,* ... 320

DOCUMENT.

The sanction of the Court receiving documents clears the defect of their not having been tendered with the plaint. [*Gosain Totaram* v. *Rajah Ruckince Bullub,*] 487

DOMICILE.

See WILL, CONSTRUCTION OF.

DOWER.

See MAHOMEDAN LAW.

DURESS.

Where one seeks to set aside a deed on account of duress, and such duress does not amount to personal duress, but merely to pressure by threats as of injury to property, the Plaintiff must offer to restore any benefit accruing to him under the deed. [*Charles Seton Guthrie* v. *Abdool Mozuffer,*] 660

See H. L. ADOPTION 3.

DURESS.

A *Rajinamah* to compromise a suit instituted by the Appellant against the Respondent, and an instrument called an "Instalment Bond" being a sale contract of one-fourth share of a certain *Talook*, were declared null and void as having been obtained by fraud and intimidation practised on the Respondent by the Appellant, who was then the chief manager of the 'Agent's Court at Ganjam;' the Appellant's brother, too, being a *Moonshee* to one of the Assistant Agents, and the instruments having been executed while the Respondent was under arrest and in custody.

Held that, in the circumstances of the case, *Arzees* or Memorials presented to the Government by the Respondent complaining of the acts of violence and threats by the Appellant, before the execution of the instruments in dispute, though no proof of the facts alleged in them, were, even in the absence of direct evidence of their being even communicated to the Appellant, sufficient evidence of the influence of the feelings by which the Respondent had been induced to grant the instruments. [*Pakala Balakristnama Patrulu* v. *Sree Naraina Mardaraz Devu,*] ... 66

EAST INDIANS.

See NATIVE CHRISTIANS.

ENAM.

Suit by a co-sharer in the income of a charitable foundation for *Brahmins*, in *Enam*, held in severalty, to recover from the Government Collector the amount of quit-rent charged by him in excess of a Permanent *Pottah* on his shares. *Held*, that the default of his co-sharers in payment of their quit-rents, did not authorize the Collector in re-assessing the Plaintiff's shares at an increased rent.

Held, further, that the Court had jurisdiction to entertain the suit, as *Mad.* Reg. IV. of 1831, applies only to suits brought to try the validity of grants emanating from, or confirmed, or affected by, the direct act of the Governor in Council. [*H. A. Brett, Collector of Salem* v. *Ellaiya,*] 492

ENDOWMENT.

See H. L. SHEBAIT.

ENHANCEMENT OF RENT.

1. Suit for enhancement of rent by a *Zemindar* against a *Talookdar* holding as a mesne tenant a portion of the *Zemindary*, in which the Appellant Defendant, contended that she was not merely a *Mouroosi* tenant, *i. e.*, one holding by hereditary tenure, but that she held at a fixed rent (*i. e.*, was *Istemrardar*), and pleaded protection from the enhancement upon the facts that the tenure had been created by grant prior to the commencement of the present century and descended successively to five tenants at a fixed rent, dismissed. [*Ranee Surnomoyee* v. *Suttees Chunder Roy, Bahadoor,*] 60

2 A claim to enhance rent assumes the existence of some right of occupation in the Defendants (the actual tenants) and of a right to raise the rent previously paid in the Plaintiff (the *Zemindar.*) [*Baboo Dhunput Sing* v. *Gooman Sing,*] 309

3. A suit for enhancement implies such a privity of title or tenure existing between the parties, that a claim to some rent is legally inferrible from it. The decision in the case of *Ranee Surnomoyee* v. *Maharajah Suttees Chunder Roy Bahadoor*, (10 Moore's I. A., p. 123, *Ante*, p. 60) commented on, explained and reiterated. [*Rajah Suttosurrun Ghosal v. Tareeni Chunder Ghose,*] ... 420

4. In a suit for enhancement of rent, *Held*, that in order to bring a *Talook* within the scope of sec. 51, Reg. VIII. of 1793, it was sufficient to show that the tenure existed, and was capable of being registered at the time of the decennial settlement, the fact of actual registration not being an essential element in the formation of a *Tolook*.

Held, further, that the effect of proof of the ex-

istence of such a *Talook* at the time of the decennial settlement is sufficient to throw the *onus* on the Plaintiff to prove that it was held at a variable rent.

Decision of the Court below reversed. [*Ramasoondary Dassyah* v. *Radhika Chowdharian*,] 524

See SALE FOR ARREARS OF REVENUE.
— TENURE, ANCIENT.
— TENURE, TALOOKDARY, CANCELLATION OF.

EQUITY OF REDEMPTION, PURCHASER OF.

In a suit brought by the purchasers of the equity of redemption of the Mortgagor in a certain village, against the Appellant, the Mortgagee, and others the purchasers of the same Mortgagor's interest in certain other villages, all of which, and certain others purchased by the Appellant, were comprised in the same mortgage deed, and in which suit the Appellant contended that the whole proprietary right and interest of the Mortgagor had vested in him; such purchasers were allowed to redeem and recover possession of their village, on payment of the proportion of the mortgage debt attributable to such village.

The proportion of the debt chargeable on such villages ought to vary according to the actual value of the village; and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value.

Neither the rule nor the reason for the rule, that, when a creditor sues for his principal and interest, (the latter being equal or more than equal at the time of the commencement of the suit to the amount of the principal,) he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtors resistance of the demand, seem to apply to a case in which a Mortgagee in possession is, not a party suing for the money, but the party resisting by every means in his power a claim for redemption, and the final settlement of the account. [*Nawab Azimat Ali Khan* v. *Jowahir Singh*,] ... 573

EQUITY OF REDEMPTION, SURRENDER OF.

A member of a joint Hindu family granted a usufructuary mortgage: he subsequently, without the knowledge of the co-partners, released the equity of redemption: on hearing of this the co-partners contested the validity of the release: *Held*, that the parties claiming from the person to whom the release was made took, so far as the co-partners were concerned, a title only as mortgagees. [*Radhanath Dass* v. *Gisborne & Co.*] 636

See LIMITATION 13.

ESCHEAT.

See MORTGAGE.
— ONUS PROBANDI.

ESTOPPEL

Held, that a deed of conditional sale and mortgage created no estoppel. That it was the case of a common mortgage in which the Defendant says the money was never advanced. That it is open to a Mortgagor to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to nominal sum or nothing, and, that being so, and the instrument being relied on by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, that there was nothing whatever to prevent the Defendant from showing the real truth of the transaction.

It is clear that a pleading by two Defendants against the suit of a certain Plaintiff never can amount to an estoppel as between them and another Plaintiff in a different suit. [*Ram Surun Singh* v. *Mussumat Pran Peary*,] ... 620

See H. L. PARTITION, DEED OF, BINDING ON THE PARTIES THERETO.
— PRACTICE 2.
— RES-JUDICATA 3.

EVIDENCE.

1. In a scheme involving the payment out of the Public Treasury, of the debts of a Native Prince, who lived and died in a state of chronic insolvency, strict proof would be required of claimants, as under the circumstances the temptation is greater and the risks of detection smaller than in the ordinary case of claims against the representatives of a deceased person. [*Ghoolam Moortoozah Khan Bahadoor* v. *The Government*, ... 23

2. Where there is insufficient evidence of a fact, it is no objection to the proof of it, that more evidence might have been adduced. [*Ramalinga Pillai* v. *Sadasiva Pillai*,] 51

3. When false witnesses and forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself; but that if there is other evidence not depending in any degree for its credibility or weight on such witnesses or document, and a just case foolish and wickedly attempted to be supported by false evidence, the misconduct must not mislead them in the advice their Lordships will have to tender to Her Majesty. *Ranee Surnomoyee* v. *Maharajah Suttees Chunder Roy, Bahadoor*,] ... 60

4. If the evidence which is not susceptible of being forged is *primâ facie* strongly in favour of a party the mere production of a forged document by him in support of his own title, will not justify the transfer of a property of which he and those through whom he claims have been in possession at the date of suit for 44 years, to another who has not established any right to it himself. [*Sevvaji Vijaya Raghoonadha Baloji Kristnan Gopalar* v. *Chinna Nayana Chetti*,] 88

5. The power of the High Court under the

Civil Procedure Code (Act VIII. of 1859, sec. 355) to examine new witnesses *ex mero motu*, should be exercised very sparingly, and the reasons for its exercise should always be recorded on the proceedings. [*Sreeman Chunder Dey* v. *Gopal Chunder Chuckerbutty*, ... 215

6. An admission in a petition by a *purdanisheen* woman is of little importance unless it be shewn, how or by whom the proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts.

The omission of *S*, to support her claim by her own testimony might weaken, but could not destroy, her case and was quite insufficient to affect the conclusions in her favour which arose from the other facts and circumstances in the case. [*Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* and *Jodonath Bose* v. *Shumsoonnissa Begum*,] 2 9

7. A Plaintiff relying on an alleged *Mukhtarnama* executed by a *purdanisheen* widow, should establish the instrument by strict legal proof of its execution.

The absence of such proof is not compensated by any legitimate conclusions to be drawn from other facts in the case. [*Sheetul Pershad* v. *Mussumat Doolhin Badam Konwar*,] ... 281

8. The provisions of Act VIII. of 1859, sec. 355, requiring the appellate Court to record its reasons for admitting fresh evidence, though not a condition precedent to the reception of such evidence, ought yet to be strictly complied with.

Gardiner v. *Fell* (1 Jac. and Wal. 22) and *Freeman* v. *Fairlie* (1 M. I. A., 209 and 306 ; 1 P. C. J., 110 and 123) cited and followed. [*Gunga Govind Mundul* v. *The Collector of the Twenty-four Pergunnahs*,] 284

9. The reformation of land in the bed of a navigable river is not *primâ facie* to be ascribed to a loss from any particular riparian estate, nor is the land which has been removed from an estate by sudden avulsion reclaimable, unless the circumstances supply evidence of identity. A title by accretion is not established by mere proof of general inclusive boundaries at a time preceding the formation of the *chur*, but there must be proof of the nucleus of accretion. The land gained will follow the title of the particular land forming the nucleus.

The cultivation of *chur* lands, like that of waste or jungle lands, carries no *primâ facie* character of usurpation or wrong ; and the claimant against a purchaser, *bonâ fide* and without notice, in possession, must strictly prove his title. [*Sree Eckowrie Sing* v. *Heeralal Seal*,] 399

10. It is the established practice of the Courts in *India*, in cases of contract, to require satisfactory proof that consideration has been actually received, according to the terms of the contract, and a contract under seal does not of itself, in *India*, import that there was a sufficient consideration for the agreement.

A Plaintiff, however, suing to set aside a security admittedly executed by himself, must make out a good *primâ facie* case before the Defendants can be called on to prove consideration.

A *Zemindar* has, as such, a *primâ facie* right to the gross collections from all the *mauzas* within his *zemindary*. It is for parties setting up an intermediate tenure to prove their grant. [*Rajah Sahib Perhlad Sein*, v. *Maharajah Rajendar Kishore Sing*], ... 430

11. A. & Co. and B. & Co., entered into a joint adventure in opium. A. & Co were to send money to various places to be handed to the agents, who were to buy and sell. They now claimed against B. & Co. for money alleged to have been so sent after giving credit for sums received. The proof of the arrival of the money at A. & Co.'s places of business, was supported by entries in A. & Co's books at each place, but there was no proof of payment to the agents save such entries. As to remittances to the other places, the only evidence was the books of A. & Co., at the place of despatch. *Held*, that there was no evidence as to the latter claims ; and as to the former although the evidence appeared insufficient, the case would not be remanded, as the Appellants, independently of these claims, had a balance against them. [*Seth Lukhmee Chund Rao Bahadoor*, v. *Seth Indra Mull*], ... 564

12. Where *bonâ fide* creditors of the ostensible owner of property are claimants on the property, the Court will require strict proof on the part of any one seeking to have it declared that they held it only *benamee*. [*Nawab Azimut Ali Khan*, v. *Hurdwaree Mull*,] 571

13. Where evidence, such as hearsay, is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding.

Disapproval was expressed by their Lordships of the reception by the lower Court of evidence which ought not to have been admitted. [*Mohur Sing*, v. *Ghuribz*,] 616

14. The *Sudder Ameen* having held an adoption proved, the Principal *Sudder Ameen*, on appeal, reversed that decision on the facts. The case came before the High Court on special appeal and the decision then given was appealed to *England*, and special leave was given by Her Majesty to appeal against the decision of the Principal *Sudder Ameen*. The decision of the High Court on the law was admitted to be good, but the Judicial Committee reversed the finding of the Principal *Sudder Ameen* on the facts.

Deeds, though unregistered (registration not being compulsory,) when proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside on mere suspicion of perjury and forgery. [*Kali Chundra Chowdry*, v. *Shibchundra Bhaduri*, 621

15. Where the Courts below had admitted evidence not properly admissible, the Judicial Committee examined the whole evidence, and being satisfied that there was, independent of that inadmissible evidence, sufficient to justify the decision of those Courts, dismissed the appeal. [*Lalla Bunseedhur*, v. *The Government of Bengal*, 689

16. Where the Judge of first instance doubted the authority of a deed, it being written on two

pieces of stamped paper of different dates ; held, under the circumstances, not to be a proper deduction

Where evidence could have been adduced, and was not, as to a handwriting being forced, and the Judge by comparison with other handwriting held it to be a forgery, such finding was disapproved of. [*Kurali Prasad Misser*, v. *Anantaram Hajra*, 695

See ACCRETION 2.
— ADMISSION 1, 2.
— CHUR LANDS.
— DAMAGES, SUIT FOR.
— DURESS.
— ENHANCEMENT OF RENT 4.
— GENUINENESS.
— H. L. ADOPTION 3, 4.
— H. L. ALIENATION BY WIDOW.
— H. L. ANCESTRAL PROPERTY.
— H. L. PARTITION, AGREEMENT FOR.
— H. L. PUNDITS, OPINIONS OF.
— H. L. PUROHITAM, RIGHT TO ADMINISTER.
— H. L. WILL 4.
— LANDS SEPARATED BY CHANGE IN THE COURSE OF A RIVER.
— LIMITATION 13.
— M. L. BENAMEE PURCHASE.
— M. L. CONVERTS.
— MORTGAGE 2 & 3.
— NUNCUPATIVE WILL.
— THAKBAST AWARD.
— GHATWALLEE TENURE.

EXAMINATION OF WITNESSES.

See EVIDENCE 5.

EXECUTION SALE.

See EXECUTION PURCHASER.
— GUARDIAN.
— SALE UNDER DECREE.

EXECUTION PURCHASER.

1. The execution purchaser, in a mere civil suit of Government for money, acquires none of the extraordinary rights of a purchaser at a revenue sale. He takes merely the right, title and interest of the judgment debtor, and, therefore, subject to whatever subsisting interests in the lands had been effectually granted or created by any former *Zemindar*. [*Baboo Dhunput Singh* v. *Gooman Singh*, ... 309

2. The purchase of the property in the *Mofussil* at a sale in execution of decree is valid, notwithstanding a decree for sale of the property in a suit foreclosure pending in the High Court at the time of sale, to which the purchaser was not a party.

The possession of a purchaser at a sale in execution of decree, without notice of a mortgage of the property, is adverse to the mortgagee, and a suit to disturb his possession must be brought within twelve years of the commencement of such possession. [*Anundo Moyee Dossee* v. *Dhonendro Chundro Mookerjee*, ... 698

3. A claim which may accrue under a pending award cannot be sold in execution. [*Syud Tuffuzzool Hossein Khan* v. *Raghoonath Pershad*,] 656

See GUARDIAN.
— LIMITATION 10.
— ONUS PROBANDI 2.
— SALE UNDER DECREE.

FALSE WITNESSES.

See EVIDENCE 3.

FAMILY ARRANGEMENT.

A deed held to be the expression of a valid family contract between two brothers, acted upon by both of them, and which ought not to be disturbed.

The Court will be slow to fail to give effect to a family arrangement of the kind expressed in such a deed, followed, as it had been, by enjoyment and possession for a period of ten years. [*Mantappa Nadgowda*, v. *Baswuntrao Nadgowda*,] 648

FAMILY CUSTOM.

See HINDU LAW.

FEMALE PROPRIETOR.

See DISQUALIFIED PROPRIETOR.

FIXED RENT, SETTING OUT AT.

See H. L. SHEBAIT.
— PUTNEE LEASE.

FORECLOSURE.

A., mortgaged certain estates to *B*, who, when he filed his notice of foreclosure in September, 1850, not only had notice that the interest of *A* had been taken in execution, but was actually disputing in a summary suit the right of the decree-holder to put up that interest for sale. Both the suit and the appeal from it were decided against *B* on the 8th of January, 1851, and the equity of redemption was sold to *C*, the Appellant, on the 7th of April, 1851. *C* was afterwards declared entitled to redeem, without making any payment, by the *Zillah* and the appellate Court, on the ground, that *B* had fully paid himself by receipt of rents and profits ; the Courts apparently having

no proof of the actual collections which were, or ought to have been made by *B*, but upon materials greatly speculative and conjectural. On special appeal by *B*, *C's* suit was dismissed with costs, the *Sudder* Court holding that certain proceedings taken by *B* with a view to foreclosure effectually barred the equity of redemption. On appeal, the Judicial Committee remitted the case to *India*, holding—

1. That there had been no such trial of the question of foreclosure as *Beng.* Reg. XVII. of 1806, sec. 8. prescribing the statement of formal issues and indeed substantial justice required; and that the question of foreclosure ought to be further and fully tried upon an issue to be regularly settled;

2. That the mortgage account whether as incidental to the question of foreclosure or to the question of redemption ought to be properly taken; and

3. That it was clear upon authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice to be effectual must have been served upon the purchaser, and in the circumstances above stated, it ought to have been served upon the decree-holer. [*Mohun Lal Sookool*, v. *Goluck Chunder Dutt*, .. 49

See BYE BIL-WUFFA.
— ESTOPPEL.
— MORTGAGE 5.

FOREST LANDS.

See GOVERNMENT 1.

FORFEITURE, ENGLISH LAW OF.

See SUICIDE.

FORFEITURE OF TENANCY.

See MULTIFARIOUSNESS.

FORGED DOCUMENT.

See EVIDENCE 3, 4.

FRAUD.

Held on the evidence, that S. had failed to prove that the conveyances were taken from her through fraud or coercion. [*Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*, *Jodoonath Bose* v. *Shumsoonnissa Begum*,] 259

See FRAUDULENT CONVEYANCE.
— GUARDIAN.
— LEASE.
— LIMITATION 4, 13.

FRAUDULENT CONVEYANCE.

Held on a review of the circumstances that the Deed of assignment and trust executed in favour of his Grandfather's estate by *O*, an involved trader shortly before Insolvency was fraudulent and wholly void as against creditors. [*Tareeny Churn Bonnerjee* v. *William Maitland and Frederick Addington Goodenough*,] ... 299

FRAUDULENT TRANSACTION.

See M. L. GIFT.

FREE AGENCY.

See DEATH-BED DISPOSITION.
— PURDAH WOMAN.

FRESH SUIT.

The power to dismiss a suit with liberty to bring a fresh one for the same matter is limited to cases where the suit fails by reason of some point of form: such liberty should not be given, where, after issue joined, the Plaintiff has failed to make out his case. [*Robert Watson & Co.* v. *The Collector of Zillah Rajshahye*,] 500

See JUDGMENT IN REM.
— RELINQUISHMENT OF CLAIM IN PART.
— RES JUDICATA 1.
— FRESH TRIAL.

FUNERAL RITES.

See H. L. ADOPTION 2.

GANJAM TRIBUNALS.

Where the Courts of justice are not subject to the rules prescribed by the Government Regulations for the guidance of the Tribunals in more settled and civilized part of the country, strict attention to technicalities not required; only substantial justice is to be looked to. [*Pakala Bulakristnama Patrulu* v. *Sree Naraina Mardaraz Devu*,] 66

GENTILES.

See H. L. SUCCESSION 5.

GENUINENESS.

The presumption in favour of the genuineness of documents, offered in evidence in *India*, is very weak; but still the presumption is not in favour of forgery.

When, therefore a long series of documents is produced showing a reasonable origin of title

nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the adverse party's commencement of title, evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony. [*Josiah Patrick Wise and Aynun Bebee* v. *Bhoobun Moyee Dabia Chowdrainee and Rajendur Kishore Acharj*,] 91

GHATWALLEE TENURE.

1. In a suit by a purchaser of a *putnee* at a sale for arrears of rent to enhance the rent of the *ghatwal* under Regulation VIII. of 1819, *held* that *ismnawisi* papers for 1811—1813, stating that the amount held by the *ghatwal* was 100 *beegahs*, did not entitle the Plaintiff to enhance the rent of the surplus over that 100 *beegahs* in the face of satisfactory oral evidence of long uninterrupted possession.] *William Farquharson* v. *Dwarkanath Sing*.] 708

2. A purchaser at an auction sale cannot, where lands are held under an hereditary *ghatwally* tenure originally created before the decennial settlement and at a fixed rent, resume those lands on the suggestion that the *ghatwally* services are no longer required. The omission of words of inheritance does not show conclusively that a *sanad* is not hereditary ; it being shown that a *ghatwally* tenure had descended from father to son for several generations, it was *held* that it was an hereditary tenure. [*Kooldeep Narain Sing* v. *The Government*], ... 734

GIFT.

See DEATH-BED DISPOSITION.
— H. L. ADOPTION 3.
— M. L. DOWER 2.
— M. L. GIFT.

GIFT OVER.

See H. L. ADOPTION 1.
— WILL, CONSTRUCTION OF.

GOVERNMENT.

1. Where by a *sanad* a grant was made of certain *mauzas* specified as containing an estimated number of *bigas*, a recognition by the Revenue Authorities and Civil Courts of the grantee being entitled to forest land are part of that grant, although much exceeding the estimated area, was held to be binding on Government, and not to be an error within the meaning of Reg. VII. of 1822. section 6, clause 3 [*Sheikh Zahuruddin* v. *The Collector of Goruckpore*,] 554

2. Where by a decree of the Special Commissioner's Court, established under Act IX of 1859, a decree was made directing property to be made over to a claimant, the proceedings of officials making over that property were, when followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the propriety of the decree, or of the making over of the bulk of the property under it, *held* to bind the Government as to the right of the decree-holder to the property. [*Secretary of State for India in Council*, v. *Mussamat Khanzadi*,] ... 570

GUARDIAN.

He who sets up a charge upon a minor's estate, created in his favour by the guardian, is bound to shew, at least, that when the charge was so created, there were reasonable grounds for believing that the transaction was for the minor's benefit.

Hunoomanpershad Panday v. *Mussamat Babooee Munraj Koonweree*, 6 M. I. A., 423, 1 P. C. J., 552) cited and followed.

Held on review of the facts of the case that the provisions of the *Ikrarnamah* of February 17, 1850, whereby Plaintiff's guardian besides abandoning large claims (adjudicated and unadjudicated) upon the Defendant acknowledge the minor's liability to pay Defendant 27,000 Rs., could not be for the benefit of the minor and could not have been reasonably supposed to be so, when the only consideration for such concessions by the guardian was the abandonment by the Defendant of an appeal to *England* preferred by him in connection with a claim for Rs. 50,000 on the minor's estate, which claim after being only partially decreed in the first Court had been wholly dismissed, on appeal, by the *Sudder* Court.

That the provision in the *Ikrar* was similarly objectionable whereby the guardian was encouraged to embark in expensive litigation with pecuniary assistance from Defendant on condition that the fruits of the litigation were to be divided with the Defendant. If the litigation failed, the minor's estate would not be bound by such a speculative advance.

That under the circumstances it was sufficient for the failure of the suit that the Defendant had wholly failed to relieve himself of the burden which the law cast upon him of showing that he had good grounds for supposing that the transaction was for the benefit of the minor's estate.

Held further that the transaction was a fraud on the minor, whether the guardian was herself defrauded or was a colluding party thereto.

An innocent purchaser in an execution sale and the purchaser in such a sale fraudulently brought about by himself cannot have the same rights. The question is, in the former case, which of two innocent parties shall suffer ; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong doing. A Court exercising equitable jurisdiction may with-

hold its hand in the one case, and yet set aside the sale with or without terms in the other.

Ali Hossein v. *Badil Khan* (19th May, 1863, S. D. A, N. W. P.) overruled.

Decree of the *Sudder* Court awarding to Plaintiff possession with mesne profits subject to a refund (with 5 per cent. interest) of the sum actually advanced by Defendant to save the estate from an execution sale, confirmed, except as to interest, which was allowed at the rate (six per cent.) agreed to in the *Ikrar*. [*Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh*,] ... 167

See RELINQUISHMENT.

INHERITANCE.

See H. L. ADOPTION 1 AND 4.
— H. L. SUCCESSION.
— LEGITIMACY.

INSOLVENCY.

There is nothing fraudulent or improper in an Insolvent firm parting with or putting an end to a current speculation, the result of which is still uncertain, on the best terms they are able; on the contrary, such a course is an honest one to follow.

The rescision and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one creditor to others after a debt has been incurred.

If an honest man discovers he cannot pay a bet if he loses, and is ready to rescind the bet before the event happens, he is not bound to take the chance of winning for the benefit of his creditors. [*Miller* v. *Barlow*,] 727

INTEREST.

1. *L.* advanced to *I.* monies for trade under promissory notes at 5 per cent. interest. The trade proving highly lucrative, *I.*, without any fresh consideration, voluntarily debited himself with 8 per cent. instead of the legally demandable rate of 5 per cent., without executing any fresh agreement to that purpose.

L. sued *I.*'s estate claiming interest at 8 per cent.

Held on the conduct of the Plaintiff and the established facts in the case that the claim of interest at 8 per cent., founded upon a bare promise of the debtor to pay at the augmented rate, or upon the fact that the debtor has in his account voluntarily debited himself with the augmented interest, could not be maintained in law for want of consideration, amounting merely to a *nudum factum*. [*Charles Seaton Guthrie* v. *Frederick George Lister*,] 221

2. In a suit against the Official Assignee of the Court for the Relief of Insolvent debtors at *Calcutta*. *Held*, that, under the circumstances a Court of Equity would clearly be disposed to give interest; and that as the High Court had the powers both of a Court of Equity and a Court of law, interest had been properly allowed. [*Miller* v. *Barlow*,] 727

See BOND.
— BYE-BIL-WUFFA.
— EQUITY OF REDEMPTION.
— MORTGAGE 3.
— PAYMENT.
— PROFITS.

INTERLOCUTORY ORDER.

See APPEAL 1 & 2.

INTERMEDIATE TENANTS.

See JURISDICTION 2.
— PLEADING 7.

INTERMEDIATE TENURE.

See EVIDENCE 10.

INTERPRETATION, RULES OF.

See H. L. FAMILY ARRANGEMENT.

INTIMIDATION.

See DURESS.

ISM-NAWISI PAPERS.

See GHATWALLEE TENURE.

ISSUES.

1. The reasons for their decisions must, in all cases, be recorded by the Judges of the High Courts in *India*. In a suit for maintenance, where the objection was taken on appeal to the Privy Council that no issues had been directed in the Courts below, held, that an order of the High Court, referring the matter to the lower Court, for enquiry, "to ascertain the amount of maintenance which might appear to be justly and properly payable with reference to the means of the Defendants and the other facts of the case, and to proceed to decisions in the manner indicated in section 351 of the Civil Procedure Code," was equivalent to a direction of issues, and rendered any further issues unnecessary. [*Katchekaleyana Rungappa Kalakka Tola Oodiar* v. *Kachivijoya Rungappa Kalakka Tola Oodiar*,] 461

2. Where, on the appeal, the Counsel for Appellant admitted he could not succeed on the merits, as the evidence stood on the record, and their Lordships were of opinion that substantial justice had been done, the mere omission to settle issues by the Court of first instance, which was not made

a ground of appeal to the first Court of Appeal, but was noticed and commented on by that Court, was held not to constitute a fatal mis-trial of the cause so as to render a new trial necessary.

Baboo Rewan Pershad v. *Jankee Pershad* (11 Moore's I. A., 26 ; *ante*, p. 214) commented on. [*Mussumat Mitna* v. *Syud Fuzl Rub*,] ... 626

See BYE-BIL-WUFFA.
— FORECLOSURE.
— FRESH SUIT.
— PLEADING 4, 5.
— RES-JUDICATA 1.

ISTEMRARDAR.

See ENHANCEMENT OF RENT.

ISTEMRARI.

See POTTAH 1.

JAGHEERDAR.

See ADMISSION 2.

JOINT ADVENTURE IN OPIUM.

See EVIDENCE 11.

JOINT ESTATE.

See H. L. WILL 1.

JOINT FAMILY PROPERTY.

See ABSCONDING PROPRIETOR.
— CONSTRUCTION 3.
— H. L. ANCESTRAL PROPERTY.
— H. L. JOINT UNDIVIDED FAMILY.
— H. L. WIDOW 1.

JOINT HINDU FAMILY.

See EQUITY OF REDEMPTION.
— LIMITATION 13.
— POSSESSION 1.
— H. L. JOINT UNDIVIDED FAMILY.
— H. L. PARTITION, DEED OF.
— H. L. RE-UNION.

JOINT FUNDS.

See H. L. RE-UNION.

JOINT PARTNERSHIP ASSETS.

See PARTNERSHIP 1.

JOINT TENANTS.

Where persons jointly interested in an estate arranged that the rents should be received by an agent, and they themselves sometimes collected direct from the tenants, such collection being treated as a receipt by the agent or by some one on his behalf, and not as a collection antagonistic to the rights of the other joint tenants, the law of limitation is no bar to taking the back accounts. Where one tenant in common receives rents, and then relinquishes his interest in the estate to another, that other is not answerable to the third tenant in common for any claim he may have against the first for having received more than his share. [*Ranee Khujooroonissa*, v. *Syud Ahmed Rezah*], ... 677

JUDGMENT IN REM.

A Hindoo widow having died whilst an appeal by her to the *Madras Sudder* Court against an adverse decree of 1847 was pending, various persons appeared on issue of the usual notice and claimed conflictingly to prosecute the appeal as representing the estate. The Court dismissed their applications leaving any of them at liberty to bring a new action to enforce their respective claims.

The Appellant accordingly brought a fresh suit which was dismissed on the merits by treating the decree of 1847 as a judgment *in rem*.

Held on appeal by the Judicial Committee, that a decree in a suit by *A.* against *B.*, claiming as widow to succeed to her husband's estate in preference to *B.*, his nephew, on the ground of a divided family, could not operate as a bar to a suit by *C.*, a daughter, claiming to succeed to her father's estate on *A.'s* death, on the ground that the property was self-acquired by her father. Such judgment was not a judgment *in rem* but a judgment *inter partes*.

That the procedure adopted by the *Sudder* Court in disposing of the appeal against the decree of 1847 and the subsequent finality attached to it amounted to a signal failure of justice. The High Court, after the death of the widow, ought to have ascertained who were the next heirs of the husband and allowed them to prosecute the appeal against the decree of 1847. As they were not allowed to prosecute such appeal, that decree could not be treated as final against them in the fresh suit which they were directed to institute.

It is doubtful whether the procedure of the *Indian* Courts admitted of a suit in the nature of a bill of revivor or a bill of revivor and supplement, and in no case could it be said that the *Sudder* Court contemplated such a suit.

The Judicial Committee having all the materials before them were fully competent to make the order which the *Sudder* Court ought to have made in the appeal against the decree of 1847 and were not at all bound to transmit the case to the *Sudder* Court to hear and determine the appeal. [*Katama Natchiar* vs. *The Rajah of Sivagunga*,] 25

JUDICIAL COMMITTEE.

See BOUNDARY DISPUTE.
— COMPROMISE 2.
— EVIDENCE 13.
— JUDGMENT IN REM.
— LUNACY.

JUNGLE LANDS.

See EVIDENCE 9.

JURISDICTION.

1. The Judges of the S. D. Adawlut, acting as Special Commissioners under Reg. III. of 1828, having decided at the instance of the *Zemindar* against the right of the Government to resume and re-assess certain *Ghatwalee* lands, had also from the nature of the subject, jurisdiction to determine the title to the monies received by the Government as mesne profits from the *Ghatwals*

Such jurisdiction is included within the admitted power of the Court to decide as to the correctness or otherwise of the resumption by Government.

The decree under appeal added to by declaring that the Court below had and have jurisdiction to decide upon the true title to the disputed funds. Case remitted to *India* in order to be so dealt with.

The costs of the appeal awarded against Government, to the *Zemindar* Appellant. [*Rajah Lelanund Singh* v. *The Government of Bengal*,] ... 46

2. A suit for arrears of rent due on account of land, against intermediate tenants, *Held* to be within the jurisdiction of the Collector under sec. 23 of Act X. of 1859, whether it was to be treated as what it substantially was, viz. "a suit for the rate of rent at which a *Pottah* or *Kaboolyat* should be given," or as what it was in form, a suit "for arrears of rent due on account of land." *Ranee Surnomoyee* vs. *Maharajah Satischundra Roy, Bahadoor*, (10 M. I. A. 123; *post*, p. 60) and *Babu Gopal Lall Thakoor* vs. *Teluk Chandra Roy*, (10 M. I. A 183; *post*, p. 98) *Held* not to apply, having been tried before Act X. of 1859, was passed. [*Baboo Dhunput Singh* vs. *Gooman Singh*,] 309

See ARBITRATION 2.
— COMPROMISE 2.
— ENAM.
— LUNACY.
— PARTITION.
— PRACTICE 28.
— RES-JUDICATA 4.

KARARNAMAH.

See LIMITATION 11.

KINSMEN, ASSENT OF.

See H. L. ADOPTION 3.

KOUSTAVA.

See H. L. ADOPTION 3.

KURTA, ACCOUNTABLE AS MANAGER.

See H. L. RE-UNION.

KUTKUBALA, USUFRUCTUARY.

See MORTGAGE, LAW OF, IN MADRAS.

LACHES.

See POLLIAM TENURE.
— RE-HEARING.

LAND.

When a party has proved that land which formed part of his estate has by a sudden change in the course of the river been separated, he is entitled to recover such land under clause 2, section 4, Regulation XI. of 1825.

When a party claim such land upon the ground of immemorial custom, he must prove such custom.

The *Canoongoe* papers are not sufficient evidence to prove immemorial custom.

The proceedings shewing that such custom obtains on the banks of the river, will be no evidence to prove that it obtains on the banks of another. [*Rae Manick Chund* v. *Madhoram*,] ... 473

LEASE.

K. in consideration of 3.000 Rs. advanced for the purposes of litigation by P. executed in P.'s favor a lease of K.'s *Zemindary* for ten years and set off the said advance against future rents under the lease. On the same day, K. gave to P. Bonds for the 3,000 Rs. and an order to K.'s tenants to pay rents under the lease to P., which order was subsequently countermanded, and in consequence P. failed to realise rents.

P. sued for a decree adjudging K. not to interfere with and prevent P.'s enjoyment of all the incomes of the *Zemindary*.

K. answered that P. obtained the lease by undue influence; that P. only paid Rs. 1,052, out of the 3,000 Rs. for which Bonds had been given; that on the 25th November 1851, P. agreed to advance the remainder of the loan within 5 days, on failure whereof P. would return the lease and bonds and receive back the amount already advanced by him; that P. failed to pay as above agreed, and in consequence K. failed in the litigation and suffered serious loss.

The first Court dismissed P.'s suit holding the lease to be an executory contract not enforcible without consideration and also the transaction to be void for maintenance and champerty.

On remand by the High Court, the first Court found the agreement of 25th November 1851 to be

a genuine document and considering the prior lease to be cancelled thereby, dismissed the suit.

The High Court on appeal decreed to P. specific performance of the lease and possession of the *Zemindary* under it.

Held, by the Privy Council that there was no proof that the lease had been fraudulently obtained;

That the agreement of 25th November 1851 was not proved to be genuine;

That as their Lordships were anxious to preserve to K. all the rights which arose to him out of his dealings with P., and as it appeared extremely doubtful whether K. received the 3,000 Rs. in full; the decree for possession under the lease to P. should stand affirmed with costs, but with a declaration that it was to be without prejudice to the claim of K. for redemption (if any), and to any question which might be raised as to the amount actually advanced by P. [*Kamalu Naicken* v. *Pitchacootty Chetty*,] ... 147

See PUTNEE LEASE.

LEAVE TO APPEAL.

1. Leave refused to appeal, in a suit in which no application for leave had been previously made to the High Court of *Bombay*—the Court making the decree—and in which the amount involved was below the applicable value; as, even if there were no other difficulties, the decision was not one which would govern other cases.

If there are any grounds to be assigned as an explanation of the circumstance that no leave to appeal to Her Majesty in Council has previously been applied for to the High Court, those grounds should be stated in the petition. [*Gungowa Kome Malupa*, v. *Erawa Kome Jogapa*], ... 583

2. Special leave to appeal granted against Orders of the High Court of the North-West Provinces removing a minor from the custody of the petitioner, her mother, such leave to be without prejudice to any application to the Court below by the petitioner that she might be advised to make, to have access, at suitable times, to her daughter. [*In the matter of Victoria Skinner*,] .. 615

LEGITIMACY.

The first Court having pronounced for Appellant without stating any grounds for its judgment, and the second Court having found for the Respondents without allowing sufficient weight to the circumstance that they as Plaintiffs had to make out their case not only by proving their relationship (which was admitted) but also their heirship which depended on the illegitimacy of the Appellant; and the Plaintiffs being bound to adduce general evidence sufficient to throw upon the Defendant the burden of proving his legitimacy;

Case remitted to the original Court for a re-trial after reception of fresh evidence, as their Lordships were unable to dispose of the case upon the evidence on record. No costs allowed in the appeal. [*Khaja Mahomed Gouhur Ali Khan* v. *Ashrufoonnissa*,] 45

LEX LOCI.

See NATIVE CHRISTIANS.
— M. L. DOWER 1.

LIABILITY OF PURCHASER.

See JOINT TENANTS, RECEIPTS BY.

LIEN, DECLARATION OF.

See MORTGAGE 1.

LIFE ESTATE.

See H. L. ADOPTION 1.

LIMITATION.

1. Sec. 9. of the Circular Order No. 104 of 1860 applying to the Province of Oudh which has reference to suits in which the period of limitation is to be three years, and which is in these terms:—"Suits for money lent for a fixed period, or for interest payable on a specified date or dates, or for breach of contract, unless there is a written engagement or contract, and where Registry Offices existed at the time such engagement was registered within six months of its date, and signed by the party to be bound thereby, or his duly authorized agent" construed to apply where there is a written engagement, and where, there being a written engagement, it is registered within six months of its date in cases in which a Registry Office existed at the time of the engagement.

Sec. 14, and not the above sec, held to apply to a case where there was a written engagement and no Registry Office at the date of the engagement; the sec. 14, which is in these terms:—"All suits on Bonds registered within six months of their date, or on Bonds formerly attested when there were no means of registering, and all other suits for which no other limitation is expressly provided by these rules," having reference to suits in which the period of limitation was to be six years.

Quære.—Whether the Regulation of limitations could or could not be made available without being pleaded. [*Saligram* v. *Mirza Azim Ali Beg*], 87

2. By a *Brohmottur Puttro*, granted by an ancestor of *A*, in the year 1796, to the ancestor of *B*. of a piece of land, *B*. and his heirs were to enjoy a house built thereon, in consideration of setting up an idol in the house, without payment of rent. Upwards of sixty years after this grant, during which period the idol remained and its worship uninterruptedly continued, no rent having been paid by the grantee of his heirs, *A*. without any demand for rent, or bringing a suit for assessment of the property, brought a suit against *B*. to recover six years' arrears of rent, at the rate fixed by *Ben*. Reg. XIX. of 1793, sec. 10. *Held*, reversing the decree of the *Sudder* Court, that *B*.,

and those under whom she claimed, having been in undisturbed possession, and the cause of action having arisen sixty years ago, such suit was barred by cl. 3, sec. 3, of *Ben.* Reg. II. of 1795.

If no action could be maintained directly to recover possession of the land, none can be brought to recover the rent which is the compensation for the occupation, that occupation having been always rent-free.

Held further, that while that clause taken away the cognizance by any Court in *Bengal* of a suit, if the cause of action should have arisen sixty years before the institution of the suit, it distinguishes between the effect of the twelve years' limitation and that of sixty years, by precluding all inquiry into any original defect in the title under which the possession for the latter period obtain, and made it, in effect, unavailing to show that the possession of *A.* commenced under a grant made null and void by the Regulation of 1793.

Whether the twelve years' limitation provided by the *Beng.* Reg. II. sec. 3, cl. 1, of 1805, can be held applicable to such a suit. *Quære.*

Semble. That to maintain such an action, a demand for arrears of rent should have been preceded by a suit for assessment of rent under *Ben.* Reg. XIX. of 1793, sec. 10. [*Mussumat Chundrabullee Debia* v. *Lukhee Debia Chowdrain*], 119

3. Act XIV. of 1859 was introduced in the non-Regulation Province of *Oude* in July 1860.

Under sec. 24 of that Act a suit begun there within two years from the introduction would be governed by the prior law of limitation, namely the *Punjab* Code as modified by Circular Orders No. 51 of March 1859, and No. 104 of July 4, 1869. *Saligram* v. *Mirza Azim Ali Beg* (*ante*, p. 87, 10 M. I. A., 114) cited and followed.

Before the passing of Lord *Tenterden's* Act in *England* and Act XIV. of 1859 in *India*, an *admission* of the debt was sufficient to remove limitation; and it was not necessary to shew an *acknowledgment* in writing *signed* by the debtor. In such case, a letter (though not signed or sealed) offering to pay the principal by instalments, and praying to be excused from payment of interest, would be an ample acknowledgment to take the case out of the Statute of Limitation.

Case remanded for trial of the issues between the parties. [*Shah Mukhun Lall* v. *Nawab Imtiazood Dowlah*,] 160

4. *Held* on a review of the previous litigation that the Plaintiff's suit was not barred by the limitation laid down in *Bengal* Regulation III. of 1793, sec. 14, as it was instituted within twelve years from the summary order made by the *Sudder* Court in 1845 which finally ordered his dispossession. [*Tarakant Benarjee* v. *Puddomoney Dossee*,] 184

5. The general period of limitation, twelve years, is inapplicable where the possession and title of the Defendants are alleged in the plaint to be founded on fraud.

In the case of a fraudulent sale under Act I. of 1845 by the Mortgagee's representative in possession, that Act did not apply so as to defeat the Mortgagor's equity of redemption such a sale was to be considered as a private sale, and impressed a trust on the estate which passed under it. The limitation provided by sec. 24, Act I. of 1845 was inapplicable in such a case. [*Nawab Sidhu Nuzar Ally Khah* v. *Rajah Ojoodhyaram Khan*,] .. 198

6. A claim to possession of lands barred by the ordinary limitation of twelve years will not be revived by reason of the claimant's making common cause with Government in an ejectment suit brought by the Collector to resume and assess alleged *lakhiraj* lands, during the continuance of a lease for the said lands from the Collector to the claimant.

It is of the utmost consequence in *India* that the security which long possession affords should not be weakened.

The law having laid down a limitation of twelve years as between private owners, the claim to possession of particular lands must be governed by that rule. The Government may have sixty years to enforce a right to demand *jumma* on those lands, but they have no right to intervene in a boundary dispute between private proprietors. [*Gunga Gobind Mundul*, v. *The Collector of the Twenty-four Pergunnahs*,] 284

7. The Order of the Governor General of India in Council dated the 21st February 1860, does not prevent the Government from setting up a plea of limitation, like any other suitor.

Held however that the suit was not barred by limitation under the Punjab Code, and that even if it were barred, there was "sufficient reason" for not suing earlier.

The technical difficulties which might have attended legal proceedings against the Ex-King of *Delhi*, during his Sovereignty, could not be pleaded by Government in a suit brought under their own orders above-mentioned. [*Lalla Narain Doss* v. *The Estate of the Ex-King of Delhi*,] ... 297

8. *A*, a *Zemindar*, sold the rights of *B*, his *putnidar*, for arrears of rent, under Regulation VIII. of 1819. This sale was subsequently set aside at the suit of *B* for irregularity. *A* then sued *B* for the arrears, under Act X. of 1859, and *B* raised the defence that the suit was barred, more than 3 years having elapsed from the close of the year in which the arrear became due. *Held* (reversing the decision of the High Court,) that upon the setting aside of the *putni* sale. the *putnidar* took back the estate subject to the obligation to pay the rent; and that the particular arrears of rent claimed must be taken to have become due in the year in which that restoration to possession took place, and Plaintiff could sue within three years from the close of that year.

Also held, that *A* was not guilty of a trespass in bringing the property to sale under a defective notice, and *A* could not have sued for the arrears pending the proceedings to set aside the sale. [*Mussumat Ranee Surno Moyee* v. *Shookee Mohee Burmonia*, ... 424

9. Defendant claimed to hold a *Mokurrari* tenure, under deeds executed by Plaintiff *Zemindar*. The Plaintiff denied the authenticity of the deeds, and used to set them aside. The lower Courts dismissed his suit as barred by limitation, on the

ground that Plaintiff had, in a petition before the Collector, admitted that Defendant was *Mokurraridar* of the tenure, and that this being so, limitation ran against him from the date of the deeds. *Held*, that the case should have been tried on the merits, as the petition was not a conclusive admission of the genuineness of the deeds, and it was not right to infer from it that Plaintiff knew of their existence at the time of their professed date. [*Rajah Sahib Perhlad Sein* v. *Run Bahadoor Singh*,] 430

10. One of four children set up a deed of gift and a Will, in virtue of which he was, in 1842, placed, by a summary proceeding of the Courts, in possession of the whole estate left by his deceased father. The rights and interests of two other children were, subsequently, sold in execution of a decree for debt, and purchased by the present Plaintiffs. A fourth child instituted a suit against the first mentioned one, to set aside the deed of gift and Will, the result of which was that, in 1855, the Will, which affected two-thirds of the estate, was set aside as having been made without due consent of heirs, the consent alleged in the Will being held to be no consent. The Plaintiffs now sued to get possession of the shares of the two children whose rights and interests they had bought. *Held*, reversing the decision of the High Court, that the Plaintiffs, as purchasers at an execution sale, were in no better position than claimants under any other conveyance or assignment, and their cause of action arising in 1842, they were barred by limitation. [*Rajah Enayet Hossain*, v. *Girdharee Lall*, ... 455

11. Where a Plaintiff sued for a debt due under a *Kararnamah*, held, that, in order to bring the case within the exception in the law of Limitation, it was sufficient to show, by clear and positive proof, that, within the period prescribed, he had asserted his right to claim under the *Kararnamah*, and that the Defendant admitted this claim to be as of right. It was not necessary that a precise sum should have been mentioned by either party, or that a promise to pay should have been made by the Defendant. [*Gopeekishen Gosamee*. v. *Bindaban Chunder Sircar Chowdry*], 479

12. So long as an actual *bonâ fide* contest is going on in Court between a decree-holder and the judgment-debtor as to the judgment, there is a pending "proceeding" within section 20 of Act XIV. of 1859, and the period of limitation must be computed from the Court's decision.

The decision in the case of *Ram Sahaye Singh* v. *Degum Singh* commented on and approved of. [*Maharaj Dheeraj Matab Chund, Buhadoor*, v. *Bulram Sing*,] 597

13. Act XIV. of 1859, section 1, clause 13, is intended to apply to suits between members of a joint family, not to a case where a mortgage having been made by one member on behalf of all to a stranger, that member afterwards, against the will of his co-partners, releases the equity of redemption.

To entitle a purchaser to claim the benefit of Act XIV. of 1859, section 5, he must prove,—1st, that he is a purchaser of what is represented to him and what he fully believes to be not a mortgage but an absolute title; and, that he purchased *bonâ fide*, that is to say, without a knowledge of the title having been originally a mortgage and of a doubt existing as to the mortgage having ceased; and 3rd, that he is a purchaser for valuable consideration.

Where an estate having been originally mortgaged by K., a member of a joint Hindu family, he subsequently, without the knowledge of the other members, released the equity of redemption to R., who afterwards sold to H., the owner of a factory, who afterwards sold to G. and Co. the factory with the lands appertaining thereto, amongst which was the property so released, and proceedings had for many years been taken by the other members to assert their rights,—*Held*, reversing the decision of the High Court that G. and Co. were not purchasers entitled to the protection of Act XIV. of 1859, section 5. *Held* also, that section 10 does not apply in such a case, although K. acted fraudulently. [*Radhanath Doss* v. *Gisborne & Co.*,] 636

A, B, and C being joint creditors of D, A and B received, in 1856, a payment on account in respect of their share in the debt. D having made default in payment of the balance, separate suits were brought against him by A, B, and C. The Court having held that the payment was a payment to all, A and B recovered more than their share, and C recovered less. A family suit for partition between A, B, and C was, in 1862, compromised, and it was agreed that all claims between the parties should be considered as settled, but it was agreed that if C should, out of an appeal brought by him against D, have any claim against A and B, that should be reserved. C's appeal was, in 1863, unsuccessful, and in 1864 he brought an action against A and B for his share of the money paid in 1856. *Held*, that he was entitled to recover the amount which A and B had recovered against D in excess of their claim, and that the suit was not barred by the law of limitation. [*Syad Luft Ali Khan* v. *Mussumat Afzalunissa Begum*,] 701

See EXECUTION PURCHASER.
— JOINT TENANTS, RECEIPT BY.
— MESNE PROFITS.
— PRACTICE 21.

LUNACY.

Where the High Court founded their judgment upon evidence which did not justify the conclusion, the Judicial Committee reviewed the whole evidence, in order to ascertain whether the decree could be supported.

On an inquiry as to the fact of lunacy under Act XXXV. of 1858, any finding as to the actual time when the lunacy began is beyond the jurisdiction of the judicial officer making the enquiry.

Where the fact of lunacy was admitted, and the question was the date at which it commenced, the evidence of a planter in the neighbourhood as to common report for years in the village as to the

lunacy having been admitted by the lower Court, the Judicial Committee refused to reject it.

The rule as to admission of evidence laid down by Dr. Lushington in *Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo*, (7 Moore's I. A., p. 137, 1 P. C. J., p. 639) followed. [*Baboo Bodhnarain Singh* v. *Baboo Omrao Singh*,]... 607

MAINTENANCE.

1. The *Sudder* Court having established that the family was joint and the property undivided, left in the hands of one of the brothers a gross sum out of the estate, calculated to make the widow of one of the brothers a monthly payment out of interest for maintenance. *Held* that although a Court of Equity in *England* would have set apart a certain sum to a separate account during the life-time of the widow, yet from the want of machinery in the Native Courts in *India*, such practice could not be carried out. The arrangement was therefore upheld, with a declaration that it was to be without prejudice to the right of the Plaintiff or of his representatives to claim on the death of the widow a proper share in the capital of the maintenance fund. [*Rampershad Tewary*, v. *Skeochurn Doss*], ... 177

2. The *quantum* of maintenance is a question with which the Courts of *India*, having local knowledge, and being conversant with the habits of native families, are peculiarly competent to deal with; and strong grounds should be shown to justify any interference by the Judicial Committee with their discretion in that matter. [*The Collector of Madura*, v. *Mootoo Ramalinga Sathupatty*], ... 361

3. In a suit for maintenance brought by an illegitimate son of a Hindu *Zemindar*, deceased, *held* that it was established that the Plaintiff was the natural son of such *Zemindar*, and recognized by him as such, it having been not essential to the Plaintiff's title to maintenance that he should be shown to have been born in the house of his father, or of a concubine possessing a peculiar *status* therein.

Case remanded for the Courts in *India* to try whether such maintenance can be a charge upon an impartible *Zemindary*, or if not, out of what property or fund, if any, the son was entitled to be paid. [*Muttusawmy Jagavera Yettappa Naicker*, v. *Venculaswara Yettaya*,] 395

See PRACTICE 8.
— H. L. SUCCESSION 3

MAXIM.

See H. L. CUSTOM.
— MORTGAGE 3.
— MORTGAGE, LAW OF, IN MADRAS.
— POSSESSION 1.

MESNE PROFITS.

Where a purchaser of a *fourvanna* share was kept out of possession of a portion of the property sold, and having recovered judgment in a suit brought for possession and mesne profits against the vendor, an arrangement was come to pending appeal, that within a year the parties should appoint an arbitrator to fix on the shares and make a division, and in default of such appointment an application should be made to the *hakim*, but that if no such application was made within the year, and a suit should be subsequently brought, the party suing should lose his right to mesne profits. —*Held* that, under the circumstances, the Defendant having prevented the Plaintiff from making the necessary application within the year, and proceedings having gone on for years to carry out the partition, the Plaintiff was, on the termination of those proceedings, entitled to sue for mesne profits.

Where proceedings were gone on to effect a partition, the right to particular properties being in dispute,—*Held* that the right to mesne profits accrued at the termination of those proceedings, and that the party improperly kept out of possession was entitled to sue for all mesne profits during the period of his non possession, subject to any ground which the Defendant could show which would entitle a Court of Equity to deprive the Plaintiff of his rights.

In a suit brought in January 1862 respecting property situated in *Assam*, mesne profits for twenty-eight years prior to 1854 were decreed subject to any equitable claims for deducting any portion; Act XIV. of 1859 not applying to *Assam* previous to July 1862.

Where, in a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor, though liable for mesne profits, was not in the position of trustee of the rents for the party kept out of possession. [*Nilkamal Lahuri* v. *Śri Gunomoni Debi*,]... 651

See BYE BIL-WUFFA.
— COMPROMISE 1.
— PRACTICE 29.

MINOR.

See GUARDIAN.
— LEAVE TO APPEAL 2

MORTGAGE.

1. *H.* mortgaged a *Taluk*, and left a childless widow *K.* his heir, by whom default being made in the payment of Government Revenue, the mortgagee, *G.*, paid it (by borrowing from the Appellant's father) in order to save her own interest.

Held, that *G*, could either (1) sue on the mortgage and tack thereto the amount of Revenue so paid by her, or (2) sue under sec. 9 of Act I. of 1845. Probably both objects might be united in one plaint.

G., however, only sued *K.*, under sec. 9, without impleading the reversioners and without asking for the *Taluk's* sale, and obtained a general decree against *K.*, but none against the land. *G.*, then assigned her rights under that decree to the Appellants, who attempted to sell the *Taluk* in execution of the decree. The Respondents, reversioners, then intervened and successfully objected to the *Taluk* being sold for *K.'s* personal debt. The Appellants then brought the present suit against *K.*, and her reversioners.

Held, on a construction of the plaint, that it did not seek the advance for arrears of Revenue to be declared a charge upon the *Taluk*, but sought only to recover the amount of the previous decree, and to have the property sold for that purpose;—

That the decree in the first suit (which was based on sec. 9) was effective only against the person and the limited interest of *K.*, and that an equity which the Appellant possessed, enforcible against the reversioners also, could not be enforced against them in a suit brought to extend and enforce the personal decree against *K.*;—

A mortgagee saving the mortgaged property in the possession of a Hindu widow from default of Government Revenue ought to sue her and the reversioners to have an additional charge declared in his favor to the extent of the Revenue so advanced; subject to redemption; and only in default thereof seek a sale;—

If the widow seek to destroy the estate by wilful default of Revenue, the reversioners would be entitled to recoup out of her life-profits the money paid by them to the actual salvors [*Nagendra Chunder Ghosh*, vs. *Sreemutty Kaminee Dossee*,] 275

2 A mortgage of a *Zemindary* being taken to secure a balance struck on a settlement of accounts, between a Hindoo widow and her creditor, of certain advances previously made under circumstances that would make them a charge upon her husband's estate or entitle her to alienate as against the next heirs; and it being shown that the widow succeeded to the *Zemindary* encumbered with debts which she had no means of discharging, except the income of the *Zemindary*, which was admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and to provide for the expenses of her establishment and family, *Held* that the facts proved showing a strong improbability of the satisfaction of the debt, the *onus* of proof that the debt was subsisting at the date of the mortgage, could not be thrown on the Appellant (mortgagee);

That, because the Respondent had the right to demand the proof of the Appellant having a charge on the estate by the act of the widow, and of the debt being of a particular character, it did not follow the ordinary rule, which requires the party who alleges payment to prove payment, was to be invested in his favour, or that the debt was to be presumed to be satisfied unless the contrary was shown by the creditor, and

That the burden of proof that the settlement of account was not a *bonâ fide* transaction was upon the Reversioner.

Held, further, that the mortgagee was entitled to hold the *Zemindary* against the Crown taking it by escheat, as a security for so much of the said sum and of the interest thereon as then remained unpaid; and that the Crown would be entitled to redeem. [*Cavaly Vencata Narainapa*, v. *The Collector of Masulipatam*,] 338

3. The principle that a party cannot both approbate and reprobate the same transaction, is applicable to Indian cases.

Where a mortgage deed stipulates for interest at 9 per cent, but other and collateral deeds, forming part of the same transaction, provide for further profits to the mortgagee, held, that the mortgagor cannot, unless there be a positive legal enactment to that effect, be heard to plead that the written engagement, though not extending to the whole profits stipulated, must be adhered to as against the mortgagee, though the mortgagor may go beyond it to show the full extent of the profit, and so to be relieved from the consequences of his actual contract. Interference with the rate of interest in *India* was a thing of positive law, and cannot be extended beyond the provisions of the Regulation (XV. of 1793). Section 9 of the Regulation does not declare that where an attempt has been made to elude the usury laws, the contract is itself void, nor does it direct the return of the pledge without redemption. The mortgagee may retain his pledge until he has received out of it his debt with interest at 12 per cent., the maximum allowed by section 10 of the Regulation.

In a suit for redemption, on the ground that the debt has been satisfied with interest, the *onus* is on the Plaintiff. A mortgagee is not an assurer of the continuation of the same rate of profit as his mortgagor was able to raise. Hence an estimate of the rental proceding mortgagor's possession is not sufficient proof of the profits in his time.

The nature of the accounts which a mortgagor may call for from mortgagee, explained. The mortgagee need not personally attest the accounts if he has no personal knowledge of them.

Presumptions against mortgagees for non-productions of accounts must have reasonable limits, and not be mere conjectures or based on inexact data. [*Shah Mukhun Lall*, v. *Sree Kishen Singh*,] 403

4. Mortgage executed in the name of the concubine of a deceased Mahomedan considered to be a *Benamee* transaction. [*Bhowan Dass*, v. *Sheik Mahomed Hossein*,] 560

5. Where a party *bonâ fide* purchased from another as his own property, land in fact mortgaged, and obtained possession and mutation of names, his title was held to be adverse to that of the mortgagee.

Foreclosure proceedings in the Supreme Court as to *Mofussil* property, to which a purchaser from the mortgagor is not made a party, cannot affect that purchaser.

After a *bonâ fide* purchaser had been in open

possession more than twelve years, and after the lapse of more than twelve years from the accrual to the mortgagee of the right of entry under the mortgage deed (which was in the English form), the mortgagor sued the purchaser to obtain possession of the property, *held*, the suit was barred.

Quære.—Whether in cases in the *Mofussil* where the mortgagor continues in possession paying rent to the mortgagee, the Law of Limitation begins to run from the date of the right of entry. [*Brojonath Koondoo*, v. *Khelat Chunder Ghose*,] 711

See EXECUTION PURCHASER 2.
— FORECLOSURE.
— LIMITATION 5, 13.

MORTGAGE, DEEDS OF.

See CONSTRUCTION 2.
— EQUITY OF REDEMPTION.

MORTGAGE, LAW OF, IN MADRAS.

The sole question being, whether, under the law of the *Madras* Presidency, the interest of a Mortgagee under a deed of conditional sale, does or does not become absolute, according to the terms of the contract, by the mere failure of the Mortgagor to redeem at or before the time specified in the deed; the contract, dated 13th June 1808, being, that, the Mortgagee should hold possession of the land for five years, paying the Government revenue, that the Mortgagor should repay the principal and redeem the land on the 10th June 1813, and that, in default, the Mortgagee, and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c., and the transaction being one of mortgage by *Bye-bil-wuffa*, or *Kut Kubala* usufructuary; the usufruct of the property being taken in lieu of interest. *Held*, that the first question which suggested itself, was, whether there was any rule of law to prevent the Court from giving effect to such a contract, according to the intent of the parties plainly expressed by its language. That no such qualifications as had been introduced in *Bengal* by *Bengal* Regulation No. XVII. of 1806 could be discovered in any Act of Legislation in the Statute Law applicable to *Madras*. That what is known in the Law of *England*, as the *Equity of Redemption*, depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract; and that such a doctrine was unknown to the ancient Law of *India*. Decree of the *Sudder Dewanny Adawlut* at *Madras*, allowing the representative of the Mortgagor to redeem, set aside as erroneous.

Great and unexplained delay having taken place in the prosecution of an appeal, eventually heard *ex parte*. No costs were given to the Appellant although successful. [*Pattabhiramier* v. *Vencatarow Naicken*,] 623

MORTGAGOR.

See BYE-BIL-WUFFA.
— ESTOPPEL.
— LIMITATION 5.
— MORTGAGE, LAW OF, IN MADRAS.

MORTGAGOR, RIGHT OF.

See BYE-BIL-WUFFA.
— ESTOPPEL.
— LIMITATION 5.
— MORTGAGE, LAW OF, IN MADRAS.

MOOSTAGIER.

See POTTAH.

MUKHTARNAMAH.

See EVIDENCE 7.

MULTIFARIOUSNESS.

A. had brought a summary rent-suit for arrears due by B. under a *Kabooleat* for some *Mouzahs*. B. denied the *Kabooleat* and pleaded possession under a *Bhakee Bird* tenure. The Deputy Collector considered the *Kabooleat* not proved and dismissed the suit.

A. then brought a regular suit against B. for (1) establishing A.'s proprietary right in the *Mouzahs* (2) setting aside the summary decision and (3) recovering arrears of rent under the *Kobooleat*. The Defendant in addition to the pleas urged by him in the summary suit, pleaded misjoinder of claims.

Held, that as Courts in *India* are Courts both of Law and Equity, a claim for rent in arrear could unobjectionably be added to a claim to remove clouds on the title to demise raised by the tenant;

A landlord may waive a forfeiture, and may treat a tenancy or interest as continuing which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently the mere inclusion of a claim for rent in such a suit cannot make it multifarious, unless it could be treated as such if it insisted on the repudiation or forfeiture.

Decree of the *Sudder* Court, dismissing the suit for misjoinder, reversed with costs of the appeal, and case remanded for trial on the merits. [*Maharajah Rajundur Kishwar Sing, Bahadoor*, v. *Sheopursun Misser*], ... 174

NABOB OF THE CARNATIC'S DEBTS' ACT.

The *Nabob* of *Carnatic's* Debts' Act (No. XXX

of 1858) not only limits the extraordinary remedy which it gives, to certain defined classes of debts, but throws upon the claimant more than the ordinary burden of proof, compelling the holder of any acknowledgment or security to prove the actual consideration for it ; and those claiming the price of goods delivered, to prove their fair and actual value.

Held on the merits that the Appellant had failed to discharge the burden of proof. [*Ghoolam Moortoozah Khan Bahadoor*, v. *The Government*,] 23

NATIVE CHRISTIANS.

The law which governs the *status* and rights of native converts to Christianity, considered.

Heirship may be governed by the Hindu or other law to which the ancestor was subject, but parcenership as understood in a joint undivided Hindu family, is the creature of and must be governed by Hindu law alone.

A Hindu by conversion to Christianity becomes completely severed from his family.

Opinions of Pundits in Macnaghten's Hindu Law, Vol. II., pp. 131-32, to the effect that on the death of an apostate from Hinduism, his heirs according to Hindu Law will take the property which he had at the time of his conversion, and that his subsequently acquired property would devolve by the law of his new religion—approved.

The *Lex Loci* Act (XXI. of 1850) held inapplicable where the parties have ceased to be Hindus in religion.

Madras Reg III. of 1802, sec. XVI. cl. 1, which prescribes that the Hindu law shall be applied to the Hindus and the Mahomedan law to Mahomedans, must be understood to refer to Hindus and Mahomedans not by birth merely, but by religion also.

Held that a case of succession to the property of a deceased of pure Hindu blood (whose ancestors for generations had adopted Christianity) and who had himself married an East-Indian wife, ought to be decided (as provided in Mad. Reg. II. of 1802, sec. XVII. for cases for which no specific rule exists) according to equity and good conscience, *i. e.*, by referring the decision to the usages of the class to which the convert attached himself, and of the family to which he belonged.

As upon conversion the Hindu law ceases to have any continuing obligatory force upon the convert, he may renounce the Hindu law or abide by it notwithstanding change of religion, and a descendant from a convert family which hitherto preserved the Hindu law and custom, may also renounce the same. His course of conduct, his attaching himself to a class which as to these matters has adopted and acted upon some particular law, or his having himself observed some family usage or custom may show his intention as to the governing law.

Held on the evidence ; that the class of "native Christians" in India, embracing in its extended sense all natives converted to Christianity, had subordinate divisions forming again distinct classes, of which some adhered to Hindu customs and usages as to property ; others retained them in a modified form ; and others again had wholly abandoned them and adopted different rules and laws as to their property. This latter class comprised the "East-Indians" a class well defined in India, which followed in all things the usages and customs of the English resident there.

Held further on the evidence, that although the family from which the deceased proprietor M. A. and the Respondent F. A. were descended belonged to that class of native Christians which commonly retains Hindu usages and customs, yet the deceased M. A. from the time of his marriage, with an East-Indian wife, adhered in all respects to the religion, manners and habits of the East-Indians.

Although it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, yet when there are different laws as to property applying to different classes, parties ought to be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in other respects, of the class to which they are shewn to belong. Nothing can be more just than that the rights and interests in a person's property and his power over it, should be governed by the law which he has adopted, or the rules which he has observed.

Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and in forming their presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

Decree of the Sudder Court of Madras, which awarded a half share of the property to the Respondent F. A. under Hindu law, reversed. [*Abraham* vs. *Abraham*,] 10

NATIVE PRINCES.

See EVIDENCE 1.

NOVATION OF BOND.

B became surety under bond to Government for the Treasurer of a Collectorate. The Collector yearly examined the accounts, and struck a balance which he certified to be correct. B on each such occasion, executed a new bond, but the old bonds were not cancelled or given up. On subsequent enquiry, the Treasurer was discovered to have embezzled moneys during each year, *Held*, that, on such discoveries being made, B was still liable under the old bonds, there having been no

novation, [*Lalla Bunseedhur* v. *The Government of Bengal*,] 689

NUNCUPATIVE WILL.

A party setting up a nuncupative Will and resting his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place. [*Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*,] 348

OBLIGOR.

See PLEADING 8.

ONUS PROBANDI.

1. In a suit by S. to recover possession of a village held without disturbance for 44 years, on the ground that P., an ancestor of the present Defendant, was but a usufructuary mortgagee put in possession by an ancestor of S.,—*Held* that the burthen of proof lay on S, and that he must succeed by the strength of his own title, and not by reason of the weakness of the opponents. [*Sevaji Vijaya Ragunadha Valoji Kristnan Gopalar*, v. *Chinna Nayana Chetti*,] 88

2. Suit by a judgment-creditor's assignee to have it declared that the purchase in an execution-sale by Appellant did not effect any transfer of the ownership from Plaintiff's debtors and the property still liable to be sold in execution of the Plaintiff's decree.

Held that the *onus* lay upon the Plaintiff to prove in the affirmative that the *Talook* was still the property of the judgment-debtors and that the *onus* had not been sufficiently discharged. The decision of the Court in matters of this description should rest not upon suspicion but upon legal grounds established by legal testimony. [*Sreemanchunder Dey*, v. *Gopalchunder Chuckerbutty*,] 215

3. In a suit by a *purdanisheen* Mahomedan lady, S., to recover Government securities indorsed over to her husband B. R., by her, *held* that the burden of proving the reality and *bonâ fides* of the purchases pleaded by him, lay upon B. R and that the burden had not been discharged. [*Moonshee Buzloor Ruheem*, v. *Shamsoonnissa Begum*,] 259

4. In a suit by S., seeking to be relieved from the effect of conveyances admittedly executed by herself, against one who never stood in a fiduciary relation to her, *held* that the *onus* lay upon the Plaintiff, S., to establish her right to the relief prayed for. [*Ibid.*]

5. In a suit by the Crown claiming lands as an escheat, which are admittedly in the possession of the party claiming as heir, the *onus* is on the Crown to show that the last proprietor died without heirs. It is open to the Defendant in such a suit to set up any *justertii* to bar the claim of the Crown. [*Gridhari Lall Roy*, v. *The Bengal Government*,] 382

See BOUNDARY DISPUTE.
— ENHANCEMENT OF RENT 4.
— EVIDENCE 10.
— GUARDIAN.
— H. L. ANCESTRAL PROPERTY.
— H. L. JOINT UNDIVIDED FAMILY 1, 3, 4.
— H. L. PARTITION, AGREEMENT FOR.
— LAND SEPARATED BY CHANGE IN THE COURSE OF A RIVER.
— LEGITIMACY.
— M. L. LEGITIMACY.
— M. L. MORTGAGE 2, 3.
— M. L. NABOB OF CARNATIC'S DEBTS' ACT.
— M. L. NUNCUPATIVE WILL.
— M. L. PRACTICE 5.

OPINIONS OF PUNDITS.

See H. L. PUNDITS, OPINIONS OF.
— NATIVE CHRISTIANS.

ORDERS.

See APPEAL 1, & 2.
— AWARD.
— LIMITATION 4.

OSTENSIBLE OWNER.

See EVIDENCE 1.

OUDH.

See LIMITATION 1, 3.
— M. L. DOWER 1.

OWNERSHIP.

See ACCRETIONS.
— BENAMEE PURCHASE 1.
— H. L. JOINT UNDIVIDED FAMILY.
— H. L. SEIZIN.
— TITLE 2.

PALOCK PUTRA.

See H. L. ADOPTION 5.

PARTIES.

See DISABILITIES.
— ESTOPPEL.
— EVIDENCE.
— MORTGAGE 1.
— PLEADING 8.

PARTITION.

On one of two Hindoo widows applying under Act XIX. of 1841 to determine the right to the immediate possession of the property, a third party set up a will and claimed the property supported by the other widow. The claim was, however, rejected, and, by order of the Court, the property was equally divided between the widows in which they acquiesced. *Held* that, notwithstanding the acquiescence, no regular and complete partition was effected, the Judge in that summary proceeding having had no jurisdiction to make it. [*Bhugwandeen Doobey*, v. *Myna Baee*], ... 327

See H. L. JOINT UNDIVIDED FAMILY 2.
— H. L. PARTITION, AGREEMENT FOR.
— MESNE PROFITS.
— RAZINAMAH.

PARTITION, SUIT FOR.

See MESNE PROFITS.

PARTNERSHIP.

1. The partnership assets consisted in part of Company's paper which was taken in the name of the deceased son of the testator, or in his name jointly with the names of the other brothers and was indorsed and handed over to his brothers:—*Held* that that was a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership which would not affect the right that each son had to his share of the profits, not giving to the son who died, the exclusive right to Company's paper which he so even indorsed, though taken in his name alone, but making it only a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged, [*Bissonath Chunder* vs. *Bamasoondery Dossee*,] 344

2. Every one of the partners in a Mercantile firm of ordinary trading partnership is liable upon a Bill drawn by a partner in the recognized trading name of the firm, for a transaction incident to the business of the firm, although his name does not appear upon the face of the instrument, and although he be a sleeping and secret partner.

In order to take a case out of these principles of the general law, it must be shown that the holder of the Bill knew at the time he received it that the transaction was the private affair of a single partner. [*Bunarsee Das*, v. *Gholam Hossein*,] 557

See H. L. JOINT UNDIVIDED FAMILY 1.

PAYMENT.

Where payment was made upon a bond, the amount paid being less than the interest due, *held* the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree. [*Luchmeswar Singh* v. *Syad Luft Ali Khan*,] 700

See EVIDENCE 10, 11.

PLEAS.

In a suit to recover possession, the Plaintiff alleging that the land in dispute from which he had been ousted, had been settled with him by Government in 1833 as part of his *zemindary*, and the Defendant alleging that the land was part of his *lakhiraj* garden land, which had been released by Government from assessment, the Courts below found that the lands in dispute were part of those which had been settled with the Plaintiff. On appeal to the Privy Council, the Defendant attempted to show that, assuming the lands in question to have been part of those settled with the Plaintiff, that settlement had been improperly made.

Held, that this contention was not open to the Defendant upon the record, never having been taken in the Courts below. [*Sreemutty Dossee*, v. *Ranee Lalunmonee*], ... 453

See BYE-BIL-WUFFA.
— ESTOPPEL.
— PLEADING 1, 2.
— STAMP.
— WAIVER.

PLEADING.

1. The Plaintiff could not be bound by the decision in a suit in which his application to intervene was disallowed and in which the decree was passed so shortly after the above refusal as to allow no time either for an appeal or for the institution of a separate suit. The Defendants could not be permitted to plead in bar a decree so obtained in the absence of the party really interested in contesting the matter with them. [*Tarakant Bannerjee* vs. *Puddomoney Dossee*,] .. 184

2. In dealing with an objection in bar to a Plaintiff's suit before a trial on the facts, the Court is bound to assume the truth of the allegations contained in the plaint.

The mere pendency of a suit in the Supreme Court does not operate as a bar to the prosecution of a suit in a Mofussil Court intended to be simply in furtherance of and supplemental to the suit in the Supreme Court. [*Nawab Sidhee Nuzur Ally Khan* vs. *Ojoodhyaram Khan*,] .. 198

3. The determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations in the plaint (which constitute the case the Defendant has to meet) but which are in reality contradictory of the Plaintiff's case.

Held that the High Court as a Court of special appeal could not substitute a new statement of

facts for that originally contained in the record, and further that even if the case substituted were admitted to be true, the legal conclusion drawn by the High Court from it was opposed to the settled principles of law or equity [*Eshanchun der Singh* vs *Shamachurn Bhutta*,] 209

4 A Defendant in possession when resisting a Plaintiff's claim to an estate is bound to resist it upon all the grounds possible for him according to his knowledge then to bring forward

What is in issue must be taken to have been decided by the judgment

A party deliberately abandoning all right to a document as a Will and using it for a different purpose cannot in a subsequent suit between the same parties use the document as a valid Will [*Srimot Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odoya Taver* vs *Katama Nachiar*,] . 212

5. Evidence ought not to be gone into without settling and recording the issues in the suit in conformity with the provisions of sections 139, 140-1, Act VIII of 1859 [*Baboo Rewun Pershad* vs *Jankee Pershad*,] 214

6. A Plaintiff must succeed on the strength of his own and not on the weakness of the Defendants title [*Gridharee Dass*, v. *Nundokissore Doss, Mohunt*] . 306

7. *Held*, without deciding the case on that point, that the fact of intermediate Tenants being sued as occupying *Ryots* liable for the rent assessed upon them in that character, raised objections both of form and of substance fatal to the maintenance of the suit, inasmuch as the notice on which it was founded did not in that case accurately specify "the ground on which enhancement of rent was desired, and the assessment on which the sum sued for was calculated, was improperly made *Dyaram* v *Bhobindur Narain* (1 Ben S D A, 139) and the note of Sir *William Macnaghten* at the foot of it, p 140, approved of [*Baboo Dhunput Singh* vs *Gooman Singh*,] 309

8 In a suit for recovery of money due on a simple money Bond, certain persons no way parties to the Bond, were made co-defendants with the Obligor, on the allegation that they had combined with the latter to get her estates illegally transferred to them —*Held* that the allegation of illegal transfer was no ground of suit against the co defendants, the suit being based upon an instrument which created no charge upon, or estate or interest of any kind in the lands, and that the Plaintiff was only entitled to a money decree against the person, and could not obtain any decree against the property, of the Obligor

So ruled, although the plaint was entitled as a petition of Plaint against all the Defendants and against "the *Zemindary* rights' of the Principal Defendant, and went on to pray for a decree both against the person and property of the Obligor, and the Plaintiff tendered in evidence a Bond of a subsequent date pleading the *zemindary* rights of the Obligor [*Mohummud Zahoor Ali Khan* v *Mussumat Thakooranee Rutta Koer*,] 320

9 A pleading setting up as a defence a purchase for valuable consideration should ever the seisin of the vendor, and the sale of his absolute title for good consideration [*Radhanath Doss*, v *Gisborne & Co*,] . 636

See APPEAL 1, 2 & 3
— BYE BIL-WUFFA
— ESTOPPEL
— FRESH SUIT
— LIMITATION 1, 4, 7, 13
— M L RESTITUTION OF CONJUGAL RIGHTS
— MULTIFARIOUSNESS
— NUNCUPATIVE WILL
— PLEAS
— WAIVER

PLEDGE, RETURN OF

See MORTGAGE 3

POLLIAM TENURE

Judgment of the S D A Madras awarding to the Respondent possession of the *Polliam* of *Eiasaca Naiknoor* upheld on the ground that there had been great delay on the part of Government in claiming the property by escheat for want of male heirs, and that the evidence on the record established the custom and usage for females to succeed to that *Polliam* [*The Collector of Madura* v *Veeracamoo Ummal*,] .. 43

POSSESSION

A Defendant in possession cannot be ousted without proof of a better title to the estate in the Plaintiff

The general rule of Hindu Law that the possession of one member of a joint family is the possession of all, does not apply where the claimant has been clearly excluded In the latter case the possession is adverse and time will run

Muhpal Singh v *Gya Dutt* and *Bunseedhur* v *Cheddumnee Lall* cited [*Jowalah Buksh* v *Dharum Singh*,] . 189

See CONTRACT OF SALE
— ESTOPPEL
— EVIDENCE 4
— LIMITATION 4, 6
— ONUS PROBANDI 1
— PRESUMPTION OF TITLE
— TITLE 2

POTTAH

1 *Pottah* is a generic term embracing every kind of engagement between a *Zemindar* and his under tenants, or *Ryots*, and is not to be *primâ facie* assumed, in the absence of all words of inheritance, to give an hereditary interest

Where, therefore, a *Pottah* was addressed to the lessee as '*Moostager*" or '*Farmer* and contained such expressions as "*Mocurrery*' or "from generation to generation"—*Held* that the *Pottah* taken by itself, could not be taken to have granted a *Mocurrery istimrary* tenure, but that, upon proof, that the tenure had been held under the *Pottah* as against the *Zemindar* at one unvarying rent since 1792, treated *de facto* as an hereditary tenure, and, from time to time, described both by the *Zemindar* and tenants as a *Mocurrery* tenure, and, as such made the subject of sale and transfer, to the knowledge and with the assent of the *Zemindar*, who on one occasion bid, through his manager for a portion of it, the want of the words "from generation to generation, in the *Pottah* would be supplied and the *Zemindar* could be successfully resisted in a suit in the Civil Court to disturb the possession of the tenant *Joba Singh* v *Meer Nujeeb Oollah* (4 Ben S D A 271) cited and followed

Whatever be the interpretation to be given to the somewhat loose and ambiguous expression, "a terminable lease," it is clear that a tenure under which the Tenant can no longer be dispossessed by his superior cannot be brought within that exception [*Baboo Dhunput Singh* v *Gooman Singh*,] .. 309

2 Where, by an old *pottah*, lands forming part of a *zemindary* had been leased at a specified rent, but there were no words in the *pottah* importing the hereditary and *istemrari* character of the tenure, held, that the absence of such words was supplied by evidence of long and uninterrupted enjoyment, and of the descent of tenure from father to son, whence that hereditary and *istemrari* character might be legally presumed [*Rajah Suttosurrun Ghosal* v *Tarinee Chunder Ghosh*,] 420

See ENAM

PRACTICE

1 A case submitted by an Indian Court for the opinion of Pundits ought to set forth all special circumstances which bear upon the question [*Abraham* v *Abraham*], 10

2 The Judicial Committee will not disturb the finding of the Courts below upon mere issues of fact, unless clearly satisfied of some miscarriage either in the reception or in the appreciation of evidence. In cases turning upon the credibility of evidence, it disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination and of inspecting the original documents [*Ghoolam Moortoozah Khan Bahadoor, v The Government*], 23

3 Leave to appeal having been granted by the Judicial Committee on the condition of the Appellant depositing with the Registrar of the Privy Council the sum of £300, for costs the sum was accordingly deposited, the record was transmitted from *India*, and the Respondent lodged his printed case, but the Appellant, though served with peremptory notice to lodge his case, took no step to bring the appeal to a hearing In such circumstances, on the Respondent's application, the appeal was dismissed and the residue of the sum, after payment of the Respondent's costs, was directed to be paid over to the Appellant [*Gour Monee Debia*, v *Khajah Abdool Gunnee*], 60

4 An appeal to *England* from an order of remand for trial *de novo* by the *Sudder* Court at *Calcutta* to the *Zillah* Court, was, after refusal, upon special application, admitted by the Judicial Committee of the Privy Council, whereupon the Appellant applied to the *Calcutta* High Court to stay proceedings pending the appeal to *England*, on the ground, that the decision of the Appellate Court would govern the question at issue, but his application was refused A petition and an *ex parte* application for the same relief were then presented to Her Majesty in Council, but the Judicial Committee, in the Respondent's absence refused to make any order, though without prejudice to the Petitioner's further application when he had served the Respondent [*Rajah Peeladh Sein*, v *Baboo Bhoodoo Sing*], 73

5 In a case of disputed boundaries, the judgment of a majority of *Sudder* Judges, being, in the circumstances of the case, final and conclusive, and not as one in ejectment would be, and the effect of the judgment being to give some things to the Defendant which, on the evidence, belonged to the Plaintiff,—*Held* that the Judges were wrong in determining the case upon the mere failure of the Plaintiff on his part to support the burthen of proof cast upon him, even though the Plaintiff had failed to prove that no part of the disputed territory was included in what was claimed by the Defendant, and had been unable to prove by independent evidence his right to recover certain *Mouzahs* specified in the plaint, and

That the case should be remitted for further enquiry, but that the burthen of proof should nevertheless still rest upon the Plaintiff, as enough of Defendant's possession had been proved for the purpose

Upon a reversal of the decree of the *Sudder* Court, costs of the suit already paid by the Appellant ordered to be refunded, and the Court below directed to deal with such costs and all other costs of the suit, including those of the appeal according to the result of the said inquiry [*Rajah Lelanund Sing Bahadoor*, v *Maharajah Mohesshur Sing Bahadoor*,] . 74

6 Sec 4, *Ben* Regulation XVI of 1797 authorises the *Sudder* Court on the admission of an appeal to England to require security to be given by the decree holder for protection of the litigated property pending the appeal, notwithstanding execution of the decree had issued before [*Mussumat Jarsut oolButool* v *Mussumat Hosseeree Begum*,] 116

7 The *Sudder* Court having in the exercise of the discretion conferred by Act XXXII of 1839 awarded interest at 12 per cent per annum from the date of suit the Privy Council reduced it to

10 per cent., it appearing that in the account current between the Appellant and *H. B.* and Co. interest was allowed at that rate.

With reference to the Appellant's partial success and other circumstances of the case each party ordered to bear his own costs of the appeal. [*Murtonjoy Chuckerbutty* v. *John Cochrane*,] 124

8. An application for special leave to appeal ought always to be made to the Court below before being made to the Privy Council. Such application dispensed with in the particular case as the parties by their course of conduct were precluded from urging before the Court below that the real value exceeded 10,000 Rs. Special leave to appeal, granted in a case actually brought for arrears of maintenance less than 10,000 Rs. in amount, on the ground that the real value of the subject matter at issue between the parties exceeded the appealable amount. *Mutusawmy Jagavera Yettapa Naiker* v. *Vencataswara Yettia*,] 131

9. Applicant having appealed to *England* against a remand decree of the High Court, dated January 12th, 1864, applied unsuccessfully in June 1865 to that Court for stay of the proceedings on remand. Without appealing against the latter order of the High Court, the applicant applied direct to the Privy Council for expediating the hearing of his original appeal and for stay of proceedings in *India*.

Their Lordships declined to pronounce any opinion on their right or authority to interfere in such cases, being of opinion that even if they had such power no case had been made for interference.

An application for stay of proceedings must essentially be founded upon two grounds—(1) that serious injury will result to the applicant unless the proceedings are stayed; (2) that his application is promptly made.

Mere apprehension as to costs is no ground for stay of proceedings, as ultimately those costs fall on the losing party, nor can such application be considered prompt if made after a delay of sixteen or eighteen months, and must be dismissed with costs. [*Nawab Sidhee Nuzur Ally Khan*, v. *Oojoodhyaram Khan*], ... 133

10. The concurrent opinions of two *Indian* Courts even upon a mere question of fact will not prevent the Privy Council from acting upon their own independent judgment.

Ruggama v. *Atchama* (4 M. I. A., 1; 1 P. C. J., 313; *Haradhun Mookerjia* v. *Muthura Nath Mookerjia* (4 M. I. A., 414; 1 P. C. J., 375); and *Mudhoo Soodun Sundial* v. *Suroop Chunder Sircar* (4 M. I. A., 431; 1 P. C. J., 378) cited and followed. [*Tayammaul* v. *Shashachalla Naiker*,] 139

11. A mere variation in the rate of interest from 5 to 6 per cent. ought not to deprive the Respondents of their costs of the appeal. [*Lalla Bunseedhur* v. *Koonwar Bindesseree Dutt Sing*,] 167

12. A slight modification of the decree would not entitle the Appellant to any costs. [*Ramapershad Tewarry* v. *Shoochurn Doss*,] ... 177

13. Case remanded for the trial of the remaining issues between the parties with the observation that in appealable cases the Courts below should as far as may be practicable, pronounce their opinions on all the important points. Their neglect to do so is a serious evil to the parties litigant as it may involve the expense of another hearing in *India* and a second appeal to *England*.

The practice condemned of including in the transcript record prepared and printed in *India*, voluminous accounts and receipts wholly unnecessary to the question at issue in appeal.

Directions given in taxing costs to disallow all expenses occasioned by the insertion of such unnecessary papers. [*Turakant Banerjee* v. *Puddomoney Dossee*,] 184

14. The Privy Council being of opinion that the Plaintiff was entitled to some damages, and having the whole evidence before them, proceeded to assess the amount of damages as had been done in the case of *Le Breton* v. *Ennis* (4 M. P. C., 323.)

No costs awarded in the appeal and proportionate costs in the *Indian* Courts. [*Mudun Mohun Doss* v *Gokul Doss*,] 202

15. A petition for special leave to appeal ought to contain a full statement of the law and facts of the case to enable the Privy Council to judge of the propriety of granting the leave prayed for. The facts alleged in the petition must be verified by affidavit; otherwise it must either be dismissed with liberty to renew, or stand over for amendment.

Petition entertained, after proper amendment. [*Goree Monee Dossee* v. *Juggut Indro Narain Chowdhry*,] 207

16. The Judicial Committee will not advise the reversal of concurrent decisions of the *Indian* Courts merely on the effect of evidence, or the credit due to witnesses, unless clear error is shewn.

Naragunty Lutchmeedavamah, (1 P. C. J., 827, 9 M. I. A., 87) cited and followed. [*Mussumat Jariut-ool-Butool*, v. *Mussumat Hosseinee Begum*,] 243

17. The marriage of the Plaintiff and the legitimacy of her child having been established by the *Sudder Ameen*, the *Sudder Dewanny Adawlut* on appeal, proceeding merely on probabilities reversed the findings of the *Sudder Ameen*.

Held by the Judicial Committee, (reversing the appellate Court's judgment) that although in a question of disputed fact regarding the credibility of witnesses, irrespective of the probabilities of the case, the second appellate Court is reluctant to compare the conflicting decisions of the two lower Courts, and decide the case on a conflict of evenly balanced testimony by a preponderance of probabilities: yet if there be credible testimony, positive and impeached, it would be improper to put all the evidence aside and act alone on the probabilities of the stories and on inferences from the conduct of the parties.

It is not uncommon in *India* to find a true case placed on a false foundation and supported in part by false evidence under the evil advice of wicked and foolish managers thereof. It is not always safe to conclude a case to be false and dishonest in which such falsities are found. [*J. P. Wise*

and Juggonnath Roy Chowdhry vs *Sunduloonissa Chowdhranee,*] 249

18 The Judicial Committee will not disturb the concurrent judgments of the *Indian* Courts on an issue of fact unless clear error was established [*Meethun Bebee* v *Burheer Khan,*] 255

19 The Privy Council will not disturb the unanimous judgment of the Indian Courts on a question of fact unless the very clearest proof is shewn that the decision is erroneous [*Pareeny Churn Bonnerjee* vs *William Maitland* and *Frederick Addington Goodenough*] 299

20 The Appellant having named in his petition on which special leave to appeal was granted only two Respondents, a third party, alleging an interest, was on her application to dismiss or suspend the hearing of the appeal, made a party Respondent to the appeal

The contention having fairly arisen from the mode of dealing of the last owner, the costs of the appeal of both parties were ordered to be paid out of the residuary estate [*Nawab Umjad Ally Khan* v *Mussumat Mohumdee Begum,*] 315

21 Though the Judicial Committee was always disposed to give a liberal construction to pleadings in *Indian* Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit yet a Plaintiff could not be entitled to relief upon facts or documents not stated or referred to by him in the pleadings

Where the suit was wholly misconceived, the Judicial Committee, considering that if the appeal be dismissed altogether, without prejudice to the Appellant to bring a fresh suit, he might unjustly be met by the plea of limitation did what the Court of the first instance could do, and allowed the plaint to be amended [*Mohumed Zahoor Ali Khan* v *Mussumat Thakooranee Rutti Koer,*] 320

22 The survivor of two Hindoo widow, notwithstanding her originally acquiescing in an adverse title set up against the widows in a case under Act XIX of 1841, does not lose any rights which accrued to her as one of the co heirs of her husband, when that claim was decided to be untenable Nor can alienation of her share be urged as a bar to a suit for recovery of the share of the other widow, deceased, against the latter's father and brother claiming the property as legatees under a will of the latter

An application for review of judgment of the *Sudder* Court in appeal under sec 378, Civ Pro Code, Act VIII. of 1859, being limited to the immoveable property, and the written grounds for review impugning the correctness so far as it related to the real property only to the exclusion of the moveable property in dispute both in the suit and appeal —*Held* that it was competent to the Judges, by whom the order allowing or rejecting application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing, there seeming to be nothing in the Code of Procedure which expressly prohibited them from so doing

Semble —Whether, if the Court was wrong in its procedure, its miscarriage should prevent the Judicial Committee from deciding the question touching the disposit on of the moveable estate on its merits, when there would be no surprise [*Bhagwandeen Doobey* v *Myna Bee,*] 327

23 In the particular circumstances disclosed in the petition, special leave to appeal from the decree of the High Court of the 1st of December, 1865 and the judgment or Order, on review of that decision, of the 1st of April, 1867 allowed it having been laid down by the High Court in previous cases that if there is decision upon a review of judgment that decision is to be considered the final decree [*Nogendra Chunder Ghose* v *Mahomed Ensuff,*] 358

24 The judgment of the Court below reversed, as the only alternative on the Counsel for the Respondent withdrawing from the case on the ground that the judgment could not be maintained Such conduct of Counsel in a perfectly clear case, where there can be but one judgment in the matter, highly approved of [*Rajah Burodacaunt Roy* v *The Commissioner of the Soonderbuns,*] . 419

25 A *Zur-i peshgi* deed the validity of which forms a subject of dispute of the present appeal, was, in a prior case, set aside by the H C, but was founded to be a valid instrument, on appeal from that decision, by the Judicial Committee, and the case out of which this appeal arose involved the same question and turned upon the decision of the Judicial Committee in the former case In the circumstances the decision of the H C, throwing aside the *Zur i peshgi* deed, on preliminary grounds, was reversed, and the cause remitted to the H C, with a declaration that the document was valid, and a direction to the H C to dismiss the appeal from the *Zillah* Judge to the H C with costs, in case the Respondent should fail to appear in the H C, but if he appear to hear and determine the appeal on merits

As for costs it was ordered that in the event of the appeal being decided against the Respondent the Appellant's costs of appeal to *Lagland* should be borne and the costs (if any) paid under the decree of the H C repaid by the Respondent [*Kaleepershad Tewaree* v *Laila Binda Lall,*] 476

26 The Lords of the Privy Council do not, as a rule, disturb the concurrent decision of both the Courts below upon a question of facts unless it very clearly appears there has been some miscarriage of justice some mistrial, or that the conclusion is very plainly erroneous [*Goshain Tota Rim* v *Rajah Luckinee Bullub,*] 487

27 In a question relating to boundaries of land, the Judicial Committee on a review of the evidence, reversed the concurrent decrees of the Court of First Instance and the *Sudder* Court, but without costs

On special application for leave to appeal from two decrees of the *Sudder* Court, and also two decrees made by the Court of First Instance, the Order in Council made on the leave given was confined to the *Sudder* Court decrees *Held*, that such Order was for the purpose of the hearing of the appeal to be considered as embracing all four

decrees. [*Ram Chunder Dutt* v. *Chunder Coomar Mundul*,] 507

28. Special leave to appeal from an Order of the High Court of *Calcutta* dismissing the petitioner from his office of *Moonsiff*, refused, same not being a Patent Office within the meaning of the Statute, 22nd *Geo.* 3, Cap. 75; and the Court having no jurisdiction to entertain the application. [*In the Matter of Sree Mohun Ghuttuck*,] ... 549

29. When the Privy Council declares an Appellant entitled to real property of which he was out of possession, and directs the High Court to make the inquiry necessary to ascertain what is comprised therein, and to proceed in the suit as upon the result of such inquiry may appear to be just, the High Court on being applied to for execution ought, besides giving possession, to ascertain and award the mesne profits up to the date of giving possession. [*Rajah Lelanund Singh*, v. *Maharajah Luckmissur Singh Bahadoor*,] 599

30. Where the Court of appeal in *India* concurs in the finding of the Court of first instance on a question of fact, the Privy Council will not disturb that finding, unless satisfied, beyond all reasonable question, that there was some miscarriage in respect of the principle on which the decision rested, of a presumption to which too much weight was given, or of something as to which the Judicial Committee could see there was a principle involved which ought to be set right for the guidance of the Court in other cases. [*Gabindsundari Debi*, v. *Jagadamba Debi*,] ... 611

31. The *Sudder* Court being equally divided, referred a case for the opinion of the High Court of *Calcutta*. The High Court at *Agra* having been established in the meanwhile, *held*, that the Chief Justice of that Court had power to hear and determine the case. [*Mussumat Oodey Koowur* v. *Mussumat Ladoo*,] 628

32. An infant Appellant, in an appeal pending in the Privy Council, having come of age, and having petitioned the High Court in *India* to be allowed to withdraw from the suit,—*Held*, that it was competent to the Respondent in *England* to have the appeal dismissed for want of prosecution, although the guardian had given security for the costs and paid the expenses of the appeal, and although the (former) infant was not served with notice of the motion, the Council being satisfied that he had in the High Court petitioned for leave to withdraw. [*Ranee Bistoopria Putmadye* v. *Nund Dhul*,] 631

33. Where both the lower Courts had agreed as to the facts, the Privy Council refused to examine the evidence, the controversy being merely as to the weight to be attributed to it. [*Lalji Sahu*, v. *The Collector of Tirhoot*,] ... 643

34. Where the High Court affirmed the judgment of the Court below on the facts without giving reasons for such affirmance, the Judicial Committee reviewed the facts, and reversed the decree. [*Charles Seton Guthrie*, v. *Abdool Mozuffer*,] 660

35. Where there are concurrent decisions on a question of fact, the Judicial Committee will not (especially in a question of fact as to boundaries) reverse the decision unless there was no evidence, or there has been in the conduct of the trial, or in the mode in which evidence was adduced, or in the course of deciding the case, a clear departure from the ordinary principles which regulate judicial proceedings. [*Maharaj Kumar Baboo Guneswar Singh* v. *Durga Dutt*,] 676

36. Where the decisions of the first Court on a question of fact has been affirmed on appeal, their Lordships will not reverse such finding on a mere balance of testimony; there must be so strong a preponderance of testimony that they can confidently pronounce it to be wrong. [*Ranee Sarat Sundari* v. *Kumar Paresnarayun*,] ... 681

See COMPROMISE 2.
— DEATH-BED DISPOSITION.
— DOCUMENTS NOT TENDERED WITH PLAINT.
— EVIDENCE 1, 3, 4, 5, 10, 12, 13, 14.
— FORECLOSURE.
— FRESH SUIT.
— GANJAM TRIBUNALS.
— GUARDIAN.
— ISSUE 1.
— JUDGMENT IN REM.
— LEAVE TO APPEAL.
— LEGITIMACY.
— LUNACY.
— MAINTENANCE 2.
— PLEAS.
— PLEADING.
— PURDAH WOMAN.
— RE-HEARING.
— RES-JUDICATA.
— STAMP.
— TROVER.
— H. L. ADOPTION 2.
— H. L. CUSTOM.
— M L. RESTITUTION OF CONJUGAL RIGHTS.

PRECATORY TRUST.

See H. L. MOHUNT.

PRESUMPTION.

See BENAMEE PURCHASE 1 & 2.
— BOUNDARY DISPUTE.
— GENUINENESS.
— H. L. ADOPTION 5.
— H. L. ALIENATION BY WIDOW.
— H. L. JOINT UNDIVIDED FAMILY 3.
— H. L MORTGAGE 3.
— H. L. POTTAH 1, 2.
— H. L. REUNION.
— H. L SHEBAIT.
— H. L. WILL 3.
— M L BENAMEE PURCHASE.
— M L. LEGITIMACY.
— M L. MARRIAGE.

PRESUMPTION OF TITLE.

Dispute arising as to certain boundary lands between the *Zemindaries* of *Yettiapooram* and *Ramnad*, the disputed lands were attached by the Government to prevent, it would seem, the breach of the public peace. In a suit then instituted by the *Zemindar* of *Yettiapooram*, the Plaintiff, Respondent, neither party could make out any clear title but the facts went to show that both at, and long prior to, the time of the attachment, the disputed lands were in time possession of the Plaintiff, Respondent. *Held*, affirming the decision of the Courts below, that the title of the Respondent must be preferred and the appeal dismissed with costs. [*The Zemindar of Ramnad*, v. *The Zemindar of Yettiapooram*], ... 65

PRIMOGENITURE.

See H. L. ANCESTRAL PROPERTY.

PRINCIPAL AND AGENT.

1. *H. B.* and Co. as Factors, having an interest by reason of their advances in the Appellant's goods, were, by the general Mercantile law of *England* (which, in the absence of proof of any particular qualifying usage or custom, was applicable between Principal and Factor at *Calcutta*) justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their Principal, or by contract, which circumstances were not proved

The consignments being within the scope of the Factors' general discretion and no breach of duty being established, the Principal and not they were chargeable with the losses on those shipments.

Bertram v. *Godfray* (1 Knapp's P. C. Cases, 381) distinguished. [*Murtonjoy Chuckerbutty*, v. *John Cochrane*], ... 124

2. If an agent making a contract exceeds his definite authority by inserting an additional term therein, and the contractee is unaware of the agent's want of authority; in such a case the principal cannot enforce the contract without giving effect to the additional term which is an integral part thereof.

But where the agent acting under definite directions enters collaterally into a distinct and separate contract with a third party, the principal is not bound by the additional liability which he never contemplated. [*Eshan Chunder Singh*, v. *Shamachurn Bhutto*], ... 209

PRIVITY OF TITLE OR TENURE.

See ENHANCEMENT OF RENT 3.

PROCLAMATION OF DISQUALIFICATION.

See DISQUALIFIED PROPRIETOR.

PROFITS.

Where a party refused to render accounts, and there was evidence of spoliation of the Banking Books, the Court charged him with the principal sum for which he was accountable, with interest at 12 *per cent.*, in lieu of the profits he failed to account for, that being the rate claimed by himself on the sums due to him. [*Ram Pershad Tewarry*, v. *Sheochurn Doss*], ... 117

See MORTGAGE 3.
— H. L. WILL 1.

PUNJAB CODE.

See LIMITATION 3, 7.
— M. L. DOWER 1.

PURCHASE.

See AUCTION PURCHASER.
— BENAMEE 2.
— CONSTRUCTION 1.
— CONTRACT OF SALE.
— EQUITY OF REDEMPTION, PURCHASE OF.
— EVIDENCE 9.
— FORECLOSURE.
— GUARDIAN.
— JOINT TENANTS, RECEIPTS BY.
— LIMITATION 13.
— PURCHASER IN REVENUE SALE.
— SALE UNDER DECREE.
— H. L. PARTITION, DEED OF.
— H. L. STEP-MOTHER.

PURCHASER.

The purchase of property in the *Mofussil* at a sale in execution of decree is valid, notwithstanding a decree for sale of the property in a suit for foreclosure pending in the High Court at the time of sale, to which the purchaser was not a party.

The possession of a purchaser at a sale in execution of decree, without notice of a mortgage of the property, is adverse to the mortgagee, and a suit to disturb his possession must be brought within twelve years of the commencement of such possession. [*Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee*,] 698

PURCHASER IN REVENUE SALE.

A purchaser of a *Zemindary* at a sale by public auction to satisfy arrears of Government revenue under *Beng.* Regulation XI. of 1822, is entitled (1) to the immediate possession of such lands as at the time of the sale were in the possession of the *Zemindar*, and (2) to set aside by suit all sub-tenures created since the Decennial Settlement by the *Zemindar* or any of his ancestors.

Mouzahs forming a *Shikmee Talook* created before the Decennial Settlement, and held of the *Zemindar* by *Mocurrery* tenure, *i. e.*, at a fixed rent not liable to alteration, are not liable to resumption by a purchaser under Beng. Regulation XI. of 1822.

A *Zemindary* was purchased at a revenue sale in 1833, and persons claiming as *Talookdars* certain *Mouzahs* within the *Zemindary* were by order of the *Sudder* Court put in possession in 1841, about which time the purchaser died, leaving a widow, who adopted an infant son under a power from her deceased husband, and instituted a suit in 1853 for the recovery of the *Mouzahs* :—*Held* that the death of the purchaser and the minority of the heir would clearly take the case out of the Regulation of Limitation III. of 1793. [*Rajah Suttosurrun Ghosal* v. *Tarinee Chunder Ghose,*] 420

See CONSTRUCTION 1.
— SALE FOR ARREARS OF REVENUE.
— SERVICE TENURE.
— TENURE, ANCIENT.
— TENURE, TALOOKDARY, CANCELLATION OF.
— GHATWALLY TENURE.

PURDAH WOMAN.

The Judicial Committee of the Privy Council, and the Courts of *India*, have always been careful to see that Deeds taken from *Purdah* women have been fairly taken ; and that the party executing them has been a free agent, and duly informed of what she was about. [*Greesh Chunder Lahoree* v. *Mussamut Bhuggobutty Debia,*] ... 579

See EVIDENCE 6, 7.
— ONUS PROBANDI 3.

PUTNEE

A transfer of his tenure by a *Putneedar* is not binding on the *Zemindar*, unless made strictly in accordance with the provisions of Regulation VIII. of 1819. [*Robert Watson & Co.*, v. *The Collector of Rajshahye,*] 500

See LIMITATION 8.

PUTNEE LEASE.

A *Zemindar* gave a *putnee* lease at a fixed *Jumma* of his *Zemindary* together with certain *Bheel Bhurrattee* lands which were added by accretion to the *Zemindary* and held originally under a ten years' settlement (with a preferential right of renewal) which had only ten months more to run.

On the expiration of the said term the lessee chose to take a renewal of the settlement in his own name and engaged to pay separate rents therefor to Government—and continued for nine years to pay to the *Zemindar* the entire *putnee* rent.

Held, affirming the judgment of the Court below, that under the circumstances the lessee had no right to bring a suit against the *Zemindar* for a refund of the Government revenue paid by the lessee for the resettled *Bheel Bhurrattee* lands or for abatement in the fixed *putnee jumma*. [*Prannath Chowdry* v. *Ranee Surnomoyee Dossee,*] 22

RAZINAMAH.

Two brothers executed a *Razinamah* in 1824 defining their respectve rights in fixed shares in paternal property, which included a tax levied on the pilgrims at *Gya*. The tax was subsequently abolished and a perpetual money payment awarded instead as compensation.

An actual partition was then made between the brothers, of the *Zemindary* properties in the share specified in the *Razinamah*, but not of the aforesaid money payment.

Government finally set off the money payment by reducing the revenue assessment of certain *Mehals* which led to disputes between the brothers as to whether the money should be divided in the proportions stated in the *Razinamah* or in the proportions of the Government revenue paid by each after partition for the *Mehals* the subject of revenue remission. *Held*, that the money payment in lieu of the abolished tax was a distinct asset and separately divisible in the proportions fixed by the *Razinamah* ;

That in whatever new form the Government might subsequently choose to keep their fiscal accounts, the rights of the parties under the *Razinamah* and the partition could not be affected without their consent, but would continue to be adjusted according to the proportions originally established. [*Maharajah Inderjeet Kooar*, v. *Mussumat Ismudh Koonwar*] ... 142

REDEMPTION.

See BYE-BIL-WUFFA.
— EQUITY OF REDEMPTION, PURCHASE OF.
— FORECLOSURE.
— LEASE.
— MORTGAGE 1, 2.
— MORTGAGE, LAW OF, IN MADRAS.

REFORMATION OF LAND.

See EVIDENCE 9.

REGISTRATION.

See ENHANCEMENT OF RENT 4.
— H. L. ANCESTRAL PROPERTY.
— H. L. JOINT FAMILY 3.

REGISTRATION OF DEED.

Where a deed, which ought to be registered, is

refused registration, the party aggrieved should proceed under s. 84 of Act XX. of 1866; and if this course is not pursued, he cannot make use of the document as evidence in a civil suit brought by him to enforce specific performance of the terms of the deed, and to set aside a subsequent deed as fraudulent. [*Putteh Chund Sahoo* v. *Leelumber Sing Doss*,] 709

REGULATIONS (BENGAL.)

III. OF 1793, SEC. 14.

See LIMITATION 4.

III. OF 1793, SEC. 16.

See RES-JUDICATA 1.

VIII. OF 1793, SECS. 41, 51.

See ENHANCEMENT OF RENT 4.
— RESUMPTION.
— SALE FOR ARREARS OF REVENUE.

X. OF 1793.

See DISQUALIFIED PROPRIETOR.

XV. OF 1793, SEC. 9.

See MORTGAGE 3.

XV. OF 1793, SECS. 8 & 9.

See CONSTRUCTION 4.

XV. OF 1793, SEC. 11.

See BOND.
— BYE-BIL-WUFFA.

XIX. OF 1793, SEC. 10.

See LIMITATION 2.

XLIV. OF 1793, SECS. 5 & 7.

See CONSTRUCTION 1.
— SALE FOR ARREARS OF REVENUE.

XI. OF 1796, SECS. 4 & 6.

See ABSCONDING PROPRIETOR.
— CONSTRUCTION 3.

XVI. OF 1797, SECS. 4.

See PRACTICE 6.

LII. OF 1803.

See DISQUALIFIED PROPRIETOR.

II. OF 1805, SECS. 3, CL. 3.

See LIMITATION 2.

XVII. OF 1806.

See BYE-BIL-WUFFA.
— FORECLOSURE.
— MORTGAGE, LAW OF, IN MADRAS.

VIII. OF 1819.

See LIMITATION 8.
— PUTNEE.
— GHATWALEE TENURE.

VII. OF 1822.

See AWARD.

VII. OF 1822, SEC. 6, CL. 3.

See GOVERNMENT 1.

XI. OF 1822, SECS. 30—33.

See SALE FOR ARREARS OF REVENUE.
— TALOOKDARY TENURE.

IX. OF 1825.

See AWARD.
— THAKBUST AWARD.

XI. OF 1825, SEC. 4, CL. 2.

See LAND SEPARATED BY CHANGE IN THE COURSE OF A RIVER.

III. OF 1828, SEC. 13.

See JURISDICTION 1.
— SUNDERBUNS BOUNDARY.

IX. OF 1833.

See AWARD.

REGULATIONS (MADRAS.)

REG. III. OF 1802, SEC. 17, CL. I.

See NATIVE CHRISTIANS.

REG. IV. OF 1831.

See ENAM.

RE-HEARING.

There were four Respondents in an appeal to the Privy Council. At the hearing, the appeal was allowed *ex parte* against all the Respondents. One Respondent afterwards petitioned for a re-hearing, on the ground that neither he nor his agents had notice that the appeal had been entered, or fixed for hearing, until after it had been decided.

On enquiry it appeared that the petitioner had inaccurately described the suit to his agents as an appeal against himself only, without mentioning the names of the other Respondents; and the agents on being told at the Privy Council Office, that no appeal so entitled was pending, had taken no further steps.

Held, that there had been omission and neglect on the petitioner's part and on the part of his agents, such as to prevent the Judicial Committee from recommending a re-hearing of the case. [*Exparte Kisto Nauth Roy*,] 426

RELEASE.

See EQUITY OF REDEMPTION.

RELIGION.

See NATIVE CHRISTIANS.

RELINQUISHMENT.

A widow, being old, presented a petition in a suit by her daughter-in-law, as guardian of the former's infant son, relinquishing all her rights in the property to the daughter-in-law herself, and as guardian of the infant. The son died, and the mother now sued her daughter-in-law for possession as heiress of her son. *Held* that, by the petition, the mother had transferred no rights to the daughter-in-law as proprietor, but that the mother, as heiress of her son, was entitled to the estate [*Mussumat Qodey Koowur* v. *Mussumat Ladoo*,] 628

RELINQUISHMENT OF CLAIM IN PART.

Sec. 7, Act VIII. of 1859 is a bar to a subsequent suit for the omitted portion of the claim, although the omission had been involuntary or accidental.

The clear and positive words of a law cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges suppose to have been the reasons for enacting it.

The correct test for the application of sec. 7, is, whether the claim in the new suit is founded on a cause of action distinct from what was the foundation of the former suit. [*Moonshee Buzloor Ruheem*, v. *Shumsoonnissa Begum*,] ... 259

REMAINDER MAN,

See WILL, CONSTRUCTION OF.

REMAND.

See EVIDENCE 11.
— JUDGMENT IN REM.
— JURISDICTION 1.
— LEGITIMACY.
— MAINTENANCE 3.
— TROVER.
— M. L. RESTITUTION OF CONJUGAL RIGHTS.

REMITTANCE.

See EVIDENCE 11.

RENT.

See CONSTRUCTION 1.
— ENAM.
— ENHANCEMENT OF RENT 1, 2.
— JOINT TENANTS, RECEIPTS BY.
— MESNE PROFITS.
— PUTNEE LEASE.
— H. L. SHEBAIT.

RE-SETTLED LANDS, ABATEMENT FOR.

See PUTNEE LEASE.

RES-JUDICATA.

1. Sec. 16, *Beng.* Regulation III. of 1793 prohibiting the *Zillah* and City Courts from entertaining any cause which, from the production of a former decree, or the records of the Court, shall appear to have been heard and determined by any former Judge, or Superintendent of a Court having competent jurisdiction,—*Held* to apply only to cases in which the question to be determined in the cause was the same question as had been already heard and determined, and not to cases in which new circumstances had intervened, and altered the nature and character of the question to be determined.

Money recovered under a decree of judgment cannot be recovered back in a fresh suit or action

whilst the decree or judgment under which it was recovered remains in force, as the original decree or judgment must be taken to be subsisting and valid until it has been reversed and superseded by some ulterior proceeding. [*Shama Purshad Roy Chowdhry*, v. *Hurro Purshad Roy Chowdhry*.] 103

2. The Appellant having obtained a decree against one *Lenaine* alone, its effect, being, simply to direct the restitution by *Lenaine* of 95 logs of timber claimed by the Appellant. *Held*, that, section 2 of Act XXIII. of 1861, was no bar to a regular suit, in the nature of an action of trover, whereby damages were claimed, to the extent of Rupees 23,304-6-4, including interest from the time admitted as the date when one *Snadden* obtained the 95 logs of timber, brought by the Appellant, not only against *Lenaine*, but also against *Snadden*, who was a purchaser of the timber from *Lenaine*, and who was no party to the original suit, no party to the original decree, and in no way bound by it; the object of the second suit, being not restitution of the 95 logs, and therefore not an execution of the decree at all; but, its object being to recover damages for a tort alleged to have been done by both *Lenaine* and *Snadden*. [*Aga Syed Abdool Hoosain*, v. *Adam Lenaine*,] 486

3. A Mahomedan died, leaving, among other, a widow and a sister entitled to shares in his estate. The widow got possession of the whole. The sister died; and after her death, her husband, on behalf of himself and grandson, sued the widow to obtain the shares to which the deceased's sister was entitled, and obtained a decree for payment of the same after satisfaction of the widow's lien for dower, in certain proportions to himself and grandson. The husband's interest in the decree was subsequently confiscated by Government for having taken part with the enemy in the mutiny. He subsequently died, leaving his grandson. The widow died during the mutiny, and her brother was put into possession of the property, by the Government as her heir. The grandson now sued the widow's brother to recover his own and his grand-father's share, alleging that the lien for dower had been satisfied. *Held*, the suit was not barred by Act VIII. of 1859, section 2. [*Nawab Mahomed Ameenoodeen Khan* v. *Moozuffur Hossein Khan*,] 585

4. The doctrine laid down in the *Duchess of Kingston's case* as to estoppel by judgment is applicable to cases tried under the Civil Procedure Code of *India*, the 2nd section of which is consistent with that rule

But the Judicial Committee, reversing the decision of the Court below, considered that the doctrine had no application in the present case, the judgment relied on not being the judgment of a Court of concurrent jurisdiction directly upon the point upon the same matter; and after an examination of the whole evidence restored the judgment of the first Court [*Khugowlee Singh* v. *Hossein Bux Khan*,] 655

See PLEADING 4.
— TROVER.

RESUMPTION.

1. Where the purchaser, in a sale for arrears of rent, of a *Putnee* granted by the *Rajah* of *Burdwan*, claimed to resume as *Gram Surunjamee* (rent-free village lands) certain lands situate in the *Talook* and in the occupation of persons described as *Thannadar*, from before and since the Decennial Settlement, in lieu of wages for duties partly police and partly *Zemindary*.—*Held*, affirming the judgments of the Courts below,—

That the *Chakeran* lands of the description were not held as *Thannadary* lands in the strict sense of the expression, as such lands had already been resumed by the Government under Beng. Reg. I. of 1793, sec. 8, cl. 4, but as *Chowkeedary* lands:—lands appropriated to the maintenance of an officer, who performed, and was liable to perform, duties as a village watchman;

That they were not to be included in the *Malguzary* lands for the purpose of increasing the *Jumma*, because the *Zemindars* had not the full benefit of them; but that they were to be included in the *Malguzary* lands, under Beng. Reg. VIII. of 1793, sec. 41, for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in the part be to attend to public interests would vest;

That the *Talookdar* had no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they are subject; and

That the right of appointing such officer belonged to the *Talookdar*, and that such officer was liable to the performance of such services to the *Talookdar* as, by usage in the *Zemindary* of *Burdwan*, *Chowkeedars* had been accustomed to render to the *Zemindar*. [*Joykishen Mookerjee*, v. *The Collector of East Burdwan*], ... 54

2. Reg. II. of 1819, s 30, does not apply to a suit in a Civil Court for resumption under s. 10 of Reg. XIX. of 1793. In such suits the *onus* is upon the Plaintiff to prove *primâ facie* case. The decisions in *Sonatun Ghose*, v. *Moulvi Abdul Furar* and *Hira Mani Bebi* v. *Kunj Behari Holdar* upheld [*Hurryhur Mookhopadhya*, v. *Madub Chunder Baboo*], ... 713

See ADMISSION 2.
— SERVICE TENURE.
— GHATWALEE TENURE.

REVENUE SALE.

See CONSTRUCTION 1.
— EXECUTION PURCHASER.
— MORTGAGE 1.

REVIEW OF JUDGMENT.

See PRACTICE 22.

SALE.

See ABSCONDING PROPRIETOR.
— CONSTRUCTION 2.
— LIMITATION 8, 5.

SALE FOR ARREARS OF REVENUE

The *zemindary* was sold for arrears of Government revenue under Reg XI. of 1822 The purchaser's representatives sued to enhance the rent of the under-tenure. *Held*, that they had no right to enhance. The rights of the purchaser were defined by ss. 30—33 of Reg. XI. of 1822, which were repealed by Act XII. of 1841, and that Act. with exception of the 1st and 2nd sections, was again repealed by Act I. of 1845. Neither of the two last-mentioned Statutes contains any saving of rights acquired under the Statutes which it repealed, but expressly limited the enlarged powers which it gave to purchasers at sales for revenue arrears to purchasers at future sales.

A sale for arrears of revenue cannot of itself merely, and without any act, proceeding or demonstration of will on the part of the purchaser, alter the character of an under-tenure.

Semble.—Sec. 5, Reg. XLIV. of 1796, is now of no force for any purpose, but that of declaring the general principles upon which all the subsequent legislation has proceeded, viz., that of putting a purchaser at a sale for arrears of revenue in the position of a party with whom the perpetual settlement of the estate was made. Where an under tenure existed at the time of the decennial settlement, the only right which the *Zemindar* could exercise over it was that conferred by section 51 of Reg. VIII. of 1793. *Rajah Suttosurrun Ghosal*, v. *Tarinee Chunder Ghose*,] ... 420

See CONSTRUCTION 1.
— EXECUTION PURCHASER
— TENURE, ANCIENT.

SALE UNDER DECREE

It is the practice of the Courts in *India* not to give possession under a Judicial sale by removing one who is in possession under an apparent *bonâ fide* title. As a debtor can only assert his title to possession by a regular suit, so a decree-holder who derives his title through him must do the same. [*Turakunt Banerjee* v. *Puddomoney Dossee*,] 184

See EXECUTION PURCHASER.
— LIMITATION 5.

SALVOR.

See MORTGAGE 1.

SERVICE TENURE.

In 1775 a rent free *sanad* was granted to M. for having put down wild elephants, the consideration in future being to cultivate and keep up a body of men, and take care of the *ryots*, M. died, and a fresh *sanad* was in 1786 granted to K. and R., they being thought to be his heirs; but in 1807, M.'s true heirs having established their title, the Government gave them a fresh *sanad* in lieu of the one to K. and R., reciting the circumstances; both these *sanads* were to cultivate, keep up a body of men, keep off elephants, and attend to the safety of the *ryots*. *Held* that this was not a service tenure that could be resumed, and the subject of service tenures was explained.

The *zemindary* in which these lands were situated was settled in 1802, and was in 1850 sold for arrears of Government revenue; the Appellant claimed to set aside the *sanad* of 1807, on the ground that Government had not right to give such a *sanad*, but he contended that, if it had, it could be set aside by a purchaser at a Government sale. *Held*, that the *sanad* was not a new grant, but a confirmation of the one made before the decennial settlement, and that Government was competent to give such confirmation [*Alexander John Forbes* v. *Meer Mahomed Tuquee*,] 588

SHIPMENT, LOSSES ON.

See PRINCIPAL AND AGENT 1.

SOLICITOR, DUTY OF.

It is the duty of a Solicitor, who has once undertaken a cause, to carry it to a conclusion, ... 533

SPECIAL DAMAGE.

See TORT.

STAMP.

The Respondent in settlement of family differences, executed in favour of the Appellant, his elder brother, a deed of release as to certain family property—which release was subsequently held to be a valid family contract between the two brothers—written upon unstamped paper, and containing an agreement for subsequent stamping, and which was afterwards stamped with an insufficient stamp of two annas. In a subsequent suit by the Respondent against the Appellant in which it was desired to use the document in evidence, the Respondent in the Court of First Instance disputed the deed of release on the ground of genuineness only, but, in the Appellate Court, he also objected to its admissibility in evidence as being insufficiently stamped, and his objection was overruled. On appeal to the High Court of *Bombay*,

that Court ruled, that, the deed of release was valid only to the extent of the value covered by the two annas stamp, and that to this extent it operated to reduce the Respondent's claim. *Held*, that, admitting the stamp was insufficient, there were two courses which ought to have been taken by the High Court. The Court might have refused to admit the document for want of a proper stamp. That it was not said that that would have been a correct course, but that it would have been a possible course; or, they might, under the Acts and Regulations for that purpose have required the document to be properly stamped, and the penalty paid. That, as to rejecting the document *in toto*, there was the serious difficulty, that there did not appear to have been any objection raised to its admission in the Court of First Instance, and that it was difficult to see, how, that being the case, it would have been a just course to have rejected *in toto* the document, in the Court of last appeal. That the Court of last appeal in *India*, did not take either of these courses. It did not reject the document, nor did it do, what obviously would have been the correct course, require the deed to be properly stamped, and the penalty paid, but left the deed as part of the evidence in the suit, just in the way in which it had been placed among the evidence by the Court of First Instance, and it qualified its effect, and the extent of its operation, by making it a deed of release, releasing so much of that which the Plaintiff might otherwise claim, as would be covered by the insufficient stamp of two annas, a course apparently entirely without precedent, without principle, and without authority. [*Mantappa Nadgowda* v *Baswuntrao Nadgowda*,] 648

See EVIDENCE 16.

SUDRA CASTE.

See H. L. MARRIAGE.
— SUCCESSION 2.

SUICIDE.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them, not only the laws, but the Sovereignty of their own State, and those who live amongst them, and become members of their community, become also partakers of and subject to the same laws.

The rule is however inapplicable to *India*, where the first settlement was made by a few foreign traders in a highly civilized country under the Government of a powerful Mahomeden ruler with whose sovereignty the English Crown never pretended to interfere for some centuries afterwards The retention by the English settlers of their own laws within their factories, was not on the ground of International law or by authority of the Crown, or because the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in his judgment in the case of the Indian Chief (3, Rob 28)

The permission accorded by the indulgence or weakness of Eastern Potentates to Europeans settling in factories to retain the use of their own laws, does not extend these laws to Natives within the limits of those factories, who remain to all intents and purposes subjects of their own Sovereign.

The English law not being applicable to Hindus on the first settlement the subsequent acquisition of the rights of sovereignty by the English might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged.

The English Crown had no jurisdiction over the native subjects of the Great Mogul when Charles II. granted the Company's Charter in 1661.

Neither the Charter 13, George I. nor the subsequent Charters expressly declare that the English law, civil and criminal, shall be applicable to natives within the limits of Calcutta None of these Charters contain any forms applicable to the punishment by forfeiture or otherwise, of the crime of self-murder and with respect to other offences to which the Charters did extend, the application of the English Criminal law to non-christian natives, has been treated as subject to qualifications.

The English law of ferfeiture of the personal property of persons committing suicide, inapplicable to Hindus and Mahomedans.

Quære.—Whether the law ever had existence as regards Europeans. [*The Advocate General of Bengal* vs. *Ranee Surnomoyee Dossee*,] ... 39

SUITS BETWEEN UNDER-TENANT AND ZEMINDAR.

A suit between Under-tenants claiming a right to the possession of lands of which they have been dispossessed, and their *Zemindar* who disputes their right of possession, may be brought under the 6th clause of the 23rd Section of Act X. of 1859. [*Khojah Assanoolloh* v. *Obhoy Chunder Roy*,] 535

SUITS, VALUATION OF.

In estimating the value of a suit the costs must not be included in the amount in dispute. [*Nilmadhab Doss* v. *Bishumber Doss*,] ... 489

SUMMARY ORDER.

See LIMITATION 4.

SUNDERBUNS BOUNDARY.

Section 13, Regulation III. of 1828, was intended to make provision for the immediate settlement of the limits of the *Sunderbuns*; hence it fixed peremptorily a period after which the demarcation of those limits, made by the Special Commissioner to that end appointed, should be final.

No person can come in after that period (namely, three months from the date of the Commissioner's proceeding fixing the boundary) pleading infancy or other ground for re-opening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world. Even within the period of limitation allowed, no one could be heard to object to the

line, unless he declared and offered proof that at the time of the survey he was in the occupation of a definite quantity of land cleared and under cultivation within the line. After the line had once become final, no party could be heard to say that even cultivated lands within it were part of his settled *Zemindary*. [*Rajah Burodacant Roy* vs. *The Commissioner of Soonderbuns*,] ... 413

TALOOK.

— *See* DISQUALIFIED PROPRIETOR.
— ENHANCEMENT OF RENT 1, 4.

TENANTS.

— *See* ENHANCEMENT OF RENT.
— JURISDICTION 2.
— PLEADING 7.

TENURE.

— *See* CONSTRUCTION 1.
— ENHANCEMENT OF RENT 1, 3.
— EVIDENCE 10.
— SERVICE TENURE.
— H. L. SHEBAIT.

TENURE, ANCIENT.

Some time before 1843, the Government Revenue payable by a *Zemindary* falling into arrears, the property was put up to public auction and was sold to S., who thereby acquired such rights to cancel &c., as the then subsisting Regulations gave to purchaser at such a sale; but neither S., nor any one of the subsequent purchasers from S., attempted to disturb a mesne tenure or increase its rent till 1856, when the then *Zemindar* first instituted a suit to increase the rent:—*Held*, reversing the decree of the *Zillah* and *Sudder* Courts,—

I. That the existing interest of the mesne tenant did not, *ipso facto*, cease to exist without any act done by the purchaser in the Government sale in 1843, as the language of sec. 5 read with the exception in sec. 7, Beng. Reg. XLIV., 1793, showed that what was meant by sec. 5 was not the destruction of tenure, but the increase of rent, under certain specified and equitable limitations.

Quære.—Whether sec. 5, Beng. Reg XLIV., 1793, is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the *Zemindary*, which passed to subsequent purchasers.

II. That it was manifestly unjust to allow the Respondent to disturb the tenure, considering that, during the long period for which the property had been held at a small unvarying rent, it had been bought and sold, and changes and improvements had been made, no doubt, at a considerable expense and upon the faith of the rent remaining unchanged, and that the Respondent himself had purchased for a price presumably calculated accordingly. [*Rance Surnomoyee* v. *Maharajah Sutteeo Chunder Roy*], ... 60

TENURE, TALOOKDARY.

An auction purchaser under *Bengal* Regulation No. XI. of 1822, had the option of cancelling and avoiding a *Talookdary* tenure, a power which he might or might not exercise; and, in a case in which the Government was the purchaser it was *Held*, that, it was incumbent on the Government to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure. That, if the Government had not effectually annulled the tenure before 1842, it had lost its Statutory right to do so, since Regulation XI. of 1822, upon which that right depended, was repealed by Act No. XII. of 1841. That in the case under appeal, the Government, whatever might have been its powers, did not, in fact, cancel or destroy the tenure, but left the *Talookdars* in the position in which they would have been, as of right, under the old law, reducing their tenure from a *Talook* at a fixed, to one at a variable rent; and that a purchaser of the rights of the Government had a right to bring a suit properly framed for the further enchancement of the rent, but was not entitled to disturb the possession of the *Talookdars*, or to let the land over their heads to the highest bidder. [*Khojah Assanoollah v. Obhoy Chunder Roy*], ... 535

THAKBAST AWARD.

A *Thakbust* award of boundary, made in the Lower Provinces, may be an award under Regulation IX. of 1825, within the meaning of Act XIII. of 1848. It would, in any case, be material evidence of possession. [*Rajah Sahib Perhlad Sein* v. *Maharajah Rajenderkishore Singh*,] ... 430

THANNADARY LANDS.

See RESUMPTION.

TITLE.

1. A Defendant in possession cannot be ousted without proof of a better title to the estate in the Plaintiff.

A compromise as to title by inheritance between Plaintiffs and another Defendant R. K. (whom the *Sudder* Court considered entitled to the estate) would not justify a decree for possession against J. the Defendant in possession inasmuch as (1) no question of title could be determined in the Plaintiff's suit as between the co-defendants J. and R. K. and consequently J.'s possessory title would be defeated without giving him an opportunity of contesting the title finally used against him (2) the decision in effect indirectly sustained an union of titles which could not have been directly advanced in union against J.'s possession.

Held, on the evidence that the Plaintiffs had wholly failed to prove that they or their immediate ancestors were ever in possession as co-sharers since 1753. [*Jowla Buksh* vs. *Dharam Singh*,] 189

2. A originally owned two *Zemindaries* be-

tween which lay a *Bheel*, or marsh, of which he also owned the fisheries. One of the *Zemindaries* was sold and purchased by B., but the *Bheel* fisheries still continued with the remaining *Zemindary* held by A. After the sale, certain lands reclaimed from the *Bheel* were, for some years, held by B as part of his purchased *Zemindary*. A instituted a summary suit under Act IV. of 1840, and was by an order of the Magistrate put in possession of these lands. B brought a regular suit against A to recover the lands, and set aside this order.

Held (reversing the decisions of the Courts below,) that it was necessary for B to show a better title to the land than A could produce. It was not enough from him to prove possession anterior to the Magistrate's order under Act IV. of 1840. The presumption was that the land of the *Bheel* belonged to A, who had admittedly owned both estates before, and had retained the fisheries of the *Bheel* after the auction sale. B ought to have shown when and how, if at all, the right to the fisheries and the right to the soil were severed. [*Rajah Burodacant Roy* v. *Chunder Coomar Roy*,] 402

See ACCRETIONS.
— ADMISSION 1.
— ENHANCEMENT OF RENT 3.
— EVIDENCE 9.
— JURISDICTION 1.
— LAND SEPARATED BY CHANGE IN THE COURSE OF A RIVER.
— LIMITATION 4.
— POSSESSION.

TITLE, PRIVITY OF.

See ENHANCEMENT OF RENT.

TORT.

In actions of *tort* the Plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action.

A man is not bound to give effect to a wrongful invasion of his possession even when the invasion is under color of legal process

After a wrongful attachment the Plaintiff was not bound to accept the permission alleged to have been given to him to use his own property; nor would the right of action be lost, if the permission had been accepted.

Bayliss v. *Fisher* (7 Bingh., 153) cited and approved.

Held that under such circumstances the Plaintiff's suit had been improperly dismissed and that he was at the very least entitled to nominal damages. [*Muddun Mohun Doss* v. *Gokul Doss*], 202

TROVER.

Suit in the nature of an action of trover, by the Plaintiff, to recover Company's paper, as heir, such Notes being part of his deceased Mother's estates, against a Purchaser without notice and the Vendor, his Brother, alleging first, that the dealing with the Notes on the part of his Brother was illegal and contrary to the Plaintiff's rights as heir; and secondly, that in a previous suit against his Brother, regarding the Notes, he had obtained a decree against him in respect of one of the Notes sued for, but had not enforced judgment. The suit was dismissed by the Courts in *India* on the grounds (1) of limitation, under Act, No. XIV. of 1859, and (2) as barred by the previous suit. On appeal, such decree reversed, as it appeared, that the real point in issue, the validity of the transfer of the Notes, had not been heard, and the suit remitted back to the Judicial Commissioner at *Lucknow*, to give directions to the Court of First Instance to re-hear the case, with liberty to either party to amend the pleadings.

Costs of appeal to abide the result of the re-hearing. [*Ikbaloodowlah* v. *Sah Bunarsee Doss*], 463

See RES-JUDICATA 2.

TRUST.

See LIMITATION 5.
— H. L. MOHUNT.

TRUSTEE.

See MESNE PROFITS.

UNDER-TENURE.

See SALE FOR ARREARS OF REVENUE.

UNLAWFUL ASSEMBLY.

See DAMAGES, SUIT FOR.

USAGE.

See NATIVE CHRISTIANS.

USAGE OUTWEIGHING WRITTEN TEXT OF LAND.

See H. L. CUSTOM.

USURY.

See CONSTRUCTION 3.

USURY LAW.

See MORTGAGE 3.

USUFRUCTUARY MORTGAGE.

See EQUITY OF REDEMPTION.

VALUATION OF SUITS.

See SUITS, VALUATION OF.

VARIABLE RENT, ONUS OF PROOF.

See ENHANCEMENT OF RENT 4.

VENDEE.

See MESNE PROFITS.

VENDOR.

See JOINT TENANTS, RECEIPTS BY.
— MESNE PROFITS.

VILLAGE WATCHMEN.

See RESUMPTION.

VOLUNTARY PAYMENT.

A. was in possession of certain lands in lieu of dower. B. puts up to sale, in execution of a decree against C., (A.'s husband) C.'s rights and interests in those lands. A., under protest, deposited in Court the amount claimed, in order to stop the sale, and consented that it should be paid over to B., until the rights of the parties could be settled in a regular suit. A then sued B. for a refund of the money, on the ground that at the time of B.'s attaching the property, his decree against C. had been already satisfied. The *Zillah* Court gave a decree for A. upon the merits. The High Court, on appeal, held, that the payment into Court was a voluntary payment, and therefore A. had no right of action against B. *Held* (reversing the decision of the High Court), that the payment was not a voluntary payment. [*Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdry*,] ... 380

WAIVER.

Where a party has a good objection, such as an absence of tender before suit, to urge to the prosecution of a suit, his omission to do so in the first instance is fatal to his availing himself of it as an objection on appeal. [*Nawab Mahomed Ameenoodeen Khan* v. *Moozuffur Hossein Khan*], 585

See MULTIFARIOUSNESS.

WASTE LANDS.

See EVIDENCE 9.

WATCHMEN.

See RESUMPTION.

WEDLOCK.

See H. L. LEGITIMACY.

WEIGHT OF TESTIMONY.

See PRACTICE 33.
— H. L. WILL 4.

WESTERN SCHOOL.

See H. L. WIDOW 2.

WIDOW.

See HINDU LAW.

WILL, CONSTRUCTION OF.

Where a testator has an ascertained domicile, the construction of his Will must depend on the law of that domicile; but if no particular law is applicable, the Will is to be interpreted by principles of natural justice.

In such cases, in applying the rules of Hindu, Mahomedan, or English law to the Wills of Hindus, Mahomedans, of East Indian Christians, respectively, their particular habits and modes of life may be looked to as a guide to the interpretation.

From the context of the Will and surrounding circumstances, "children" may be interpreted as illegitimate children.

Where by Will the income of estates was left to devisees for life, with a gift over of the *corpus* on their death, and a portion of the income instead of being divided among the tenants-for-life was applied to the purchase of other estates, *held*, these estates did not pass to the remaindermen, but formed the absolute property of the tenants for life, and passed to their devisees. [*Mussumat Fanny Barlow* v. *Sophia Eveline Orde*], ... 540

See H. L. ADOPTION 1.
— H. L. MOHUNT.
— H. L. WILL.
— M. L. WILL.

YEAR OF GRACE.

See BYE-BIL-WUFFA.

ZEMINDAR.

See ADMISSION 2
— EVIDENCE 10.
— PUTNEE.
— RESUMPTION.

ZEMINDARY.

See CONSTRUCTION 1, 3.
— EVIDENCE 10.
— H. L. ANCESTRAL PROPERTY.
— H. L. MAINTENANCE 3.
— H. L. ZEMINDARY OF SHIVAGUNGA.

PART II.

HINDU LAW.

ACCUMULATION

See WILL 1

ADOPTION

In 1811 G K, being then childless, executed an *Onoomuttee-puttro*, by which he gave power of adoption to C B, his wife Subsequently a son B K, was born to G K, but G K, nevertheless, two years after the birth of the child, executed another instrument, which was in these words —" This is an *Onoomuttee puttro* to the following purport —Prior to the birth of a male child from your womb, I had executed in your favour an *Onoomuttee puttro* on the subject of your receiving an adopted son Subsequently, by the will of God, you have given birth to a male child Still having regard to the future, I have again given you permission If which God forbid, the male child of your body be non existent then you will adopt a son from my race *(gotra)*, or from a different race (*gotra*,) for the purpose of performing mine and your *Sradh* and other rites, and for the *Sheba* (service) of the gods and for the succession to the *Zemindary* and other property, on which, if the adopted son be non existent, which God forbid then you shall, according to your pleasure on the failure of one adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering), that *dattaka* (adopted) son shall be entitled to perform your and my *Sradh*, &c, and that of our ancestors, and also to succeed to the property To this end I execute this *Onoomuttee puttro* B K, succeeded his father G K, as heir at about [illegible] years of age, and died when 24 years old without issue his widow inheriting his estates both ancestral and self acquired A son was then adopted by C B, in execution of the power given by the deed of 1819 Two of the Judges of the *Sudder* Court (the third Judge *dissentient*) decided on the validity of the adoption on the grounds that the document was to be regarded (i) as a will and (ii) as containing a limitation, on failure of male issue of the testator, in the life time of C B, of the estates of the testator, to a son to be adopted by C B, as a *persona designata* *Held* on appeal, reversing the decree of the *Sudder* Court —

First, that the instrument was merely a deed of permission to adopt, and not of a testamentary character, it having been registered as a deed in the life time of the maker, containing no words of devise, nor it having been the intention of the maker that the instrument should contain any disposition of his estate except so far as such disposition might result from the adoption of a son under it

Secondly, that, although doubtlessly by the decision of Courts of Justice, the testamentary power of disposition by Hindoos had been established within the Presidency of *Bengal*, it would be to apply a false and mischievous principle, if it should be held that the nature and extent of such power could be governed by any analogy to the law of *England*,

Thirdly, that the adopted son as such, takes by inheritance, and not by devise and by the Hindoo law, in the case of inheritance, the person to succeed must be the heir of the last full owner, and that, therefore, B K, was the last full owner, and his wife succeeded, as his heir, to a widow s estate, and

Fourthly, that the adoption by C B, under the *Onoomuttee puttro* was invalid, the power being incapable of execution at the time when it was professed to have been exercised

Quære —Whether under his testamentary power of disposition G K, could have restricted the interest of B K, in his estate to a life estate, or could have limited it over (if his son left no issue male, or such issue male failed) to adopted son of his own? [*Mussumat Bhoobun Moyee Debia*, v *Ramkishore Achanji Chowdhry*] 111

2 In a suit which involved a disputed question of fact as to an unpremeditated adoption and Will which were apparently parts of the same family arrangement the Court of first instance in *India* upheld the adoption and the Will solely relying upon the testimony of an independent witness call

ed by itself and on the conduct of the Appellant after her husband's death. The *Sudder* Court upheld the judgment on appeal.

The Privy Council reversed the concurrent judgments of the *Indian* Courts as the witness called by the Court only proved that the adopter testator was a dying man, almost continually insensible though occasionally roused to consciousness by violent means but immediately relapsing into insensibility; and when momentarily conscious, with his mind inert and fatigued upon the slightest exertion. Such evidence was entirely insufficient to establish the testamentary or adoptive capacity.

The acquiescence of a Hindu female in an alleged adoption or Will ought not to prejudice her so long as she is acting without independent advice. The participation in and acknowledgment of adoption by the Widow and the performance of funeral rites by the adopted son cannot sustain the validity of an adoption unless it clearly appears that the act itself was performed under such circumstances as would render it perfectly legal. [*Tayammaul* v. *Sashachalla Naiker*,]... 139

3. According to the Hindu law prevalent in the *Dravada* country, and particular in that part of it wherein the *Ramnad Zemindary* is situate, a Hindu widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him.

Where the husband's family is in the normal condition of a Hindu family—*i. e.*, undivided, the father-in-law, if alive, is, as the head of the family, and the natural guardian of the widow, competent by his sole assent to authorize an adoption by her, but if he is dead, the consent of all the brothers is necessary. Where, however, the widow has taken by inheritance the separate estate of her husband, the father-in-law's assent would be sufficient and in his absence, such assent of kinsmen as suffices to shew that the act is done by the widow in the proper and *bonâ fide* performance of the religious duty; and neither capriciously nor from a corrupt motive.

The rights of an adopted son are not prejudiced by an unauthorized alienation of the widow, which precedes the adoption she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves, go to the root of the legality of an adoption.

The doctrines regarding a Hindu widow's right to adopt a son to her husband, without his express authority, contained in the Treatises, the *Mitacshara* received in Southern *India*, the *Mayucha* and *Koustubha* in the *Mahratta* country, and *Daya-bhaga* in *Bengal*, as laid down by commentators and received as the governing law in *India*, discussed.

The ruling in the case of *Veerapermall Pillay* v. *Narrain Pillay* (1 *Strange's* Madras Cases, p. 121) that it is indispensable that the widow should have the authority of her husband to adopt, examined and questioned.

Rajah Haimunchull Sing v. *Koomar Gunsheam Sing* (2 *Knapp's* P. C. Cases, p. 203; *vide post*, Vol. I. p 37)—*Held* not intended to govern a case arising in the South of *India*. [*The Collector of Madura* v. *Mootoo Ramalinga Sathupathy*,] 361

4. In an adoption made by a Hindu widow, under authority conferred upon her for that purpose by her husband, the authority must be strictly proved, and, as the adoption is for the husband's benefit, the child must be adopted to him, and not to the widow alone. An adoption by the widow alone, would not, for purposes of Hindu law, give the adopted child, even after her death, any right to property inherited by her from her husband.

Held, in the present case, that the evidence did not support the contention that adopted son of the widow had been adopted to the husband. [*Chowdhry Pudum Singh* v. *Koer Oodey Singh*,] 447

5. A Hindu died after having made a *hibbanamah*, or deed of gift, giving the bulk of his property to the eldest son of one of his brothers, designating him as his *Pallok Putra*. The donee thereof died without issue, but leaving a widow him surviving. On the death of his widow, his cousins sued his step-brother for possession of their share of his property, on the allegation that he had been adopted by their uncle, and consequently the relationship between him and his step-brother had been severed, and that they were equally entitled with the step-brother to succeed. The Defendant denied the fact of adoption. The High Court held that the intention to adopt, and the fact of adoption, were proved by the terms of the deed of gift.

Held by the Privy Council, reversing the judgment of the High Court, that the words of the *hibbanamah*, ("but as I had no son or daughter, I took you as my *Pallok Putra*, in the month of *Aghran* 1211, B. S. (1803,) with the *Anumati* (permisson) of your parents, for the purpose of securing funeral oblations of water and funeral cake, and having brought you up like a son, performed the ceremonies of your *Sangskar*, &c., and have constituted you my representative") were not those which property import the adoption of son by gift—*Dattaka Putra*.

Held, that the presumption which arose from the religious duty of a childless Hindu to adopt was, in this case, opposed to as strong a presumption that a Hindu would not break the law by giving in adoption an eldest or only son. [*Nilmadhub Doss*, v. *Bishumber Doss*.] 489

See ADMISSION 1, PART I., GENERAL.
— SUCCESSION 1.
— WILL 4

ALIENATION.

A recital in a deed of sale by a Hindu widow of her deceased husband's property, setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity ; nor does the attestation of a relative import his concurrence. Such a transaction may become valid by the consent of the husband's kindred, but kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there ought to be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindu law. [*Raj Lukhee Dabea*, v. *Gokool Chunder Chowdry*,] 518

See ADOPTION 3.
— SHEBAIT.
— WIDOW 2 & 4.

ANCESTRAL PROPERTY.

Where property is proved to be ancestral, the mere registration of one brother as proprietor is of little value as supporting a case of the property not being joint, and the burden of proving that the property is not joint, rests on him who alleges that to be the case.

There was no sufficient proof of a family or local custom that the descent of the *zemindari*, the subject of dispute, was regulated by the rule of primogeniture. [*Umrithnath Chowdhry* v. *Goree nath Chowdhry*,] 618

SEE JOINT UNDIVIDED FAMILY.
— SUCCESSION 4.
— WIDOW 2.

ASSENT.

See ADOPTION 3.
— ALIENATION BY WIDOW.

AUTHORITY TO ADOPT.

See ADOPTION 3 & 4.

BANDHUS.

See MITAKSHARA.

BENARES SCHOOL.

See WIDOW 3.

BENGAL SCHOOL.

See WIDOW 2.

BOMBAY.

See SUCCESSION 1.

BRAHMINS.

See PUROHITAM.

BROTHER.

See ADOPTION 3.
— PARTITION.

COGNATES.

See MITAKSHARA.

COLLATERAL HEIRS.

See STRIDHAN.

CONSTRUCTION.

See ADOPTION 1, 5.
— FAMILY ARRANGEMENT.
— JOINT UNDIVIDED FAMILY.
— MOHUNT.
— SHEBAIT.
— WIDOW 1.
— WILL 1.

CORPUS.

See WILL 1.

CUSTOM.

The duty of a Judge administering Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage ; as under the Hindu system of Law, clear proof of usage will outweigh the writ-

ten text of the law. [*The Collector of Madura* v. *Mootoo Ramalinga Sathupathy.*] 361

See ANCESTRAL PROPERTY.
— MOHUNT.
— WILL 3.

DEVISE.

See ADOPTION 1.

DISINHERISON.

See WILL 2.

DIVISION.

See JOINT FAMILY 2.

ELDEST SON.

See ADOPTION 5.

ENDOWMENT.

See SHEBAIT.

ENGLISH LAW.

See ADOPTION 1.

EVIDENCE.

See ADOPTION 3, 4.
— ALIENATION BY WIDOW.
— ANCESTRAL PROPERTY.
— PARTITION.
— PUNDITS, OPINIONS OF.
— PUROHITAM.

FAMILY ARRANGEMENT.

Where a dispute in a Hindu family as to legitimacy and the right to succession resulted in a family arrangement as to the mode in which the estate was to be held by the sons,—*held*, that such a document ought not to be construed narrowly by a strict interpretation of the literal meaning of the words, but that the object and general spirit are the best keys to the interpretation.

Where a family arrangement, if construed strictly, would have given a *Talook* in the event of the death of a younger son to such of the lawful widows as should have made issue,—*held* that, as such a disposition would contravene the ordinary rules of devolution of Hindu property, and be contrary to the usages of Hindus, and as there was no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers was inadmissible. [*Sri Gajapathi Radhika Patta Maha Devi Garu*, v. *Sri Gajapathi Nilamani Patta Maha Devi Garu*,] ... 601

See FAMILY ARRANGEMENT—GENERAL.

FAMILY CUSTOM.

See ANCESTRAL PROPERTY.
— WILL 3.
— RAJ 3.

FATHER'S BROTHER'S SONS.

See SUCCESSION 1.

FATHER-IN-LAW, ASSENT OF.

See ADOPTION 3.

GENTILES.

See SUCCESSION 5.

GIFT.

See DEATH-BED DISPOSITION—GENERAL.
— ADOPTION 3.
— WIDOW 4.

GIFT OVER.

See ADOPTION 1.

GRANT.

See MOHUNT.

GREAT-GREAT-GREAT-GRANDSON.

See SUCCESSION 5.

GURUKALS.

See PUROHITAM.

HEREDITARY TENURE.

See SHEBAIT.

HINDU WIDOW'S ESTATE.

See WIDOW 1.

HOUSE.

See PARTITION.

HUSBAND.

See ADOPTION 3.
— CONSTRUCTION 5—GENERAL.

HUSBAND'S PERMISSION.

See ADOPTION 3.

IDOLS.

See COMPROMISE 1—GENERAL.

ILLEGITIMACY.

See MARRIAGE.

ILLEGITIMATE CHILDREN.

See SUCCESSION 3.

ILLEGITIMATE PARENTS.

See MARRIAGE.

IMMOVEABLE PROPERTY.

See WIDOW 2.
— WILL 2.

IMPARTIBLE ESTATE.

See SUCCESSION 4.

INHERITANCE.

See ADOPTION 1, 4.
— SUCCESSION.

JOINT UNDIVIDED FAMILY.

1. *Held* upon a true construction of the plaint, that the Plaintiff's claim was really based upon his alleged rights as a co-sharer, in a joint and undivided Hindu estate, and not simply as a member in a mercantile firm.

D. with his four brothers constituted an undivided Hindu family, having a nucleus of ancestral property, which however did not contribute in any material degree to the acquisition of the funds employed in trade which formed the bulk of the disputed property. D. laid the foundation of the future fortune of the family, but instead of keeping his acquisitions separate, D for many years before his death associated his brothers with himself as partners, and thenceforward all five carried on business together each contributing by his exertions to the increase of the common stock. D. having thus voluntarily brought his earlier gains into the common stock, making them the capital on which he and his brothers were to trade, all future gains made by their joint exertions would, under Hindu Law, be the joint property of the family whilst undivided, and be partible as such on a partition.

The burden of proof of any special contract which impressed the character of mercantile partnership as distinguished from joint or separate property in the Hindu sense, upon the disputed property, lay on the Defendants and the burden had not been discharged. [*Rampurshad Tewarry*, v. *Sheocharan Doss*,] 177

2. According to the true notion of an undivided family under Hindu Law, no individual member, whilst the family remains undivided, can predicate of the family property that he, that particular member, has a definite share.

But when the members agree among themselves with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares then the character of undivided property and joint enjoyment is taken away from the subject so agreed to be dealt with and each member has thenceforth a definite and certain share therein which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually divided by metes and bounds.

Held that the deed of March 1834, created a division of right in the whole property although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds till some convenient future period. The deed operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to a separate ownership. [*Appovier*, v. *Rama Subba Aiyan*,] 218

3. It is a well-established presumption of Hindu Law that a family once joint retains that *status*, unless it is shewn to have become divided; and that the ancestral family property remains joint, unless it is shewn, by partition or otherwise to have become separate, and the *onus* lies on the party alleging separation.

Held that the Plaintiff had failed to discharge such *onus*.

The mere registration of the name one member of a joint family as *Lumberdar* or *Zemindar* for fiscal purposes does not establish his exclusive proprietary right to that property as against other members of the joint family. [*Mussumat Cheetha*, v. *Baboo Miheen Lall*,] 303

4. *Held*, following the case *Appovier* v. *Rama Subba Aiyan* (11 Moore's Ind. App. Cases, p 75; *Ante*, p 289.) that in a Hindoo family, the *status* of joint ownership is only

determined by an actual partition, or an agreement by mutual consent to a division of the joint estate.

It lies on a party claiming a share of the joint estate to prove a severance of interest. [*Ram Chunder Dutt*, v. *Chunder Coomar Mundal*,] 507

See POSSESSION 1.—GENERAL.

KINSMEN, ASSENT OF.

See ADOPTION 3.

LIFE ESTATE.

See ADOPTION 1.

LIMITATION.

See LIMITATION—GENERAL.

MANAGER.

See RE-UNION.
— SHEBAIT.

MARRIAGE.

1. According to the Hindu law prevalent in *Madras*, legitimate children of illegitimate parents of the *Sudra* caste, can contract a legal and valid marriage.

The marriage between persons of different sections of the *Sudra* caste is valid and legal. [*Inderun Valungypooly Taver*, v. *Ramasawmy Pandia Talaver*,] ... 498

2. A marriage between a *Zemindar* of the *Malavar* class, a sub-division of the *Soodra* caste, with a woman of the *Vellala* class of *Soodras*. *Held* (1) as to the *factum*, that a marriage had taken place, and (2) that such a marriage was valid by Hindoo law.

In questions of disputed facts, the rule of the Judicial Committee is, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to the Courts below may commonly be; that due weight must be given to the evidence; and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed, without some grave grounds to support the imputation, as such a rejection would virtually submit the decision of the rights of others to the suspicion, and not to the deliberate judgment, of the Judge. The entire history of a family must, therefore, not be thrown aside because the evidence of some of the Witnesses is incredible or untrustworthy. [*Ramamani Ammal* v. *Kulanthai Natchear*, ... 736

MATERNAL UNCLE.

See MITAKSHARA.

MAYUKHA.

See ADOPTION 3.

MITAKSHARA.

The enumeration of *Bandhus*, or cognate kindred, given in *Mitakshara*, *II.*, section 6, art. *i.* is not exhaustive. The maternal uncle and the father's maternal uncle will take as heirs in preference to the Crown. [*Gridhari Lall Roy*, vs. *The Bengal Government*,] 382

See ADOPTION 3.
— PARTITION, AGREEMENT FOR
— STRIDHAN.
— SUCCESSION 5.
— WIDOW 1.
— WILL 2.

MOHUNT.

The only law as to the office functions and duties of *Mohunts* is to be found in custom and practice.

Held upon a construction of the Will of *Gopaul Doss* that the direction therein conveyed to *N.*, to appoint *L.* as *N.'s* successor was only a gift in the nature of a precatory trust and not a grant to *L.* for life with reversion to *L.*

It was unnecessary therefore to decide whether the *Mohunt* had power to make such successive appointments. [*Gridharee Doss*, vs. *Nundokissore Doss*, *Mohunt*], ... 306

MOVEABLE PROPERTY.

See WIDOW 2.
— WILL 2.

NUCLEUS OF ANCESTRAL PROPERTY.

See JOINT FAMILY 1.

ONUMUTTEE PUTTRO.

See ADOPTION 1.

PALUK PUTRA.

See ADOPTION 5.

PARTITION.

According to the *Mitakshara*, an agreement for a partition, although not carried out by actual partition of the property, is sufficient to constitute a division of the family so as to entitle the widow of a deceased

brother to succeed to his share of the ancestral property in preference to the surviving brothers.

The fact of the family having separate house and field, is, according to the *Mitakshara*, sufficient evidence of partition.

The *onus* of proving re-union is upon the party pleading that there has been a re-union after partition.

Katama Natchiar v. *The Rajah* of *Shivagunga* explained. [*Rajah Suraneni Vencata Gopala Narasimha* v. *Rajah Suraneni Lakshmee Venkama Row*,] 496

Whatever may be the real intention amongst themselves of some of the members of a joint Hindu family in executing a deed of partition, purchasers from them have an undoubted right to bind them, by the execution of the deed and their public acts attending it, to the fulfilment of those obligations which such public acts cast upon them. [*Srimati Sukhimani Dasi*, v. *Mahendra Nath Dutt*,] 530

PRESUMPTION.

See ADOPTION 5.
— ALIENATION BY WIDOW.
— JOINT FAMILY 3.
— RE-UNION.
— SHEBAIT.
— WILL 3.
— BENAMEE PURCHASE—GENERAL.

PRIMOGENITURE.

See ANCESTRAL PROPERTY.

PROFITS.

See WILL 1.

PUNDITS, OPINIONS OF.

The opinion of a *pundit*, which is found to be in conflict with the translator's works of authority, may reasonably be rejected; but, those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country. [*The Collector of Madura*, v. *Moottoo Ramalinga Sathupathy*,] 361

PUROHITAM.

Suit by some *Arya Brahmins* and *Gurukuls* against some *Parishai Bhatters* (as representatives of the bodies to which they respectively belonged) to establish the Plaintiffs' exclusive right to administer the *Purohitam* to all pilgrims resorting to *Rameswaram*, and for damages.

Held, that ancient books like the *Puranas* may legitimately be used as evidence that a certain state of facts, or of opinion, existed at the date of their compilation.

Passages recommending the ministrations of *Arya Brahmins* and implying that the full spiritual benefits of a pilgrimage were not to be obtained without them, did not necessarily lead to the conclusion that even at that distant period all pilgrims in fact resorted to the *Aryas* or were under a positive obligation to do so. Rather, the very mode in which the peculiar efficacy of their ministrations was pressed, suggested that even then there was a variety of opinion and practice in the matter.

The admission of the alienability of the exclusive privilege claimed necessarily loosened the force of texts to the effect that the efficacy of the rite depends on the character of the ministering priest, and such admission greatly increased the difficulty of proving the privilege.

Functions inseparably annexed by the authority of sacred books to a particular order of men will be recognised and perpetuated by the religious sentiment of succeeding generations. But the privilege when alienable for money ceases to be the subject of religious sentiment and becomes a mere proprietary right.

A *Sreemokhum* (certificate) from *Sankara Acharyar*, the High Priest of all Hindus in Southern India, received in evidence and acted upon.

On the merits, the Appellants held to have failed to discharge the burthen of proof which the necessities of their case and the particular issues imposed upon them. [*Ramasawmy Aiyan*, v. *Vencata Achari*,] ... 1

RAJ.

1. The *Zemindary* of *Shivagunga* in *Madras* is in the nature of an impartible Principality—capable of enjoyment by only one member of the family at a time.

On the merits, it was held that the Appellant had failed to prove that *Gowery Vallabha Taver* was separate from his brother, and that the *Zemindary* was proved to be the self-acquired property of *G. V. T.* [*Katama Natchiar*, v. *The Rajah of Shivagunga*,] 25

2. *Hunsapore*, a large *Zemindary* and, like some other extensive *Zemindaries* in *Behar*, an impartible *Raj* descendible on the death of successive *Rajah* to his eldest male heir, had been in the family of the parties

for many generations before the Company's accession to the *Dewanny*. *F.* was the *Rajah* in possession of the property in 1765, who, in consequence of his refusal to acknowledge the *quasi*-sovereign rights of the Company or to pay revenue to them, was driven into the jungles by the Company's troops, and the property confiscated. In 1790, upwards of 20 years afterwards, this property was, however, conferred on *C.*, the next heir after extinction of *F.'s* line, as a matter of favour, in consideration of *C.'s* father and grandfather—*Held* that, the estate must be taken to have been the separate and self-acquired property of *C.*, that the fact that he was the member of a family which had so long held the estate next in succession to the line of *F.*, and the son and grandson of person who had established claims on the gratitude of the Company, might have been a motive determining the selection of him as grantee; but that it did not affect the nature of his estate or give it the character of ancestral property, and that the legal foundation of his claim was still the grant to him from those who had power to make or withhold it. The *Shivagunga* Case (9 M. I. A., p. 539; *post*, p. 25) cited and followed.

Held further that in the absence of any express intention of the grantor after the nature of the tenure, it must be presumed according to the policy of the Decennial Settlement that the settlement was made precisely as it would have been made, had the estate continued in the line of *F.* and that, therefore, the subject conferred on *C.* was the old *Zemindary* with all its incidents; that the selection of a member of the old family, next in succession to the excluded line, went a great way to show that the intention of Government was to restore the *Zemindary* as it had existed before the confiscation, making no further change than was involved in the forfeiture of the rights of *F.* and his descendants, and in the substitution of the person next in order of succession; and that consequently the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*.

The title of *Rajah* is not absolutely essential to the tenure of an estate as a *Raj*. (The *Tirhoot* Case, 6 M. I. A., p. 119; 1 P. C. J., p. 527) cited and followed.

Reg. XI. of 1793 does not affect the descent of large *Zemindaries* held as *Raj* or subject to *Koolachar* or family custom. [*Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*] 348

3. Where, in a question as to the right of inheritance to a *Raj*, it was admitted that there was a custom that the reigning *Rajah* should name a *Jabraj* and a *Burra Thakur*, of whom the first succeeds to the throne, and the latter to the office of *Jobraj*; but it was contended on the one hand, that if the reigning *Rajah* had appointed a *Jobraj*, his choice should have been guided partly by an alleged promise or intention of the part of the former *Rajah*, and partly by the Appellant's preferential title as legal heir by seniority amongst the near kindred; and on the other, that choice of the reigning *Rajah* was absolutely free, and could not be controlled by the wishes of the former *Rajah*—*Held*, where there was evidence of power of selection, the actual observance of seniority even in a considerable series of successions could not of itself defeat a custom which established the right of free choice.

Where family custom required the union of two things to constitute the legal heir, viz., seniority in age and nearness of kin, and the claimant has but one of these qualifications in himself, viz. seniority, he does not entitle himself to succeed. Where a custom is proved to exist, it supersedes the general law, which however still regulates all beyond the custom. [*Neelkisto Deb Burmono* v. *Beerchunder Thakoor*,] ... 467

See WILL 2.

RE-UNION.

P. and M. united Hindu brothers separated without any regular partition of the lands, each brother taking his share of the rents. P. and M. then agreed to a re-union under the terms of a deed (*Ungshobodhareet Puttur*) which recited that P. had during separation acquired for valuable consideration a *Putnee* from his own funds which he made part of the joint family property; M. agreed by that deed to renounce all claims on P. for the accounts of management and to pay out of joint funds all *debts* incurred by P. for purchasing the *Putnee*.

The brothers having again separated, P. sued M. for one-half of the purchase money of the *Putnee*, on the allegation that it had been advanced from private funds and M. as subsequent sub-purchaser was bound to repay P.

Held, that the re union of the brothers relegated them to their former *status* as members of a joint Hindu family;

That the deed (*Ungshobodhareet Puttur*) executed between them provided the terms upon which the acquisitions of the elder brother should go into the joint fund, and did not warrant P.'s claim, even if it were

proved that he had purchased from his private funds.

Property not shown to be separate is presumed by Hindu Law to be joint; as P. had not alleged much less proved that he had any separate property the funds in his hands immediately on separation would be presumed to be joint funds for which he was accountable as manager to the younger brother M., and if the *Putnee* was purchased from such funds, M. upon the general principles of Hindu Law was entitled, on re-union, to share in the *Putnee* as acquired by the use of joint funds; independently of the deed executed between the parties. [*Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*,] 164

See PARTITION, AGREEMENT FOR.
— REVERSIONER.
— WIDOW 4.

SELF-ACQUIRED PROPERTY.

See JOINT FAMILY 2, 3, 4.
— PARTITION.
— WIDOW 1, 2.
— WILL 2.

SEPARATION.

See JOINT UNDIVIDED FAMILY 2, 3, 4.
— PARTITION, AGREEMENT FOR.

SEPARATE ACQUISITION.

See WIDOW 1.

SHEBAIT.

The *Shebait* of a *talook* dedicated to the religious services of an idol, has not the legal property, but only the title of manager of a religious endowment. In the exercise of that office she cannot alienate the property, though she may create proper derivative tenures, and estates conformable to usage.

To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in *Shebait*, and is not, therefore, presumable.

Where variableness of *jumma* is the normal condition, the mere naming a sum certain in connection with the grant of a descendible tenure, does not impart of itself fixity to that sum in the absence of positive words, or of other evidence to show that such was the original design. [*Maharanee Shibessouree Debia*, vs. *Mothooranath Acharjo*.] ... 528

SISTER.

See SUCCESSION 1.

SISTER'S SON.

See WIDOW 4.

SON.

See ADOPTION.

SON ADOPTED BY WIDOW.

See ADOPTION 4.

SREEMOKHUM.

See PUROHITAM, RIGHT TO ADMINISTER.

STEP-MOTHER.

A step-son made over property to his step-mother for her support. Out of the produce, she bought properties for her nephew in the name of other parties. *Held*, under the circumstances, that the purchased property, on her death, went to the nephew, and not to the step-son as heir of her husband. [*Rajah Chandranath Roy*, v. *Ramjai Mazumdar*,] 613

STEP-SON.

See STEP-MOTHER.

STRIDHUN.

The devolution of *Stridhun* from a childless widow is regulated by the nature of the marriage; in case she had been married according to one of the four approved forms of marriage, her *Stridhun* would according to *Mitacshara*, chap, ii., sec. xi., art. xi., go to the collateral heirs of her husband and not to her own relations.

Held on the evidence that the Appellant had failed to prove the deed of gift from the deceased widow. [*Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*,] 231

See CONSTRUCTION 5.—GENERAL.
— WIDOW 3.

SUCCESSION.

1. According to the Hindu law in Bombay, sisters succeed to the estate of their brother, if the estate has been separately acquired by their father, in preference to their father's brother's sons. [*Venayeck Anundrow* vs. *Luxumabaee*,] ... 58

2. *R.*, being unanimously adopted by *A.*, and *V.*, *A.'s* wife, *K.*, *A.'s* another wife, held to stand only in relation of step-mother to *R.*, and therefore not entitled to inherit

his estate. [*The Collector of Madura* vs. *Moottoo Ramalinga Sathupathy*,] ... 361

3. According to the Hindu law, illegitimate children of the *Sudra* caste can inherit, and are entitled to maintenance. [*Inderun Valungypooly Taver* v. *Ramaswamy Pandia Talaver*,] 498

4. If the acquirer of separate property leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property, and the separate property will not descend to different persons, they will descend in a different way, and with different consequences ; the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property ; and his self-acquired property, free from those rights. The course of succession will not be the same, for the family and the separate estate, and it is clear, therefore, that according to Hindu Law there need not be unity of heirship.—*Katama Natchiar* v. *The Rajah of Shivagunga*. 9. Moore's Ind. App. Cases, p. 539.

The decision in the *Shivagunga* Case (Vol. 9, p. 539) will be found to proceed solely and expressly, on the finding of the Court, that the *zemindary* in question was proved to be the self-acquired and separate property of *Gowery Vallabha Taver*. It assumes that, if this had not been so, the decision would have been the other way.

The mere impartibility of an estate is not sufficient to make the succession to it follow the course of succession of separate estate. [*Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vancondora*,] 546

5. According to the *Mitakshara*, the great-great-great-grandson of the great-great-great-grandfather of the deceased is entitled to succession as one of the gentiles. [*Bhyah Ram Singh* v. *Bhyah Ugur Singh*,] ... 565

6. By the *Mitakshara*, a male descendant in the fifth degree from the great grandfather of the *præpositus* succeeds to the exclusion of the Sister's Son. [*Kooer Golab Singh* v. *Ruo Kurn Singh*,] ... 722

See ADOPTION 1, 4.
— RAJ 3.
— STEP-MOTHER.
— STRIDHAN.

SUDRA CASTE.

See MARRIAGE.
— SUCCESSION 2.

SURVIVORSHIP.

See WIDOW 1.

TESTAMENTARY POWER.

See ADOPTION 1.
— WILL 2.

TRUST.

See MORUNT.

UNGSHABADHAREET PUTTRA.

See RE-UNION.

WESTERN SCHOOL.

See WIDOW 2.

WIDOW.

1. By the law of inheritance prevailing throughout southern *India*, separate acquired estate descends to a widow, in default of male issue of the deceased proprietor.

Property inherited by a Hindu widow vests in her absolutely for some purposes, though in some respects, for a qualified interest. She represents the inheritance as fully as tenant-in-tail and a decree fairly and properly obtained against her binds succeeding reversioners.

Mitacshara in Chap. II., Sec. 1 does not treat of a case like the present where the estate of the deceased in part the common property of a united family and in part his separate acquisition, and there being no positive text governing the case the decision should be guided by the general principles of the Hindu Law.

Where joint family property has been divided, the share of a deceased member is inherited by his personal heirs, but there is a copartnership between the different members of the united family, then survivorship follows.

By survivorship alone, the right of co-partners in the undivided estate over-rides the widow's right of succession, but with respect to self-acquired property of a member of the united family, the other members of the family have neither community of interest, nor unity of possession ; therefore the foundation of the right to take by survivorship fails. [*Katama Natchiar* v. *The Rajah of Shivagunga*,] 25

2 *Held* on a review of the authorities, that although according to the Hindu law of the Western schools the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of the *Bengal* school, she is by

both laws restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband then living. There was no authority for making a distinction between ancestral and acquired property in this respect. [*Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*,] 231

3. According to the law of the *Benares* school, no part of a childless Hindoo's estate, whether moveable or immoveable, to which a widow succeeds by inheritance, forms part of her *Stridhun*, or particular property. Her power of disposition over both is limited to certain purposes, and on her death, both pass to the next heir of her husband.

The estate of two Hindoo widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor take the whole property, to the exclusion even of the daughter of the deceased widow. They are, therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other. [*Bhugwandeen Dobey* v. *Myna Baee*,] 327

4 A Hindu Widow executed deeds of gift, in which her late Husband's Mother, the nearest reversioner, concurrred. After the death of the Widow, but in the life-time of the Mother, the next presumable reversioner sued to set aside the deeds and for possession. *Held*, that the suit was good so far as it sought to set aside the deeds; and the Mother having died before decree, that no objection could be taken to the suit on the ground that the decree gave possession to the Plaintiff.

Such suit was held to be no bar to second suit by the same Plaintiff to set aside a mortgage by the Widow and the Mother of the deceased of a portion of the property which was the subject of the first suit, although in that suit the property was described as subject to the mortgage, and the name of the Mortgagee was mentioned. The true test of the application of s 7 of Act VIII. of 1859 is whether there has been a splitting of the cause of action.

The burthen of proving the necessity for a mortgage by a Hindu Widow rests on the Mortgagee where that necessity is disputed by the next heir. [*Kooer Golab Sing*, v. *Rao Kurn Sing*,] 722

See ADOPTION 2, 3.
— PARTITION, AGREEMENT FOR.
— MAINTENANCE 1.—GENERAL.

WILL.

1. A testator by his Will, directed his sons, continuing "joint in food," to take care of and look after his property moveable and immoveable and carry on his trading business. The Will further provided that if one of the sons should die leaving a son, the share of the son so dying would go to his son, or, in other words, the grandson of the testator; but that if any of the sons should die without a son, then the daughters of that son should receive Rs. 100, and his widowed wife, if she lived, being included as a member of the family, should receive the expenses of *brito neom* acts, and the other religious acts and ceremonies which she should peform; but, if she should prove ungovernable and, not living in the house, go and live elsewhere, or not wish to live in the family, should receive Rs. 2000 and be precluded from making any demand or claim on his moveable or immoveable property, trading business, estate, &c., upon the allegation of her husband's proper share. And should the sons disagree, the Will went on, after making certain directions as to the application of the income, to give a direction that the surplus was to be partitioned equally amongst them, one of the testator's sons dying without male issue,—*Held*, upon the construction of the Will,

I. That the interest which the testator gave to his sons was not accurately represented by the words "joint estate" in *England*, but was, as regards succession, more analogous to the tenancy in common which prevalls in *England*;

II. That the share of profits made during the joint lives of the sons which belonged to the deceased son, should not follow his share of the capital and go over to the other sons, but to his heirs; and

III. That the testator did not attempt to dispose of, and that, if he had, could not have effectually disposed of the profits of his son.

Sreemutty Soorjeemoney Dossee v. *Denobundoo Mullick* (6 M. I. A., p. 526, 1 P. C. J., p. 583) cited and followed. [*Bissonath Chunder* v. *Sreemutty Bamasoondery Dossee*,] 344

2. Although the ancient Hindoo treatises make no mention of Wills, yet it is now a settled law that the testamentary power of a Hindoo exists and may be exercised within the limits which the law prescribes to alienation, by gift *inter vivos*.

Accordingly, a Hindoo without male descendants, may under the *Mitakshara* even dispose, by Will, of his separate and self-ac-

quired property, whether moveable or immoveable; and one having male descendants may so dispose of self-acquired property, if moveable, subject, perhaps, to the restriction that he cannot perhaps wholly disinherit any one of such descendants.

If a *Raj* is granted descendible according to custom, to the eldest male heir, and the grantee a Hindoo under the *Mitakshara* leaves it by a Will to one of his great-grandsons, to the exclusion of all his grandsons, the eldest grandson consenting to it,—*Held* that the question whether according to the *Benares* school, a Hindoo can by Will make an unequal distribution of his self-acquired property among his male descendants without their consent does not arise; that the person entitled to impeach the Will is the eldest grandson; that there are no inchoate rights of inheritance in the junior members of the family; that they do not by their birth acquire that community of interest with their grandfather in his self-acquired lands which is the foundation of the supposed restriction on his power; and that, *cessante ratione cessate et ipsolex.* [*Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee,*] ... 348

3. A., a Hindoo, died leaving two grandsons, B. and C., to whom his estate descended. They were joint in food, worship, and estate. The property was wholly situate in *Bengál*, and the family who originally came from the Western Provinces, had long been resident there. C. died, leaving his widow, D., and his brother B. surviving him. B., who was manager, died 2½ years after C. After B.'s death, D. brought her suit to establish her right as widow of C. to a moiety of the family property. The representatives of B. set up an instrument, which they alleged to be the Will of C., whereby he bequeathed his share to B., reserving maintenance to D.

The Judge of *Zillah* Court of *Nuddea* held, that the alleged Will of C. was genuine, and dismissed D.'s suit. The High Court, on appeal, held (1) that D. ought firstly to have shewn her title to sue, *i. e.*, she having admitted that the family came from *Mithila;* she ought to have shewn that they were no longer governed by the *Mitakshare;* (2) that for several generations, the rule of inheritance had been according to the *Dayubhaga;* (3) that the alleged Will was not proved—(there was evidence before the Court of the *factum* of the Will adequate to the proof of an ordinary Will, but the Court held, that this evidence was outweighed by the internal improbabilities;) (4) that if the rule of inheritance was not according to the *Dayabhaga*, the Will was inofficious.

On appeal to the Privy Council, held —*1st.*—It would be a rash conclusion on the state of the evidence in the case to suppose a preference of the law of Bengal likely to be operative on the mind of the testator; and, therefore, there was no foundation for treating the Will as inofficious.

2nd.—It was not necessary to decide whether the rule of inheritance was according to the *Dayabhaga* or the *Mitakshara.*

3rd.—The evidence was adequate to the proof of an ordinary Will, and there was no internal improbability of the Will sufficient to discredit it. Hindoo law is in the nature of a personal usage or custom, and probably migratory families or tribes would retain their own usages. The presumption is in favour of the continuance of the ancient family custom.

The decision of the High Court reversed, and the decision of the Court of *Nuddea* restored and affirmed. [*Soorendra Nath Roy* v. *Mussumat Heramonee Burmoneah,*] ... 372

4. By Will dated in 1837, a testator directed his property to be held in a particular way, and gave his widow power to adopt. In 1848, she adopted a son under the Will, with the knowledge of the members of the family, and the Will was, for a period of twenty-seven years, generally recognized and acted on by the testator's family. The Judicial Committee held (reversing the decree of the High Court,) in accordance with the finding of the Principal *Sudder Ameen*, that the Will was proved.

Where a Will was executed by the testator signing with the Bengali letter "M," and it was argued that the testator being in very weak health, the firm way in which the "M." was written threw discredit upon it, the Judicial Committee preferred the decision of the native Judge on this point to that of the English Judges of the High Court, and expressed doubt as to the value of the style of such writing as evidence in favour of the Will being forged. [*Rajendro Nath Holdar* v. *Jogendra Nath Baneryee,*] ... 666

See ADOPTION I.
— MOHUNT.

BENGAL LIBRARY

PART III.

MAHOMEDAN LAW.

ACKNOWLEDGMENT.
See LEGITIMACY.

ANTI-NUPTIAL CHILD.
See LEGITIMACY.

ARRANGEMENT BY A MAHOMEDAN FATHER.
See GIFT.
— ASSENT OF HEIRS.
— WILL.

BENAMEE PURCHASE.

Although a purchase by a Mahomedan with his own money of an estate in the name of his son raises a presumption of the son's name being used *Benamee* for his father, proof that the father's object was to affect the ordinary rule of succession as from him to that property is sufficient to give as respects strangers a title of the son independent of and adverse to the father. [*Nawab Azimut Ali Khan* v. *Hurdwaree Mull*,] ... 571

See BENAMEE PURCHASE 2.—GENERAL.

BENEFICIAL OWNERSHIP.
See SEIZIN.

BREACH OF MARRIAGE CONTRACT.
See RESTITUTION OF CONJUGAL RIGHTS.

CIVIL COURT.
See RESTITUTION OF CONJUGAL RIGHTS.

CONCUBINE.
See MARRIAGE.
— MORTGAGE 4.—GENERAL.

CONDUCT.
See MARRIAGE.

CONSIDERATION, VALID.
See GIFT.

CONSTRUCTION.
See DOWER 1 & 2.

CONTRACT.
See RESTITUTION OF CONJUGAL RIGHTS.

CONVERTS (HINDU.)

Held that the Plaintiffs had failed to prove the legitimacy of their ancestors and the suit must fail for defect of title, independently of limitation.

The succession *inter se* of the descendants of a Hindu convert to Mahommedanism must on general principles be governed by Mahommedan Law.

Abraham v. *Abraham* (*Ante*, *p*. 10, IX. M. I. A., p. 195) and *Macnaghten's Principles of Hindu Law*, Vol. II. pp. 131, 132, cited and distinguished.

Quære? Whether, a Hindu family, though converted to Mahommedanism, but conforming for several generations to Hindu customs and usages, can by virtue of the retention of Hindu customs and usages, set up for itself a special and customary law of inheritance. To control the general law, if indeed the Mahommedan law admits of such control, much stronger proof of special usage would be required than had been actually given in the present case. [*Jowala Buksh* v. *Dharum Singh*,] 189

CORPUS, DOMINION OVER.
See GIFT.

COSTS.
See LEGITIMACY.

DESCENDANTS OF HINDU CONVERTS.
See CONVERTS.

DOWER

1 Considering several clauses in a letter of the *Indian* Government, dated the 4th of February, 1856, and addressed to the Chief Commissioner of *Oude*, shortly after its annexation it appeared to their Lordships that the effect of those clauses was that the principles of law as well as the rules of procedure laid down in the *Punjab* Code were to be adopted as the basis of the administration of justice in *Oude*, and to be applied as far as they might appear to the Commissioner to be not unsuited to the circumstances of the country, but that, as far as they were founded upon local customs, varying the general law, whether Hindoo or Mahommedan they were not to be applied to *Oude*, where the local customs would probably differ from those of the *Punjab*

The *Punjab* Code of 1854, cl 10, sec vi, declares that —' By the Hindoo and Mahommedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time, and especially in the event of a divorce Among Mahommedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay Such contract, if enforced by a Court would ruin a Defendant who has divorced his wife, without reflecting upon the liability to which he was subject Still, although the full amount need not be decreed, yet in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband and the 11th sec declares, that in the event of the husband's death "the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts, it stands on the same footing with them In this case, the Court would possess the modifying power of cl (10), and award to the widow a fair sum with reference to the assets of the estate and the circumstances of the heirs"

By the settlement made on the marriage, about the year 1838, of a Mahomedan, a member of the Royal family of *Oude*, the wife's dower was fixed at a *crore* of rupees, which was not claimed till his death after the overthrow of the *Oude* Dynasty The effect of allowing the widow's claim for dower would have been to a great extent to defeat the claims of other creditors of her husband, and to sweep away the whole property from the heirs, and, the matter coming up before the Judicial Commissioners of *Oude* the deceased's property was directed to be equally divided betwen the widow and the other heirs *Held*, on appeal, affirming such decision—

1 That the Commissioners were bound to apply the provisions of the *Punjab* Code to the case before them, and

2 That the Commissioners were at liberty to exercise the discretion between the widow and the heirs [*Mukah Do Alum Nawab Tajdar Bahadur v Mirza Jehan Kudr*] 106

2 Where a husband granted a dower of five *lakhs* of *Lucknow* rupees, and subsequently directed *sicca* rupees 450 000 Company's Paper to be set aside for her,—*Held*, under the circumstances, that this was to be presumed to be a payment on account of dower, and not a gift [*Iftikar unnissa Begum v Nawab Amjad Ali Khan*,] 659

See REMANDED CASE 3 —GENERAL

EVIDENCE

See BENAMEE PURCHASE

FRAUDULENT TRANSACTION

See GIFT

GIFT

A Mahomedan Donor of the *Sheah* School transferred certain Company's paper in the hands of the Government Agent at Calcutta at the time of and after the gift, to his only son, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but stipulating for and obtaining a right to the recurring produce during his life-time *Held* that, in the absence of evidence of any attempt or design to conceal from the Government Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment, and of illegal and immoral purposes prompting the disposition, the transaction could not be fraudulent either in fact or in contemplation of law

That the disposition was not an absolute transfer of the whole property, including all future interest, beneficial as well as legal, nor was it a *Benamee* transaction, and

That the transfer was complete and valid according to the Mahomedan Law, on the grounds—

(i) That if the agreement for reservation of interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, the Mahomedan Law defeats not the grant, but the condition,

(ii) That as the arrangement between the father and the son was founded on a valid consideration, the son's undertaking was valid, and could be enforced against him in the Courts of *India* as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated, and

(iii) That therefore, the transfer did not violate any of the provisions of the *Hedaya*

Hedaya, vol iii Bk xxx, pp 294, 307 referred to [*Nawab Amjad Ally Khan*, v *Mohumdee Begum*,] 315

HEDAYA.

See GIFT.
— HEIRS, NON-ASSENT OF.
— WILL.
— HINDU FAMILY CONVERTED TO MAHOMEDANISM.
— CONVERTS.

ILLEGITIMACY.

See LEGITIMACY.

LEGITIMACY.

Under the Mahomedan Law the presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not ante-dated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock, if subsequently acknowledged, acquires the *status* of legitimacy.

The *onus* lay on the Respondent to prove his mother's marriage, and his own legitimacy as a child of that marriage. There was no continuing treatment by the Father as of a legitimate son, but treatment not inconsistent with the *status* of a son conceived before marriage. There was no proof of acknowledgment, but on the contrary the reputed father had absolutely repudiated paternity.

A deed of repudiation of the parentage by the father cannot alter the *status* of a son, legitimate by birth or by acknowledgment.

Khajah Hidayut Oollah v. *Rai Jan Khanum* (1 P. C. J., 285, 3 M. I. A. 323) and *Mahomed Bauker Hoosain Khan* (1 P. C. J., 733, 8 M. I. A., 159) cited and approved.

Considering that the uncertainty in the *status* of the Respondent had been mainly caused by the conduct of the Appellants' ancestor, no costs allowed in the appeals in *India* and *England*. [*Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan*,] 223

LEX LOCI.

See DOWER.

MAHOMEDAN LAW.

See CONVERT.

MARRIAGE.

A woman, admittedly once a prostitute, cohabited for many years with a Mahomedan and lived in his house. After his death she claimed to be his wife and produced witnesses to prove an actual marriage—as also a Will in her favor.

Held that the evidence on both points had been rightly discredited by the Courts below.

A concubine cannot be converted by judicial presumption into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management vested in her. The ordinary legal presumption is that things remained in their original state and that consequently there was no marriage. [*Mussumat Jariut-ool Butool* vs. *Mussumat Hoseinee Begum*,] 243

See RESTITUTION OF CONJUGAL RIGHTS.

ONUS PROBANDI.

See LEGITIMACY.
— PURDAH LADY.

OUDH.

See DOWER 1.

OWNERSHIP.

See SEIZIN.

PLEADING.

See RESTITUTION OF CONJUGAL RIGHTS.

PRACTICE.

See RESTITUTION OF CONJUGAL RIGHTS.

PRESUMPTION.

See BENAMEE PURCHASE.
— LEGITIMACY.
— MARRIAGE.

PUNJAB CODE.

See DOWER 1.

PURDAH LADY.

See ONUS PROBANDI 3.

RESTITUTION OF CONJUGAL RIGHTS.

In a suit by *B. R.*, for restitution of conjugal rights against *S.*, *held*, that such a suit by a Mahomedan husband did lie in the Civil Court.

If the law gives a right, and that right be deni-

ed—the denial is a wrong; and unless the contrary be shewn it must be presumed that there is a remedy for the wrong in a Court of justice.

By the Mahomedan Law such a suit is in the nature of a suit for specific performance, being founded on marriage, which is regarded by that law as a civil contract; and the Court will enforce all the obligations which flow from such a contract.

If however there be cruelty rendering it unsafe for the wife to return to her husband's dominion, the Court will refuse to send her back to his house; so also, if there be a gross failure by the husband on his part of the marriage contract.

From the frame of the pleadings and issues, the question of cruelty not having been entered into, case remanded for a new trial with liberty to frame issues and take evidence as to the specific acts of cruelty. [*Moonshee Buzloor Ruheem* vs. *Shumsoonnissa Begum*,]... 259

REMAND.

See RESTITUTION OF CONJUGAL RIGHTS.

SEIZIN.

Though the transfer of a legal title will satisfy that provision of the Mahomedan Law which relates to the point of seizin in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future. [*Nawab Umjad Ally Khan* vs. *Mussumat Mohumdee Begum*,] 315

SHEAH.

See GIFT.
— WILL.

SON.

See BENAMEE PURCHASE.

SPECIFIC PERFORMANCE OF CONTRACT.

See RESTITUTION OF CONJUGAL RIGHTS.

STRANGER.

See BENAMEE PURCHASE.

SUCCESSION.

The Mahomedan Law of succession *ab intestato* applies only to the assets which constitute the succession. [*Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum*,] 315

See CONVERTS.
— RES-JUDICATA 3.—GENERAL.

WEDLOCK.

See LEGITIMACY.

WILL.

Quære.—Whether the non-assent of the heirs does or does not vitiate the Will of Mahomedan of the *Sheah* school in favour of an heir? [*Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum*,] 315

8-102-[illegible]